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WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME XXIV.

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Courts of Common Pleas.

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C. P. No. 2. Hon. Samuel W. Pennypacker, *assisted by* Messrs. Albert B. Weimer, J. Campbell Lancaster, Charles Chauncey Binney, T. B. Stork, Joseph Whitaker Thompson, and William W. Smithers.

C. P. No. 3. Hon. James T. Mitchell, *assisted by* Messrs. Robert H. Neilson, I. Tyson Morris, John F. Lewis, Henry R. Hatfield, and Russell T. Boswell.

C. P. No. 4. Mr. Henry Budd, *assisted by* Messrs. George R. Van Dusen, William M. Stewart, Jr., Samuel Hinds Thomas, Edward P. Bliss, Charles T. Cresswell, John P. Croasdale, and Francis Cope Adler.

Quarter Sessions and Oyer and Terminer.

Messrs. Thomas W. Barlow and Louis Brégy.

Orphans' Court.

Mr. Henry C. Olmsted, *assisted by* Messrs. Wm. Lyttleton Savage, Edward F. Hoffman, William C. Stœver, John Douglass Brown, Jr., William M. Stewart, Jr., and Charles K. Zug.

U. S. Courts.

Mr. C. Berkeley Taylor, *assisted by* Messrs. John J. Wilkinson, Henry W. Watson, Charles Chauncey Binney, George S. Philler, and Mark Wilks Collet.

N. B. *Admiralty Cases* revised by Mr. Morton P. Henry.

GENERAL EDITOR.

Mr. Albert A. Outerbridge, 608 Chestnut Street, Philadelphia.

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ERRATA.

KUTZ *v.* DREIBELBIS, page 68. In col. ii., line 9, insert after the word "death" the words "of Kutz." In line 12, for "these," read "then," and omit "had." In line 14, for "conflict," read "coupled;" and in line 16, omit the word "and."

WOELPPER'S Appeal, page 234. In col. i., line 5 from bottom, the word "at" should be omitted.

COMMONWEALTH *v.* KERCHNER, page 260. The names of counsel were transposed. *Boies Penrose* represented the Commonwealth; *J. P. Klinges*, contra.

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TABLE OF CASES

REPORTED IN THIS VOLUME.

ACCIDENT Association v. Smith 33
Adamson, Queen City Suspender Co. v. (C. P.) 397
Adirondack, Peter Wright & Sons v. (U. S. D. C.) 575
Aldine Press, Express Publishing Co. v. 165
Allen v. First Nat. Bank 211
Allen v. Kripe 248
Allentown Iron Co. v. McLaughlin 343
Allison v. Gilton 342
Altenburg v. Commonwealth 145
Alvord, Phila., Wilm., & Balto. R. R. Co v. 430
American Bell Telephone Co., Commonwealth v. 187
American Oil Works, Lim., Penna. R. R. Co. v. 88
Appeal, Baer's 299
Appeal, Barhite's 64
Appeal, Boyer's 300
Appeal, Breckenridge's 105
Appeal, Brown's 77
Appeal, Commonwealth's 191, 273, 473, 530
Appeal, Com'th Title Ins. Co.'s 35
Appeal, Consolidated Oil Well Packer Co.'s 544
Appeal, Craige's 35
Appeal, Cutter's 305
Appeal, Daisz's 406
Appeal, Datesman's 353
Appeal, Douglas and Pennell's 35
Appeal, Ewing's 105
Appeal, Ford's 105
Appeal, Geiger's 264
Appeal, Groff's 425
Appeal, Harmony Lodge's 366
Appeal, Harris's 370
Appeal, Hoch's 27
Appeal, Hohman's 242
Appeal, Howe's 133
Appeal, James H. Hawes M'f'g Co.'s 302
Appeal, Keim's 135
Appeal, Kemmerer's 169
Appeal, Kisterbock's 446
Appeal, Lackawanna Iron & Coal Co.'s 191
Appeal, Laughman's 465
Appeal, Lee's 363
Appeal, Lehigh Ave. R'y Co.'s 530
Appeal, Madore's 269
Appeal, Miller's 267
Appeal, Morgan's 167
Appeal, Mumma's 297
Appeal, Nichols's 440
Appeal, Nye's 121
Appeal, Penna. R. R. Co.'s 409
Appeal, Pereyra's 42
Appeal, Phila. Trust, etc. Co.'s 137
Appeal, Plumly's 281
Appeal, Pomeroy's 296
Appeal, Priestley's 305
Appeal, Read's 76
Appeal, Reed's 292
Appeal, Reiff's 316
Appeal, Snively's 310
Appeal, Stark's 537
Appeal, Stroudsburg Bank's 213
Appeal, Watson's 86
Appeal, Wentz's 201
Appeal, Williams's 365
Appeal, Williamson's 337
Appeal, Woelpper's 233
Appeal, Zell's 68
Application, Gordon's (Q. S.) 345
Application, Hamilton's (Q. S.) 303
Application, McBride's (Q. S.) 349
Application, Pollard's 181
Application, Prospect Brewing Co.'s 177
Applications for Wholesale, Brewers', and Bottlers' Licenses (Q. S.) 198
Apreda v. Romano (C. P.) 124
Association, Furst v. 505
Association v. Smith 33
Association v. Weigle 551
Atmore, City of Philadelphia v. (C. P.) 540

BACON, Homet v. 214
Baer's Appeal 299
Baizley & Roeske, Gill v. (C. P.) 55
Baker, Temple v. 1
Balthaser, Reading & Pottsville R. R. Co. v. 9
Baltimore & Cumberland Valley R. R. Extension Co. v. Duke 563
Baltimore & Cumberland Valley R. R. Extension Co. v. Seiple 563
Bank's Appeal 213
Bank, Allen v. 211
Bank v. Fair 391
Bank v. Ladd 340
Bank v. Piollet 83
Barhite's Appeal 64
Battles v. Sliney 71
Beck, City of Williamsport v. 423
Beck, County of Huntingdon v. 97
Benedict v. Marsh 256
Biddle, Hestonville, Mantua & Fairmount Pass. R. R. Co. v. 156
Bird's Estate (O. C.) 320
Bird-in-Hand Turnpike Co., Groff v. 425
Bispham's Estate, (O. C.) 79
Bitner v. Boone 404
Bloomsburg Steam and Electric Light Co. v. Gardner 21
Blymyer v. Colvin 315
Bolender, Boyer v. 300
Bond's Estate (O. C.) 176
Boone, Bitner v. 404
Boot and Shoe Co. v. Eichenlaub 332
Bordner, Brooke v. 53
Borkey, Fox v. 49
Borough of Pottsville, Crosland v. 329
Boyer's Appeal 300
Boyer v. Bolender 300
Boyer, County of Schuylkill v. 29
Bradford, Strawbridge & Clothier v. 536
Bradford City v. Downs 153
Bradford County v. Wells 117
Bradney, Commonwealth v. 101
Brady, City of Erie v. 252
Bray, Martin, Fuller & Co. v. 378
Breckenridge's Appeal 105
Brewing Co.'s Application 177
Broadhead, Shiffer v. 44
Brooke v. Bordner 53
Brooks v. First Presbyterian Church 508
Brown's Appeal 77
Brown, National Ins. Co. v. 518
Brown, Springfield Ins. Co. v. 516
Brownfield v. Hughes 557
Building and Loan Ass'n, Furst v. 505
Bush v. Gamble 229
Buzby v. Phila. Traction Co. 155

CAMPBELL v. County of Fayette 107
Carlson's License 184
Charlotte Furnace Co. v. Stouffer 311
Chestnut Street, *In re* 418
Church, Brooks v. 508
Citizens' Nat. Bank v. Piollet 83
Citizens' Nat. Gas Co. v Shenango Nat. Gas. Co. (C. P.) 573
City v. Hemphill (C. P.) 79
City of Bradford v. Downs 153

Digitized by Google

City of Erie *v.* Brady 252
City of Erie *v.* Cleveland's Heirs 252
City of Meadville *v.* Dickson 451
City of Philadelphia *v.* Atmore (C. P.) 540
City of Philadelphia, Eisenbrey *v.* 231
City of Philadelphia, Keith *v.* 115
City of Williamsport *v.* Beck 423
Clark, Co. of Lancaster *v.* 571
Cleveland's Heirs, City of Erie *v.* 252
Coal Co. *v.* Hayes 559
Coal Co., Myers *v.* 223
Colt, Moore *v.* 356
Colvin, Blymyer *v.* 315
Commissioners of Erie County *v.* Commonwealth 373
Commonwealth's Appeal, 191, 273, 473, 530
Commonwealth, Altenburg *v.* 145
Commonwealth *v.* American Bell Telephone Co. 187
Commonwealth *v.* Bradney, 101
Commonwealth, Commissioners of Erie County *v.* 373
Commonwealth *v.* Green 149
Commonwealth *v.* Kerchner & Miller (C. P.) 260
Commonwealth, Lehigh Valley R. R. Co. *v.* 189
Commonwealth *v.* Mahoning Rolling Mill Co. 194
Commonwealth, Rizzolo *v.* 13
Commonwealth, Rudy *v.* 502
Commonwealth *v.* Shaffer 539
Commonwealth *v.* Wilkes-Barre & Kingston St. Ry. Co. 280
Commonwealth *ex rel.* Kaiser *v.* Hill 184
Commonwealth *ex rel.* Taylor *v.* Wagner (C. P.) 171
Commonwealth *ex rel.* Zirnhelt *v.* Smoulter 48
Commonwealth Title Ins. Co.'s Appeal 35
Conrow *v.* Conrow 339
Consolidated Oil Well Packer Co.'s Appeal 544
Cooper's Estate (O. C.) 384
Cooper *v.* Hart & Co. 358
Corcoran, Vanhorn, Griffin & Co. *v.* 249
County of Bradford *v.* Wells 117
County of Erie Directors of the Poor, Nason *v.* 60
County of Fayette, Campbell *v.* 107
County of Huntingdon *v.* Beck 97
County of Huntingdon *v.* Kauffman 97
County of Huntingdon *v.* Ross 97
County of Lancaster *v.* Clark 571
County of Lancaster *v.* Frey 568
County of Lancaster *v.* Fulton 401
County of Lancaster *v.* Kendig 568
County of Northampton *v.* Lafayette College 521
County of Schuylkill *v.* Boyer 29
Craige's Appeal, 35
Crosland *v.* Borough of Pottsville 329
Cutter's Appeal 305

DAISZ'S Appeal 406
Datesman's Appeals 353
Datz *v.* Phillips (C. P.) 382
Davenport *v.* Jones 43
Dearborne, McClung *v.* (C. P.) 271
Del., Lack. & West. R. R. Co., Forepaugh *v.* 385
Del., Lack. & West. R. R. Co. *v.* Jones 562
Dickson, City of Meadville *v.* 451
Dill *v.* Knapp 258
Directors of the Poor, Nason *v.* 60
Dixon *v.* White Sewing Machine Co. 433
Douglas and Pennell's Appeal 35
Downs, City of Bradford *v.* 153
Dreibelbis, Kutz *v.* 67
Dreisbach *v.* Serfass 23
Dugan's Estate (O. C.) 287
Duke, Balto. & Cum. Val. R. R. Ex. Co. *v.* 563

EICHENLAUB, Erie Boot and Shoe Co. *v.* 332
Eichhorn's Estate (O. C.) 364
Einstein's Application 184
Eisenbrey *v.* City of Philadelphia 231
Electric Light Co. *v.* Gardner 21
Emery *v.* Steckel 206
Emery, Stoddard *v.* 566
Enches, N. Y., L. E. & W. R. R. Co. *v.* 261
Erie Boot and Shoe Co. *v.* Eichenlaub 332
Erie City *v.* Brady 252
Erie City *v.* Cleveland's Heirs 252
Erie County Commissioners *v.* Commonwealth 373
Estate, Bird's (O. C.) 320
Estate, Bispham's (O. C.) 79
Estate, Bond's (O. C.) 176
Estate, Cooper's (O. C.) 384
Estate, Dugan's (O. C.) 287
Estate, Eichhorn's (O. C.) 364
Estate, Hacker's (O. C.) 318
Estate, Holmes's 35
Estate, Humphries's (O. C.) 144
Estate, Linnard's (O. C.) 492
Estate, McGlathery's (O. C.) 55
Estate, Mifflin's (O. C.) 463
Estate, Murphy's 232
Estate, Murray's (O. C.) 175
Estate, Oliver's (O. C.) 139
Estate, Palmer's (O. C.) 159
Estate, Rowan's (O. C.) 158
Estate, Small's (O. C.) 92
Estate, Sterling's (O. C.) 495
Estate, Turpin's 137
Estate, Vance's (O. C.) 172
Estate, Wiltberger's (O. C.) 493
Ewen, Kerlin & Co., Wright *v.* (C. P.) 111
Ewing's Appeal 105
Express Publishing Co. *v.* Aldine Press 165

FAIR, First Nat. Bank *v.* 391
Fayette County, Campbell *v.* 107
Feagley *v.* Norbeck 227
Felpel *v.* Hershour 523
Ferguson *v.* Rafferty 525
First Nat. Bank, Allen *v.* 211
First Nat. Bank *v.* Fair 391
First Nat. Bank *v.* Ladd 340
First Presbyterian Church, Brooks *v.* 508
First Street, *In re* 568
Florey *v.* Haverford College (C. P.) 372
Ford's Appeal 105
Forepaugh *v.* Del., Lack. & West. R. R. Co. 385
Fox *v.* Borkey 49
Frantz, Martin *v.* 325
Franz, Lake Shore and Mich. So. R'y Co. *v.* 321
Freiler *v.* Kear 195
Frey, Co. of Lancaster *v.* 568
Fulton, County of Lancaster *v.* 401
Furnace Co. *v.* Stouffer 311
Furst *v.* Bldg. & Loan Ass'n 505

GAMBLE, Bush *v.* 229
Gardner, Bloomsburg Steam and Electric Light Co. *v.* 21
Garey *v.* Woodward 314
Gas Co. *v.* Gas Co. (C. P.) 573
Gebbie, Griswold *v.* 72
Geiger's Appeal 264
Gere *v.* Unger 7
Gill *v.* Baizley & Roeske (C. P.) 55
Gilton, Allison *v.* 342
Glass Co. *v.* Storms 161
Gordon's Application (Q. S.) 345
Graver, Township of Plymouth *v.* 220
Green, Commonwealth *v.* 149
Griswold *v.* Gebbie 72
Groff's Appeal 425
Groff *v.* Bird-in-Hand Turnpike Co. 425

HACKER'S Estate (O. C.) 318
Haines, Harlan *v.* 84
Hamilton's Application, *In re* (Q. S.) 303
Hamlin *v.* Thomas 4
Harlan *v.* Haines 84
Harmony Lodge's Appeal 366
Harris's Appeal 370
Harris *v.* Sheldon 370
Hart & Co., Cooper *v.* 358
Haverford College, Florey *v.* (C. P.) 372
Hawes Mfg. Co's Appeal 302
Hayes, Lehigh & Wilkes-Barre Coal Co. *v.* 559
Hayes *v.* Press Co., Lim. 413
Helt *v.* Ogle 276
Hemphill, City *v.* (C. P.) 79
Henderson, Morrison *v.* 38
Hershour, Felpel *v.* 523
Hestonville, Mantua & Fairmount Pass. R. R. Co. *v.* Biddle 156
Hickman, Simons Bros. & Co. *v.* (C. P.) 92
Hiestand *v.* Williamson 511
Hill, Commonwealth *ex rel.* Kaiser *v.* 184
Hill, Keiser & Co. *v.* Stetler 113
Hindmarch *v.* Hoffman 239

Digitized by Google

Hinkle, Thomas *v.* 119
Hoch's Appeal 27
Hoffman, Hindmarch *v.* 239
Hohman's Appeal 242
Holmes's Estate 35
Homet *v.* Bacon 214
Honesdale Glass Co. *v.* Storms 161
Horstmann, Siemens Regen. Gas Lamp Co. *v.* 396
Hough, Tucker *v.* (C. P.) 91
Howard St., *In re* (C. P.) 491, 520
Howe's Appeal 133
Huber, Phila. & Read. R. R. Co. *v.* 554
Hughes, Brownfield *v.* 557
Hulme, Miller *v.* 131
Humphries's Estate (O. C.) 144
Huntingdon County *v.* Beck 97
Huntingdon County *v.* Kauffman 97
Huntingdon County *v.* Ross 97

IN re Application of Einstein 184
In re Application of Fleming 184
In re Application of Harris 184
In re Application of Pollard 181
In re Application of Prospect Brewing Co. 177
In re Applications for Wholesale, Brewers' and Bottlers' Licenses (Q. S.) 198
In re Assessment of Damages for Vacation of Howard St. (C. P.) 491, 520
In re Carlson's License 184
In re Gordon's Application (Q. S.) 345
In re Hamilton's Application (Q. S.) 303
In re McBride's Application (Q. S.) 349
In re Opening of Broad St. 571
In re Opening of First St. 568
In re Petition of Casey 184
In re Petition of Einstein 184
In re Roads in Londonderry Twp. 327
In re Ruan St. 460
In re Tuttle's License 184
In re Widening of Chestnut St. 418
Ins. Co.'s Appeal 35
Ins. Co. *v.* Brown 516, 518
Ins. Co., Kister *v.* 442
Ins. Co., Kraber's Ex'rs *v.* 547
Iron Co. *v.* McLaughlin 343
Iron and Coal Co.'s Appeal 191

JACKSON Twp. *v.* Wagner 217
James H. Hawes Mfg. Co.'s Appeal 302
Jensen *v.* Perry 90
Jones, Davenport *v.* 43
Jones, Del., Lack., & West. R. R. Co. *v.* 562

KAUFFMAN, County of Huntingdon *v.* 97
Kear, Freiler *v.* 195
Keim's Appeal 135
Keith *v.* City of Philadelphia 115
Kemmerer's Appeal 169
Kendig, County of Lancaster *v.* 568
Kennedy *v.* Penna. R. R. Co. 371
Kerchner & Miller, Commonwealth *v.* (C. P.) 260
Kern *v.* Middleton 393
Kern *v.* Simpson 394
Kingston Coal Co., Myers *v.* 223
Kister *v.* Lebanon Mut. Ins. Co. 442
Kisterbock's Appeal 446
Knapp, Dill *v.* 258
Knott, Warfel *v.* 513
Kraber's Ex'rs *v.* Union Ins. Co. 547
Krips, Allen *v.* 248
Kutz *v.* Dreibelbis 67

LACKAWANNA Iron and Coal Co.'s Appeal 191
Ladd, First Nat. Bank *v.* 340
Lafayette College, Northampton Co. *v.* 521
Lake Shore and Mich. So. R'y Co. *v.* Franz 321
Lamp Co. *v.* Horstmann 396
Lancaster Co. *v.* Clark 571
Lancaster Co. *v.* Frey 568
Lancaster Co. *v.* Fulton 401
Lancaster Co. *v.* Kendig 568
Lane & Co. *v.* White & Co. and Phila. Trust Co. (C. P.) 380
Laughman's Appeal 465
Lebanon Mut. Ins. Co., Kister *v.* 442
Lee's Appeal 363
Lehigh Ave. R'y Co.'s Appeal 530
Lehigh Valley R. R. Co. *v.* Commonwealth 189
Lehigh & Wilkes-Barre Coal Co. *v.* Hayes 559
Lightner *v.* Lightner 334
Linnard's Estate (O. C.) 492
Loftus, Provident Life and Trust Co. *v.* 236
Logan *v.* Neill 541
Londonderry Twp. Roads 327
Long *v.* Paul 361

MADORE'S Appeal 269
Mahoning Rolling Mill Co., Commonwealth *v.* 194
Manufacturing Co.'s Appeal 302
Marlin *v.* Waters 129
Marsh, Benedict *v.* 256
Martin *v.* Frantz 325
Martin *v.* Rutt 308
Martin, Fuller & Co. *v.* Bray 378
McBride's Application (Q. S.) 349
McClung *v.* Dearborne (C. P.) 271
McCormick, Williamson *v.* 51
McGlathery's Estate (O. C.) 55
McLaughlin, Allentown Iron Co. *v.* 343
Meadville *v.* Dickson 451
Messenger, Short *v.* 244
Middleton, Kern *v.* 393
Mifflin's Estate (O. C.) 463
Miller's Appeal 267
Miller *v.* Hulme 131
Miller *v.* Rohrer 278
Mitchell, Warriner *v.* 470
Mooney, Penna. R. R. Co. *v.* 40
Moore *v.* Colt 356
Morgan's Appeal 167
Morrison *v.* Henderson 38
Mumma's Appeal 297
Murphy's Estate 232
Murray's Estate (O. C.) 175
Myers *v.* Kingston Coal Co. 223
Myers *v.* Tobias 432

NASON *v.* Directors of the Poor 60
National Ins. Co. *v.* Brown 518
Natural Gas Co. *v.* Natural Gas Co. (C. P.) 573
Neal *v.* Vollrath (C. P.) 124
Neill, Logan *v.* 541
New Era Life Assn. *v.* Weigle 551
New York, Lake Erie, and West. R. R. Co. *v.* Euches 261
Nichols's Appeal 440
Norbeck, Feagley *v.* 227
Northampton Co. *v.* Lafayette College 521
Nye's Appeal 121

O'KEEFE *v.* Thorn 379
Ogle, Heft *v.* 276
Oil Works, Penna. R. R. Co. *v.* 88
Oliver's Estate (O. C.) 139
Opening of Broad St. 571
Opening of First St. 568

PACKER Co.'s Appeal 544
Palmer's Estate (O. C.) 159
Paul, Long *v.* 361
Penna. R. R. Co. *v.* American Oil Works, Lim. 88
Penna. R. R. Co.'s Appeal 409
Penna. R. R. Co., Kennedy *v.* 371
Penna. R. R. Co. *v.* Mooney 40
Penna. R. R. Co., Specht *v.* (C. P.) 317
Peoples' Mut. Accident Assn. *v.* Smith 33
Pereyra's Appeal 42
Perry, Jensen *v.* 90
Peter Wright & Sons *v.* The Adirondack (U. S. D. C.) 575
Philadelphia *v.* Atmore (C. P.) 540
Philadelphia, Eisenbrey *v.* 231
Philadelphia, Keith *v.* 115
Phila. & Read. R. R. Co. *v.* Huber 554
Phila. Traction Co., Buzby *v.* 155
Phila. Traction Co., Seither *v.* 246
Phila. Trust Co.'s Appeal 137
Phila. Trust Co., Lane & Co. *v.* (C. P.) 380
Phila. Wilm. & Balto. R. R. Co. *v.* Alvord 430
Phillips, Datz *v.* (C. P.) 382
Piollet, Citizens' Nat. Bank *v.* 83
Plumly's Appeal 281
Plymouth Twp. *v.* Graver 220
Pollard's Application 181
Pomeroy's Appeal 296
Poole & Hunt *v.* Union Pass. R'y Co. 376
Pottsville Borough, Crosland *v.* 329
Press Co., Hayes *v.* 413
Priestley's Appeal 305
Prospect Brewing Co.'s Application 177
Provident Life and Trust Co. *v.* Loftus 236
Publishing Co. *v.* Aldine Press 165

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QUEEN City Suspender Co. v. Adamson (C. P.) 397

RAFFERTY, Ferguson v. 525
Railroad Co. v. Alvord 430
Railroad Co. v. American Oil Works, Lim. 88
Railroad Co.'s Appeal 409
Railroad Co. v. Balthaser 9
Railroad Co. v. Biddle 156
Railroad Co. v. Commonwealth 189
Railroad Co. v. Knches 261
Railroad Co., Forepaugh v. 385
Railroad Co. v. Huber 554
Railroad Co. v. Jones 562
Railroad Co., Kennedy v. 371
Railroad Co. v. Mooney 40
Railroad Co., Specht v. (C. P.) 317
Railroad Co. v. Stocker 455
Railroad Co., Usher v. 57
Railroad Extension Co. v. Duke 563
Railroad Extension Co. v. Seiple 563
Railway Co.'s Appeal 530
Railway Co., Commonwealth v. 280
Railway Co. v. Franz 321
Railway Co., Poole & Hunt v. 376
Read's Appeals 76
Reading & Pottsville R. R. Co. v. Balthaser 9
Reed's Appeal 292
Reichenbach v. Ruddach 476
Reid v. Smoulter 419
Reiff's Appeal 316
Rhoads, Wood v. (C. P.) 124
Rice v. Rice 205
Rizzolo v. Commonwealth 13
Roads in Londonderry Twp. 327
Rohrer, Miller v. 278
Rolling Mill Co., Commonwealth v. 194
Romano, Apreda v. (C. P.) 124
Ross, County of Huntingdon v. 97
Rowan's Estate (O. C.) 158
Ruan St., *In re* 460
Ruddach, Reichenbach v. 476
Rudy v. Commonwealth 502
Rutt, Martin v. 308

SCHUYLKILL County v. Boyer 29
Schuylkill River East Side R. R. Co. v. Stocker 455
Seiple, Balto. & Cum. Val. R. R. Ex. Co. v 563
Seither v. Phila. Traction Co. 246
Senseman, Shaefer v. 208
Serfass, Dreisbach v. 23
Sewing Machine Co., Dixon v. 433
Shaefer v. Senseman 208
Shaffer, Commonwealth v. 539
Sheble v. Strong 437
Sheldon, Harris v. 370
Shenango Nat. Gas Co., Citizens' Nat. Gas Co. v. (C. P.) 573
Shiffer v. Broadhead 44
Short v. Messenger 244
Shumway & Co. v. Webster (C. P.) 336
Siemens Regenerative Gas Lamp Co. v. Horstmann 396
Simons Bros. & Co. v. Hickman (C. P.) 92
Simpson, Kern v. 394
Sliney, Battles v. 71
Small's Estate (O. C.) 92
Small v. Small 452
Smith, Peoples' Mut. Accident Ass'n v. 33
Smith v. Tuit 312
Smoulter, Commonwealth *ex rel.* Zirnhelt v. 48
Smoulter, Reid v. 419
Smucker, Steen v. (C. P.) 304
Snively's Appeal 310
Specht v. Penna. R. R. Co. (C. P.) 317
Springfield Fire & Marine Ins. Co. v. Brown 516
Stark's Appeal 537
Steckel, Emery v. 206
Steen v. Smucker (C. P.) 304
Sterling's Estate (O. C.) 495
Stetler, Hill, Keiser & Co. v. 113
Stevenson, West. Un. Tel. Co. v. 497
Stocker, Schuylkill River East Side R. R. Co. v. 455
Stoddard v. Emery 566
Storms, Honesdale Glass Co. v. 161
Stouffer, Charlotte Furnace Co. v. 311
Strawbridge & Clothier v. Bradford 536
Strong, Sheble v. 437
Stroudsburg Bank's Appeal 213
Suspender Co. v. Adamson (C. P.) 397

TAYLOR v. Wright 285
Telegraph Co. v. Stevenson 497
Telephone Co., Commonwealth v. 187
Temple v. Baker 1
Thomas, Hamlin v. 4
Thomas v. Hinkle 119
Thorn, O'Keefe v. 379
Tobias, Myers v. 432
Todd v. Todd (C. P.) 31
Township of Jackson v. Wagner 217
Township of Plymouth v. Graver 220
Traction Co., Buzby v. 155
Traction Co., Seither v. 246
Trust Co.'s Appeal 137
Trust Co. v. Loftus 236
Tucker v. Hough (C. P.) 91
Tuit, Smith v. 312
Turnpike Co., Groff v. 425
Turpin's Estate 137
Tuttle's License 184

UNGER, Gere v. 7
Union Ins. Co., Kraber's Ex'rs v. 547
Union Pass. Ry. Co., Poole & Hunt v. 376
Usher v. West Jersey R. R. Co. 57

VACATION of Howard St., *In re* (C. P.) 491, 520
Van Leer, Wilson v. 289
Vance's Estate (O. C.) 172
Vanhorn, Griffin & Co. v. Corcoran 249
Vollrath, Neal v. (C. P.) 124

WAGNER, Commonwealth *ex rel.* Taylor v. (C. P.) 171
Wagner, Township of Jackson v. 217
Warfel v. Knott 513
Warriner v. Mitchell 470
Waters, Marlin v. 129
Watson's Appeal 86
Webster, Shumway & Co. v. (C. P.) 336
Weigle, New Era Life Ass'n v. 551
Wells, Bradford County v. 117
Wentz's Appeal 201
West Jersey R. R. Co., Usher v. 57
Western Union Tel. Co. v. Stevenson 497
White & Co., Lane & Co. v. (C. P.) 380
White Sewing Machine Co., Dixon v. 433
Widening of Chestnut St., *In re* 418
Wilkes-Barre and Kingston St. Ry. Co., Com'th v. 280
Williams's Appeal 365
Williamson's Appeal 337
Williamson, Hiestand v. 511
Williamson v. McCormick 51
Williamsport v. Beck 423
Wilson v. Van Leer 289
Wiltberger's Estate (O. C.) 493
Woelpper's Appeal 233
Wood v. Rhoads (C. P.) 124
Woodward, Garey v. 314
Wright v. Adirondack (U. S. D. C.) 575
Wright v. Ewen, Kerlin & Co (C. P.) 111
Wright, Taylor v. 285

ZELL'S Appeal 68
Zimmerman v. Zimmerman 294

ARTICLE ON "THE EXCLUSIVE REMEDY OF RAILROAD BONDHOLDERS" 81
RULES OF THE ORPHANS' COURT 400
RULES OF THE SUPREME COURT 97, 129
ACT OF MAY 9, 1889, RELATING TO APPEALS TO THE SUPREME COURT 97
FORMS FOR TAKING APPEALS TO SUPREME COURT, UNDER ACT OF MAY 9, 1889 . . . 572

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TABLE OF CASES CITED

IN THE

OPINIONS OF THE SUPREME COURT IN THE CASES REPORTED IN THIS VOLUME.

ABBETT'S Appeal, 50 Pa. 234, 472
Academy v. Phila., 22 Pa. 496, 193
Alexander v. Coulter, 2 S. & R. 495, 68
Allegheny v. Campbell, 107 Pa. 530, 223
Allen v. Krips, 119 Pa. 1, 248
Allison v. Commonwealth, 99 Pa. 17, 20
Allison M'f'g Co. v. McCormick, 118 Pa. 519, 561
Amoskeag M'f'g Co. v. Spear, 2 Sandf. S. C. 599, 468
Anderson v. R. R. Co., 37 Wis. 321, 59
App v. Driesbach, 2 Rawle, 287, 306
Arnold v. Arnold, 90 N. Y. 580, 68
Ayars's Appeal, 122 Pa. 266, 452

B. & M. R. R. Co. v. L. R. R. Co., 124 Mass. 368, 428
B. & O. R. R. Co. v. Schwindling, 101 Pa. 258, 41
Bailey v. Knapp, 19 Pa. 193, 277
Baily v. Commonwealth, 20 Weekly Notes, 221, 64
Baker and Wheeler's Appeal, 115 Pa. 590, 134
Balentine v. White, 77 Pa. 20, 405
Bank v. Com'th, 9 U. S. 359, 192
Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. 180, 449
Barber v. Andover, 8 N. H. 398, 428
Barclay v. Com'th, 25 Pa. 503, 331
Barker's Appeal, 2 Cent. Rep. 282, 235
Beard v. Murphy, 37 Vt. 101, 331
Beckert v. Allegheny, 85 Pa. 191, 275
Bender v. Dietrick, 7 W. & S. 284, 134
Bennett v. Bullock, 35 Pa. 364, 230
Biddle v. R. R. Co., 112 Pa. 551, 157
Biles's Appeal, 119 Pa. 105, 43
Bishop's Appeal, 2 Casey, 470, 307
Bittenger's Appeal, 76 Pa. 105, 85
Blackmore v. Allegheny Co., 51 Pa. 160, 31
Bliss v. Brainard, 41 N. H. 256, 390
Boardman v. Page, 11 N. H. 438, 326
Books v. Borough of Danville, 95 Pa. 158, 58, 59
Borough of Greensburg v. Young, 53 Pa. 280, 452
Brant v. Dennison, 3 East. Rep. 9, 277, 278
Brenner v. Moyer, 98 Pa. 274, 279
Bridge v. R. R. Co., 27 So. Car. 462, 390
Brinker v. Brinker, 7 Pa. 53, 313, 314
Brockley v. Brockley, 122 Pa. 1, 326
Brooke v. R. R. Co., 108 Pa. 530, 390
Brown's Appeal, 26 Pa. 490, 214
Brown v. Com'th, 73 Pa. 321, 104
Brown v. R. R. Co., 83 Pa. 316, 390
Brown & Sterrett's Appeal, 27 Pa. 62, 7
Brubaker v. Robinson, 3 P. & W. 295, 68
Burgees v. Burgees, 17 Eng. L. & E. 257, 469
Burke v. Maxwell, 81 Pa. 139, 490
Burrell Twp. v. Uncapher, 117 Pa. 353, 221, 222, 309
Byrod's Appeal, 31 Pa. 241, 513

CAKE v. P. & E. R. R. Co., 87 Pa. 307, 429
Camp v. Bostwick, 20 Ohio St. 347, 327
Campbell v. Sloan, 62 Pa. 481, 77
Canal Co. v. Clark, 13 Wall. 311, 468
Candor's Appeal, 5 W. & S. 513, 295
Carroll v. Penna. R. R. Co., 12 Weekly Notes, 348, 41
Carson v. McFarland, 2 Rawle, 118, 133
Carter v. Bennett, 39 Texas, 203, 390
Carter v. Trueman, 7 Pa. 315, 277, 278
Cattison v. Cattison, 22 Pa. 276, 123
Cawkwell v. Russell, 26 L. J. Exch. 34, 331
Cawley v. R. R. Co., 98 Pa. 498, 157
Chamberlin v. Morgan, 68 Pa. 168, 208
Chess v. Chess, 1 P. & W. 32, 206
Chester Co. v. Barber, 97 Pa. 455, 110, 403, 404
Citizens' Pass. R'y Co. v. Philadelphia, 49 Pa. 251, 533
City of Philadelphia v. Ridge Ave. Pass. R'y Co., 102 Pa. 190, 533
City of Reading v. Savage, 23 Weekly Notes, 332; 124 Pa. 328, 451, 452, 462
Clark v. Shee, 2 Cowp. 197, 241
Codding v. Bradford Co., 116 Pa. 47, 119
Coddington v. Bay, 20 Johnson, 627, 389
Collins v. Leafey, 23 Weekly Notes, 268, 325
Colvin v. Blymyer, 121 Pa. 582, 316
Commissioners of Northampton County's Appeal, 57 Pa. 452, 183
Commonwealth v. Allen, 30 Pa. 49, 355
Commonwealth v. Bartilson, 85 Pa. 482, 104
Commonwealth v. Church, 1 Pa. 105, 104
Commonwealth v. Clark, 23 Weekly Notes, 317, 104
Commonwealth v. Commissioners, 37 Pa. 237, 179
Commonwealth v. Commissioners of Monroe Co., 2 W. & S. 495, 376
Commonwealth v. Contner, 18 Pa. 445, 435, 436
Commonwealth v. Gamble, 62 Pa. 343, 422
Commonwealth v. Jackson, 1 Grant's Cas. 262, 103
Commonwealth v. Keenan, 67 Pa. 203, 104
Commonwealth v. Lehigh Valley R. R. Co., 22 Weekly Notes, 525, 191
Commonwealth v. O. & P. R. R. Co., 1 Grant, 329, 277, 278
Commonwealth v. R. R. Co., 14 Gray, 93, 428
Commonwealth v. Smith, 5 Pa. 142, 276
Commonwealth v. Standard Oil Co., 101 Pa. 119, 189
Commonwealth v. Stremback, 3 Rawle, 345, 435

Digitized by Google

Commonwealth to use of Allen v. R. R. Co., 45 Md. 41, 59
Commonwealth Ins. Co. v. Sennett, 41 Pa. 161, 35
Connell v. Van Arsdalen, 4 Pa. 364, 277
Conway v. Lewis, 120 Pa. 215, 550
Cooper v. Pogue, 92 Pa. 254, 362
Costegan v. M. & H. R. Co., 2 Denio, 609, 208
Cote v. Von Bonnhorst, 41 Pa. 243, 137
Coup v. R. R. Co., 56 Mich. 111, 390
Coursin v. Penna. Ins. Co., 46 Pa. 323, 520
Cowden v. Brady, 8 S. & R. 510, 435
Cragin v. N. Y. C. R. R. Co., 51 N. Y. 61, 388
Craig v. City, 89 Pa. 265, 116
Craig v. Church, 88 Pa. 42, 275
Crane v. Reeder, 22 Mich. 322, 121
Crawford v. Burrell Twp., 53 Pa. 219, 193
Cripps v. Wolcott, 4 Madd. 11, 235
Crissey v. R'y Co., 75 Pa. 83, 537
Cubbage v. Nesmith, 3 Watts, 314, 310
Cullmans v. Lindsay, 114 Pa. 167, 163
Cushing v. Drew, 97 Mass. 445, 357

DEAN v. Negley, 41 Pa. 312, 488
Dean v. New Milford, 5 W. & S. 545, 220
Del., L. & W. R. R. Co. v. Burson, 61 Pa. 369, 566
Dennison's Appeal, 1 Pa 201, 355
Denrick v. R. R. Co., 103 U. S. 21, 58
Devlin v. Little, 26 Pa. 502, 340
Dewhurst v. Allegheny, 95 Pa. 437, 275
Dillinger's Appeal, 71 Pa. 425, 405
Dilworth v. Bradner, 85 Pa. 238, 74
Dollone v. Rehmer, 4 Watts, 9, 277
Donohugh's Appeal, 86 Pa. 306, 523
Dorsey's Appeal, 72 Pa. 192, 275
Duff v. Williams, 85 Pa. 490, 74
Durnall's Road, 8 Casey, 383, 101

EARP'S Appeal, 28 Pa. 368 139
Eaton's Appeal, 66 Pa. 483, 306
Ebbert's Appeal, 70 Pa. 79, 472
Eberle v. Mayer, 1 Rawle, 366, 214
Eby's Appeal, 70 Pa. 311, 275
Edgar v. Shields, 1 Grant, 361, 133
Effinger v. Lewis, 32 Pa. 367, 227
Eilbert v. Finkbeiner, 68 Pa. 243, 3
Eilenberger v. Ins. Co., 89 Pa. 464, 445
Eliot v. Himrod, 108 Pa. 569, 253, 439
Erwin's Appeal, 39 Pa. 535, 472
Ex parte Powell, 1 Mont. & MacArthur, 283, 297
Eyrick v. Hetrick, 13 Pa. 488, 355

FARMERS' Mut. Fire Ins. Co. v. Barr, 94 Pa. 345, 520
Felt v. Felt, 19 Wis. 193, 121
Fereira v. Sayres, 5 W. & S. 210, 207
Fidelity Co.'s Appeal, 108 Pa. 340, 43
Filbert v. Hoff, 42 Pa. 97, 230
Fink v. Garman, 40 Pa. 95, 286
Finlay v. Stewart, 56 Pa. 183, 68
Fire Ins. Patrol v. Boyd, 120 Pa. 624, 523
First Nat. Bank v. Shoemaker, 117 Pa. 94, 506
Fisher's Appeal, 33 Pa. 294, 513
Forrester v. Torrence, 64 Pa. 29, 277
Foster's Appeal, 74 Pa. 397, 205
Fox v. Northern Liberties, 3 W. & S. 103, 247
Frankenfield's Ap., 11 Weekly Notes, 373, 300
Freeburger's Appeal, 40 Pa. 244, 214
Freem v. Cooke, 2 Exch. 654, 449
Friederich v. Anderson, 22 Weekly Notes, 524, 130
Frost's Appeal, 105 Pa. 258, 277

GALBREATH v. Moore, 2 Watts, 86, 68
Gast v. Porter, 13 Pa. 533, 7
Gebhart v. Shindle, 15 S. & R. 235, 277
Geddes' Appeal, 84 Pa. 482, 472
Gillis v. Space, 63 Barb. 177, 208
Glendon Iron Co. v. Uhler, 75 Pa. 467, 469
Gordon v. Commonwealth, 92 Pa. 216, 151
Gould v. Gage, 118 Pa. 559, 130
Grayson's Appeal, 5 Pa. 395, 277
Greber v. Kleckner, 2 Pa. 289, 432
Greenawalt v. Kohne, 85 Pa. 369, 163
Greenwood v. Curtis, 6 Mass. 358, 390
Greenwood v. R. R. Co., 23 Weekly Notes, 425, 324
Grove's Appeal, 37 Pa. 443, 123
Grubb's Appeal, 82 Pa. 23, 43

HACK v. Stewart, 8 Pa. 213, 295
Haines v. Com'th, 100 Pa. 317, 504
Hale v. Nav. Co., 15 Conn. 539, 390
Hammett v. Phila., 65 Pa. 146, 424
Hancock's Appeal, 112 Pa. 532, 235
Hannum v. West Chester, 63 Pa. 475, 566
Hans v. Palmer, 98 Pa. 296, 277
Hanson v. Shackleton, 4 Dowl. 48, 291
Harlan v. Harlan, 15 Pa. 507, 529
Harman v. Cummings, 43 Pa. 322, 121
Harmony Bldg. Ass'n v. Berger, 99 Pa. 320, 257
Harper v. Keely, 17 Pa. 234, 198
Hart v. Withers, 1 P. & W. 285, 379
Hartley's Appeal, 103 Pa. 23, 163
Hartman's Appeal, 36 Pa. 70, 307
Hartz v. Snyder, 26 Pa. 511, 277
Harwood v. Marshall, 10 Md. 452, 179
Hauer v. Patterson, 84 Pa. 274, 3
Haverstick v. Sipe, 33 Pa. 368, 388
Hay's Appeal, 52 Pa. 449, 204
Hays v. Mouille, 14 Pa. 48, 89
Helme v. Ins. Co., 61 Pa. 107. 446
Hertzog v. Hertzog, 29 Pa. 465, 295
Hettrick v. Hettrick, 55 Pa. 290, 123
Hexter v. Bast, 23 Weekly Notes, 456, 74
Hey v. Philadelphia, 81 Pa. 44, 219, 222
Hill v. Sewald, 53 Pa. 271, 257
Hill, Keiser & Co. v. Stetler, 21 Weekly Notes, 255; 24 Id. 113, 439
Hinkle v. Eichelberger, 2 Pa. 483, 133
Hitner's Appeal, 54 Pa. 117, 406
Hoff's Appeal, 102 Pa. 218, 121
Hoffman's Appeal, 44 Pa. 95, 513
Holbrook v. Zinc Co., 57 N. Y. 616, 449
Holt's Appeal, 98 Pa. 257, 472
Home Life Ass'n v. Gillespie, 110 Pa. 88, 445
Hommel v. Lewis, 104 Pa. 465, 378
Honor v. Albrighton, 93 Pa. 475, 537
Hoopes v. Beale, 90 Pa. 82, 163
Hope v. Marshall, 96 Pa. 395, 248
Horn v. Land Ass'n, 22 Minn. 233, 208
Horner v. Hasbrouck, 41 Pa. 169, 442
Housatonic R. R. Co. v. L. & H. R. R. Co., 118 Mass. 391, 428
Howard Ass'n v. P. & R. R. R. Co., 102 Pa. 220, 85
Howard Ins. Co. v. Brunner, 23 Pa. 50, 445
Howe v. Com'rs of Crawford Co., 47 Pa. 361, 376
Howser v. Com'th, 51 Pa. 332, 500
Hoy v. Sterrett, 2 Watts, 331, 388
Hunter v. Noel, 71 Pa. 282. 403
Huston v. Wickersham, 2 W. & S. 308, 230
Hutchison v. Com., 82 Pa. 472, 104

IN re Bahia & San Francisco R'y Co., L. R. 3 Q. B. 585, 449
In re Grape St., 103 Pa. 121, 566
In re Twenty-eighth St., 102 Pa. 142, 461
Ins. Co. v. Davis, 98 Pa. 280, 518
Ins. Co. v. Hazen, 110 Pa. 530, 518
Ins. Co. v. Humble, 100 Pa. 495, 553
Ins. Co. v. Needles, 113 U. S. 574, 294
Ins. Co. v. Schmidt, 119 Pa. 449, 446
Ins. Co. v. Wilkinson, 13 Wall. 222, 445
Institution of Science v. Delaware Co., 94 Pa. 163, 523
Irish v. Smith, 8 S. & R. 573, 206
Irvine v. Barrett, 2 Grant, 73, 390
Irwin v. West, 32 P. F. S. 157, 491

Digitized by Google

JACK v. Morrison, 48 Pa. 113, 3
Jeanes's Appeal, 20 Weekly Notes, 127, 449
Jillard v. Com., 26 Pa. 169, 104
Johnson v. McCue, 34 Pa. 180, 318
Johnson v. Morton, 10 Pa. 251, 235

KANN'S Estate, 69 Pa. 219, 204
Kaul v. Lawrence, 73 Pa. 410, 506, 566
Kensington Plan, 2 Rawle, 445 428
Keyser's Appeal, 13 Pa. 409, 214
Kidd v. Johnson, 100 U. S. 617, 468
Kille v. Ege, 82 Pa. 102, 506
King v. Cohoel, 77 N. Y. 83, 221
King v. Mayor, 1 Ld. Rayd. 559, 179
King v. Steiren, 44 Pa. 99, 208
Kintz v. Long, 30 Pa. 49, 355
Kirk v. Hartman, 63 Pa. 107, 208
Kirkpatrick v. Bonsall, 72 Pa. 155, 432
Kittera's Estate, 17 Pa. 416, 296
Knight v. W. J. R. R. Co., 108 Pa. 250, 57, 58, 59
Knowlton v. Erie R. R. Co., 19 Ohio St. 260, 390
Kreiter v. Bemberger, 82 Pa. 59, 75
Kutz's Appeal, 40 Pa. 90, 197

LANDIS v. Evans, 113 Pa. 332, 214
Lane v. Harrold, 72 Pa. 267, 230
Leather Cloth Co. v. American Leather Cloth Co., 11 Jur., N. S., 513, 468
Lee v. Welsh, 1 Weekly Notes, 453, 291
Lee v. Woolsey, 109 Pa. 124, 563
Leech v. Hill, 4 Watts, 448, 3
Leech v. Leech, 21 Pa. 69, 486
Lefevre's Appeal, 69 Pa. 122, 472
Lehr's Appeal, 90 Pa. 507, 197
Leidig v. Coover's Ex'rs, 47 Pa. 534, 295
Leonard v. Nav. Co., 84 N. Y. 48, 58
Lewis v. Riffinger, 30 Pa. 281, 227
Lieberman v. Hoffman, 2 Penny. 211, 279
Lightfoot v. Krug, 35 Pa. 348, 121
Livingston v. Bishop, 1 Johnson, 290, 247
Long v. Long, 1 Watts, 265, 310
Long v. McLanahan, 103 Pa. 539, 121
Longenecker v. Pa. R. R. Co., 105 Pa. 329, 295, 563
Lower Macungie Twp. v. Merkhoffer, 71 Pa. 276, 219, 221
Lowry v. Coulter, 9 Pa. 349, 214
Lycoming Ins. Co. v. Schreffler, 42 Pa. 188, 35
Lynn v. Lynn, 29 Pa. 369, 295
Lyon v. Ry. Pass. Assurance Co., 46 Iowa, 631, 35

MAGNOLIA Ave., 117 Pa. 56, 462
Maloney v. Bruce, 94 Pa. 249, 251, 252, 439
Manufacturing Co. v. Trainor, 101 U. S. 53, 468
Mapes v. Bank, 80 Pa. 163, 213
Maris v. Schermerhorn, 3 Whart. 13, 436
Marland v. P. & L. E. R. R. Co., 23 Weekly Notes, 93, 41
Marsteller v. Marsteller, 93 Pa. 350, 197
Mason v. Waite, 17 Mass. 558, 241
May v. May, 62 Pa. 210, 123
McAllister's Appeal, 59 Pa. 204, 43
McBride v. Smyth, 54 Pa. 245, 37
McCandless's Appeal, 98 Pa. 489, 310
McCandless v. Young, 96 Pa. 289, 74
McCarthy v. R. R. Co., 18 Kans. 46, 59
McCarty v. Nixon, 2 Dallas, 65, note, 68
McClelland v. Slingluff, 7 W. & S. 134, 214
McClintock v. Pa. R. R. Co., 21 Weekly Notes, 133, 263
McCue v. Johnston, 25 Pa. 306, 313, 314
McCullough v. Com., 67 Pa. 33, 104, 152
McCune's Appeal, 65 Pa. 450 204
McGowin v. Remington, 12 Pa. 63, 366
McIntosh v. Lee, 57 Iowa, 358, 291
McMaster v. R. R. Co., 65 Miss. 271, 390
McMasters v. Com'th, 3 Watts, 292, 424
McTaggert v. Thompson, 14 Pa. 149, 490
Meason v. Kaine, 63 Pa. 335, 68
Mechanics' Bank v. Euston, 11 Weekly Notes, 389, 326
Menendez v. Holt, 128 U. S. 514, 468
Mentz v. Mamman, 5 Whart. 154, 436
Meyers v. Com'th, 83 Pa. 141, 505
Miller v. Bird, 27 Pa. 244, 167
Miller v. Kirkpatrick, 29 Pa. 226, 193
Miller v. Miller, 44 Pa, 170, 197
Miller v. R. R. Co., 2 Pa. S. C. Dig. 57, 537
Miller v. Warden, Frew & Co., 111 Pa. 300, 529
Milligan's Appeal, 82 Pa. 389, 307, 308
Milliken v. Barr, 7 Pa. 24, 227
Milwaukee, etc. R. R. Co. v. Smith, 74 Ill. 197, 390
Minnig v. Batdorff, 5 Pa. 503, 235
Monongahela City v. Fischer, 111 Pa. 9, 23, 41
Montague v. McDowell, 99 Pa. 265, 76
Montgomery's Appeal, 92 Pa. 206, 132
Montgomery v. Grant, 57 Pa. 243, 277
Moore v. R. R. Co., 108 Pa. 349, 41
Morgan v. Browne, 71 Pa. 136, 227
Morrison v. Bachert, 112 Pa. 323, 30
Moss's Appeal, 83 Pa. 264, 139
Mosteller's Appeal, 30 Pa. 473, 295
Mount Holly Paper Co.'s Appeal, 99 Pa. 513, 449
Mulherrin v. R. R. Co., 81 Pa. 366, 41
Murray v. McKee, 60 Pa. 35, 3
Musselman v. R. R. Co., 2 Weekly Notes, 105, 432
Mynard v. R. R. Co., 71 N. Y. 180, 388

NAGLE v. R. R. Co., 88 Pa. 35, 537
Nash v. Simpson, 78 Me. 142, 363
Natches v. Natches, 47 Pa. 496, 133
Neel v. Neel, 59 Pa 347, 295
Neil v. Tate, 27 Pa. 208, 371
Nelson v. Campbell, 28 Pa. 156, 121
Neslie v. Ry. Co., 113 Pa. 300, 563
Newlin Twp. v. Davis, 77 Pa. 317, 219, 221
Newman v. Alvord, 49 Barb. 588, 468
Newville Road Case, 8 Watts, 172, 100, 101
Noar v. Gill, 111 Pa. 488, 378
Northampton Co. v. Herman, 119 Pa. 373, 30, 31
Northwestern Ins. Co. v. Phœnix Oil Co., 31 Pa. 448, 520

O'HARA v. Second Nat. Bank, 77 Pa. 76, 212
Odd Fellows' Savings Bank's Appeal, 23 Weekly Notes, 85, 366
Odiorne's Appeal, 54 Pa. 178, 123
Ogden v. Brown, 33 Pa. 247, 26
Osbourn v. Osbourn, 11 S. & R. 55, 230
Ott v. Oyer's Exrs., 106 Pa. 6, 163, 295
Overton v. Tyler, 3 Pa. 346, 84

PAINTER v. Henderson, 7 Pa. 48, 311
Parget v. Stambaugh, 2 Pa. 485, 355
Parish's Appeal, 83 Pa. 111, 121
Parks v. Watts, 18 Weekly Notes, 99, 52
Passmore v. Tel. Co., 71 Pa. 239, 501
Patten's Appeal, 45 Pa. 151, 89
Patterson v. Anderson, 40 Pa. 363, 436
Patterson v. R. R. Co., 76 Pa. 394, 559
Patton v. Ry. Co., 96 Pa. 169, 58
Paxton v. Steckel, 2 Pa. 93, 436
Payne v. Reese, 100 Pa. 301, 561
Peasleb v. Breed, 10 N. H. 489, 326
Penna. Canal Co. v. Harris, 101 Pa. 80, 490
Penna. R. R. Co.'s Appeal, 93 Pa. 150, 429
Penna. R. R. Co.'s Appeal, 115 Pa. 517, 413, 429
Penna. R. R. Co. v. Ackerman, 74 Pa. 265, 324
Penna. R. R. Co. v. Bell, 122 Pa. 58, 41
Penna. R. R. Co. v. Coon, 111 Pa. 430, 563

Digitized by Google

Penna. Co. v. Fairchild, 69 Ill. 260, 390
Penna. R. R. Co. v. Horst, 110 Pa. 226, 324
Penna. R. R. Co. v. Riblet, 66 Pa. 164, 275
Penna. Salt Mfg. Co. v. Neel, 54 Pa. 9, 198
Penna. Sch. Val. R. R. Co. v. Cleary, 23 Weekly Notes, 529, 459
Pentland v. Kelly, 6 W. & S. 483, 355
People v. Citizen's Gas Light Co., 39 N. Y. 81, 184
Phila. & Trenton R. R. Co. Case, 6 Wharton, 25, 428
Philadelphia v. Phila. & Gray's Ferry Pass. Ry. Co., 52 Pa. 177, 533
Phillips v. Meily, 106 Pa. 537, 163
Pidcock v. Potter, 68 Pa. 353, 488
Pike v. Rowland, 94 Pa. 238, 30
Pipher v. Lodge, 16 S. & R. 214, 405
Pitts. & Con. R. R. Co. v. Clarke & Shaw, 29 Pa. 146, 533
Pitts. & Con. R. R. Co. v. Sentmeyer, 92 Pa. 276, 561
Pitts. Junc. R. R. Co.'s Appeal, 122 Pa. 511, 428, 429
Pitts. So. Ry. Co. v. Taylor, 104 Pa. 306, 223
Pitts., Va., & C. Ry. Co. v. Vance, 115 Pa. 325, 458
Pontius v. Nesbit, 40 Pa. 309, 228
Porter v. Patterson, 15 Pa. 229, 550
Preta's Appeal, 35 Pa. 349, 121
Pringle v. Pringle, 59 Pa. 283, 405, 406
Protestant Orphans' Asylum's Appeal, 111 Pa. 135, 424
Pusey's Appeal, 83 Pa. 67, 419
Putnam v. Day, 22 Wall. 60, 307

R. R. CO.'S Appeal, 93 Pa. 150, 413
R. R. Co. v. Adams, 89 Pa. 29, 325
R. R. Co. v. Aspell, 23 Pa. 147, 263
R. R. Co. v. Hassard, 75 Pa. 367, 537
R. R. Co. v. Lacy, 43 Ga, 461, 59
R. R. Co. v. Lehman, 56 Md. 226, 291
R. R. Co. v. Moore, 29 Kans. 632, 390
R. R. Co. v. Stinger, 78 Pa. 219, 563
R. R. Co. v. Tanner, 68 Ga. 390, 390
Raggett v. Findlater, L. R. 17 Eq. 29, 468
Ralph v. Brown, 3 W. & S. 395, 390
Rankin v. Woodworth, 3 P. & W. 48, 167
Raudenbusch's Petition, 120 Pa. 328, 181, 182, 183
Re Application of City of Buffalo, 68 N. Y. 167, 428
Re Petition of B. & A. R. R. Co., 53 N. Y. 574, 428
Reading & Pottsville R. R. Co. v. Balthaser, 21 Weekly Notes, 253; 4 Crum. 472, 12
Reck's Appeal, 78 Pa. 435, 236
Reed v. Wilson, 41 N. J. Law, 29, 291
Reichenbach v. Ruddach, 121 Pa. 18, 179, 180
Reinheimer v. Hemmingway, 35 Pa. 432, 530
Rex v. Liverpool, 2 Burr. 731, 179
Rex v. Malden, 2 Salk. 431, 179
Richards v. Richards, 1 Grant, 391; 37 Pa. 225, 123
Richardson v. R. R. Co., 98 Mass. 85, 58, 59
Riddle's Estate, 19 Pa. 431, 307
Ritter v. Ritter, 31 Pa. 398, 197, 454
Road in Bensalem Twp., 38 Pa. 368, 101
Road in Chartiers Twp., 34 Pa. 413, 101
Road in Lathrop Twp., 84 Pa. 126, 328
Road in O'Hara Twp., 87 Pa. 356, 328
Road in Phœnixville, 109 Pa. 44, 275
Robeson v. Pittenger, 1 Green Ch. 57, 388
Robinson v. Dispatch Co., 45 Iowa, 470, 390
Rose v. Hill, 3 Burr. 1881, 235
Rose v. Latshaw, 90 Pa. 238 197
Ross v. Drake, 37 Pa. 375, 235
Ross v. Howell, 84 Pa. 129, 198
Roth v. Barner, 2 Penna. 214, 3
Rowland v. Com., 82 Pa. 405, 152
Rowley's Appeal, 115 Pa. 150, 306
Rudy v. Ulrich, 69 Pa. 177, 488
Rupp v. Eberly, 79 Pa. 141, 134
Russell's Appeal, 34 Pa. 258, 307
Ryan v. Ry. Co., 65 Texas, 13, 390

SCHAFER v. Bank, 59 Pa. 144, 3
Schmidt v. McGill, 120 Pa. 412, 156
School Dist. of the City of Erie v. Fuess, 98 Pa. 600, 64
Schriver v. Eckenrode, 87 Pa. 215, 439
Schum v. Pa. R. R. Co., 107 Pa. 8, 563
Schuylkill Co.'s Appeal, 30 Pa. 358, 214, 435, 436
Scott's Appeal, 112 Pa. 427, 306, 307, 308
Scott v. Lloyd, 12 Peters, 145, 277
Second & Third St. Pass. Ry. Co. v. Philadelphia, 51 Pa. 465, 533
Seeger v. Pettit, 77 Pa. 437, 257
Seeley v. Garey, 109 Pa. 301, 315
Seely v. Pittsburgh, 82 Pa. 360, 116
Sergeant v. Ingersoll, 7 Pa. 340, 543
Sergeant's Exrs. v. Ewing, 30 Pa. 75, 296
Sewickley Boro. v. Sholes, 118 Pa. 165, 275
Shafer's Appeal, 106 Pa. 49, 472
Sherman v. Transportation Co., 31 Hun, 162, 208
Ship Bldg. Works v. Nuttall, 119 Pa. 149, 561
Shipe's Appeal, 114 Pa. 205, 68
Shippen & Robbins's Appeal, 80 Pa. 391, 355
Shirley v. Shirley, 59 Pa. 267, 26, 27
Simpson's Appeal, 18 Weekly Notes, 175, 307
Sipes v. Mann, 39 Pa. 417, 123
Slack v. Kirk, 67 Pa. 380, 3
Smith v. Loan & Bldg. Assn., 93 Pa. 19, 333
Snavely v. Wagner, 3 Pa. 275, 355
Snyder's Appeal, 54 Pa. 67, 43
Snyder v. Christ, 39 Pa. 499, 355
Snyder v. Kunkleman, 3 P. & W. 487, 214
Somers v. Hagner, 3 Whar. 48, 197
Souder's Appeal, 57 Pa. 498, 366
Sowers v. Weaver, 78 Pa. 443, 406
Spring Garden Road, 43 Pa. 144, 101
Springfield v. Conn. R. R. R. Co., 4 Cush. 71, 428
Srodes v. Caven, 3 Watts, 258, 436
State v. Goetze, 22 Wis. 363, 121
State v. Morris, 47 Conn. 179, 291
Steininger v. Hoch, 42 Pa. 432, 277, 278
Stevenson's Appeal, 8 Casey, 318, 307
Stormfeltz v. Manor Turnpike Co., 13 Pa. 555, 428, 429
Streeper v. Williams, 48 Pa. 450, 357, 358
Styer v. Freas, 15 Pa. 339, 7
Susquehanna Ins. Co. v. Perrine, 7 W. & S. 348, 445
Swain v. West. Phila. Pass. Ry. Co.'s Appeal, 12 Weekly Notes, 225, 449
Swift v. Tyson, 16 Peters, 1, 389

TAGGART v. Comm'th, 21 Pa. 527, 331
Talbott v. Dispatch Co., 45 Iowa, 470, 390
Tams v. Lewis, 42 Pa. 410, 439
Taylor v. Kelly, 80 Pa. 95, 405, 406
Taylor v. McCune, 11 Pa. 460, 3
Taylor v. R. R. Co., 113 Pa. 162, 563
Teutonia Ins. Co. v. Mund, 102 Pa. 95, 446
Thiel College v. Mercer County, 101 Pa. 533, 523
Thomas v. Loose, 114 Pa. 35, 163, 527
Titman v. Titman, 64 Pa. 483, 295
Tomkins v. R. R. Co., 66 Cal. 165, 248
Township of Newlin v. Davis, 77 Pa. 317, 219, 221
Trego v. Lewis, 58 Pa. 463, 506
Turner v. Scott, 51 Pa. 126, 25
Turnpike Co. v. R. R. Co., 54 Pa. 350, 221, 563
Tutton v. Darke, 5 H. & N. 649, 291
Tyrone School Dist.'s Appeal, 22 Weekly Notes, 513, 429

ULRICH v. Arnold, 120 Pa. 170, 295
Universal Ins. Co. v. Heiss, 106 Pa. 20, 520

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VARNER'S Appeal, 87 Pa. 427, 37
Vastine v. Fury, 2 S. & R. 426, 436
Vicary v. Moore, 2 Watts, 451, 568
Vincent v. Watson, 40 Pa. 306, 243

WALKER v. France, 112 Pa. 203, 163, 527
Wallace v. Fitzsimmons, 1 Dallas, 248, 68
Ward v. Taylor, 1 Pa. 238, 436
Warner v. Holyoke, 112 Mass. 362, 221
Washington Ave., 69 Pa. 353, 116
Watmough v. Francis, 7 Pa. 216, 436
Waynesboro' Mut. Fire Ins. Co. v. Conover, 98 Pa. 384, 520
Weidman's Appeal, 42 Leg. Int. 338, 235
Welsh v. Bell, 32 Pa. 12, 435, 436
West Chester Gas Co. v. Chester Co., 30 Pa. 232, 195
West Hickory Mining Assn. v. Reed, 80 Pa. 38, 472
Wheeler v. Carpenter, 107 Pa. 271, 230
Wheeler v. Philadelphia, 77 Pa. 351, 461
Whitford v. R. R. Co., 23 N. Y. 484, 59
Whiting v. Bank, 13 Peters, 6 307
Wilkinson v. Pearson, 23 Pa. 117, 206
Williams v. Bentley, 27 Pa. 294, 26, 27
Williams v. City of Pittsburgh, 83 Pa. 71, 419
Williard v. Williard, 56 Pa. 119, 529
Willis v. Darby Ry. Co., 6 Weekly Notes, 461, 449
Winton's Appeal, 97 Pa. 385, 366
Wilson v. R. R. Co., 97 N. Y. 87, 388
Wolf v. Studebaker, 65 Pa. 459, 208
Wood v. Kelso, 27 Pa. 243, 390
Wood v. Leland, 1 Metc. 387, 327
Woodward v. R. R. Co., 10 Ohio St. 121, 58, 59
Woods v. North, 84 Pa. 407, 84
Wotherspoon v. Currie, L. R. 5 E. & I. 512, 470
Wright's Appeal, 12 Weekly Notes, 225, 449
Wright v. Cumpsky, 41 Pa. 102, 68
Wyman v. Wyman, 26 N. Y. 253, 442

YEAGER v. Weaver, 64 Pa. 425, 405

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, MAY 3, 1889.* [NO. 1.

Supreme Court.

July '87, 91. February 11, 1889.

Temple v. Baker et al.

Negotiable paper—Irregular indorsement—Effect of—Statute of Frauds.

In an action by Abigail Baker *et al.*, heirs-at-law of Wm. Baker, against Bennett Temple, upon a promissory note in the following form:—

$1000. WEST CHESTER, PA., Oct., 25, 1882.

158 days after date we promise to pay to the order of administrators of William Baker at the First National Bank of West Chester, $1000, without defalcation for value received. ALFRED MANCILL & SON.

Credit the Drawer.

BENNETT TEMPLE.

Indorsed: Bennett Temple,
Frederick W. Baker,
James A. Baker,
Levis G. Baker.

Held, (1) that the irregular or anomalous indorsement of Temple imposed upon him the liabilities of second indorser and did not make him liable to the payees.

(2) His indorsement cannot be turned into a contract to guarantee payment of the note, by parol testimony, because of the Statute of Frauds.

(3) The words "credit the drawer" imply no promise or undertaking upon the part of him who uses them, but are a direction to all persons to whom the note may be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee.

Error to the Common Pleas of Delaware County.

Assumpsit, by Abigail Baker *et al.*, heirs-at-law of Wm. Baker, deceased, against Bennett Temple.

This suit was brought upon a promissory note, of which the following is a copy:—

$1000. WEST CHESTER, PA., Oct. 25, 1882.

One hundred and fifty-eight days after date we promise to pay to the order of Administrators of William Baker, at the

FIRST NATIONAL BANK OF WEST CHESTER,

One Thousand $\frac{00}{100}$ Dollars without defalcation, for value received.

Credit the drawer. ALFRED MANCILL & SON.

BENNETT TEMPLE.

[Indorsed.]
Bennett Temple,
Frederick W. Baker,
James A. Baker,
Levis G. Baker.

The following facts were found by the jury in a special verdict:—

"That the note in suit was given by the makers to the holders to secure hand-money for the purchase-money of real estate which the makers afterwards refused to take. The said real estate was the property of and sold by the present holders of the note.

"That the administrators were made payees of the note for the use of the heirs, the present holders.

"That the note was indorsed by Bennett Temple, the defendant, in blank.

"That his name was written under the words 'Credit the drawer,' at the same time his indorsement was made, and none of the blanks were then filled.

"That the words 'Administrators of William Baker' were written as payees after the said indorsement by B. Temple, and after his name on the face of the note under the words 'Credit the drawer.'

"That the indorsement by the administrators was made after the indorsement of Bennett Temple had been written on the note.

"That the plaintiffs have exhausted their legal remedies against the makers of said note and have not been able to realize because of insolvency.

"That they are ignorant of the law. If the Court shall be of opinion, upon the above facts, that the plaintiffs are entitled to a verdict, then they find for the plaintiffs for $1237.50, otherwise we find for the defendant."

Subsequently the Court entered judgment for the plaintiffs on the above verdict. Defendant then took this writ, specifying for error this action of the Court.

William B. Broomall, for plaintiff in error.

The payee in the note is a holder prior to an indorser, and cannot recover from the indorser by proving an oral contract on the part of said indorser to be responsible to him.

Jack *v.* Morrison, 12 Wright, 113.

Temple's indorsement is that of a second indorser. The heirs of William Baker, who are the holders of the note, are the first indorsers.

Schafer *v.* Bank, 9 P. F. Smith, 144.
Murray *v.* McKee, 10 Id. 35.

Temple could successfully maintain an action against the administrators of William Baker upon the note as it appears to be drawn and indorsed; and it could not be proven in such a suit that Temple orally undertook to become responsible for the makers to the payees in the note.

Slack *v.* Kirk, 17 P. F. Smith, 380.
Eilbert *v.* Finkbeiner, 18 Id. 243.
Hauer & McNair *v.* Patterson, 3 Norris, 274.

Is the signature of Temple on the face of the note under the words "Credit the drawer," an agreement, or memorandum, or note thereof, to

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become responsible for the debt of Alfred Mancill & Son?

What is the signification of the words "Credit the drawer," and to whom are they directed? These words have a well-known commercial meaning. It is an order used on accommodation notes by the indorser to a subsequent holder to pay the proceeds of the discounting of the note to the drawer.

Steckel *v.* Steckel, 4 Casey, 233.

It is an assignment of the proceeds of the note. "It is used extensively in bank transactions, and its object is very apparent. If the indorser keeps an account at the bank, it is a short check in favor of the maker for the money, if the note should be discounted, and the proceeds are at once passed to his credit."

Runyan *v.* Millifken, 1 Phila. 208.

William M. Hayes and *V. Gilpin Robinson*, for defendants in error.

We do not question the law of the cases cited by the plaintiff in error. They decide that one who indorses a note above the payee is an irregular indorser and not liable to anybody; because a mere indorsement imports in law no liability to the payees—nor to a subsequent holder, because, in taking the note without the payees on it as first indorser, it deprives the irregular indorser of that recourse to the payees which he is entitled to have, and without which it is fair to presume he would not have indorsed the paper.

Our case rests upon the fact that the note in question shows, by a note or memorandum in writing, more than an irregular indorsement. It shows that the object of the irregular indorsement was to give to the maker of the note credit with the payee; this being by the signature of Bennett Temple on the face of the note, under the words "Credit the Drawer."

Where a third party indorses a negotiable note before the payee has negotiated it, he is liable to the payee if it can be proved that the object of the indorsement was to give to the maker of the note credit with the payee. And it is a fair inference from this proposition that, on proof of such an understanding, the indorser would be in like manner liable to any indorsee of the payee, either of whom may write over the signature of the indorser an agreement corresponding with the facts susceptible of proof.

Barto *v.* Schmeck, 4 Casey, 451.

For what reason would Bennett Temple sign his name under those words "credit the drawer," on the face of the note? The reason is well understood. The order of liability would be, first, the maker; second, the payee; third, the indorser: and this note, negotiated by A. Mancill & Son, would put the taker upon inquiry as to how it got back into their hands, the presumption being that A. Mancill & Son had taken it up, and that Temple was no longer liable.

To relieve the note of this question Bennett Temple makes the memorandum or note in writing on the face of the note, "credit the drawer," thereby saying, "although this note is in the hands of the maker, you can safely give credit upon the faith of it, and I will be responsible."

The defendants in error are not payees, but indorsees; there was, as to them, a sufficient promise in writing, under the Act of April 26, 1855.

The nearest case to this is Roth *v.* Barner (2 Penny. 220), which seems to decide that a party is liable on an indorsement like the one in this suit, when the note is in the hands of an indorsee.

Where it was plainly the purpose of the party to become liable, and where he evidently intended to give the credit of his name, we have faith that this Court will be slow to aid him in escaping a just liability, on a mere technicality.

Eilbert *v.* Finkbeiner, 18 Sm. 247.
Liszman *v.* Marx, 20 Weekly Notes, 69.

April 29, 1889. The Court. The point on which this case turned in the Court below has not been decided in this State, so far as we have been able to learn from a somewhat extended examination.

Like all questions affecting the liability of parties to negotiable paper, it is important and should be fully considered. It is raised upon a promissory note in the form following:—

"$1000. West Chester, Pa., Oct. 25, 1882. 158 days after date we promise to pay to the order of the administrators of Wm. Baker, at the First National Bank of West Chester $1000, without defalcation, for value received.

"Alfred Mancill & Son.

"Credit the Drawer.

"Bennett Temple."

On the back of the note were the following indorsements:—

Bennett Temple,
Frederick W. Baker,
James A. Baker,
Levis G. Baker.

The action is brought by the heirs-at-law of William Baker, who were the real payees and owners of the note, against Bennett Temple, whose indorsement appears on the note above that of the payees. The defence is that while Temple might be liable to an indorsee he is not liable to the payees who are of necessity the first indorsers. The jury before whom the case was tried returned a special verdict, covering the important questions of fact, as follows: (1) That the adminstrators were made payees for the use of the present plaintiffs, the parties in interest.

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(2) That Temple wrote his name under the words "credit the drawer," and on the back of the note before it was signed by the maker or the blanks filled up. (3) That the blanks were filled, the note signed, and the indorsement made by the administrators after the indorsement by Temple. (4) That the plaintiffs have exhausted their legal remedies against Mancill & Son the makers. The Court below entered judgment in favor of the plaintiffs.

To sustain this judgment the liability of the defendant must rest either upon his indorsement, or upon his direction to "credit the drawer." His indorsement is of that sort described in our cases as an "anomalous" one. Though not the payee his indorsement as to its order or place on the back of the note is first, that of the payees being under his. Before the passage of the Statute of Frauds in 1855 such an indorser was held liable to the payee as a guarantor, if such was the understanding when the indorsement was made, and the payee might write a contract of guaranty above the name of such indorser, and sue upon it. (Leech *v.* Hill, 4 W. 448; Taylor *v.* McCune, 11 Pa. 460.) Since 1855 these cases have been necessarily departed from so far as to require a memorandum in writing "signed by the party to be charged therewith," as the evidence of any contract of guaranty. The indorsement which imports only the commercial contract into which every indorser enters, is not such a memorandum. (Jack *v.* Morrison, 48 Pa. 113; Schafer *v.* The Bank, 59 Pa. 144; Murray *v.* McKee, 60 Pa. 35.) The result of these cases has been to fix the position and legal liability of such an indorser as that of a second indorser. He is not liable to the payee but if compelled by a later holder to pay, he has a right to proceed against the payee for reimbursement. (Slack *v.* Kirk, 67 Pa. 380; Eilbert *v.* Finkbeiner, 68 Pa. 243; Hauer *v.* Patterson, 84 Pa. 274.) Such an indorser may still be converted into a guarantor by an agreement in writing signed by him, but in the absence of the writing his liability is fixed by the law merchant. (Eilbert *v.* Finkbeiner, *supra.*) It is clear therefore that the payees cannot recover against Bennett Temple as a guarantor because of the Statute of Frauds, nor as an indorser because they are prior parties to the note and liable to him. The learned Judge of the Court below seems to have been of this opinion, for he says, "If it was not for the words 'credit the drawer,' separately signed by the defendant, the case would be undoubtedly ruled in favor of the defendant by the case of Schafer *v.* The Bank." He then proceeds to expand these words into the following: "A. Mancill & Son have this day made their promissory note for $1000, which I have indorsed for their accommodation. The person to whom said note may be given for value is hereby authorized to give credit to said A. Mancill & Son." Now unless this is the commercial meaning of the words "credit the drawer," the Statute of Frauds is as clearly violated as it would be by engrafting such a guaranty upon a mere indorsement. What therefore do the words mean? The legal relation of the parties to a bill or note to each other is presumed to be that indicated by the order in which their names stand upon it. The maker is liable to the payee, the payee to his indorsee, and so on down the line of indorsements. The last indorsee is presumed to be the holder and owner of the note, and entitled to its proceeds. The note in question was made by Mancill & Son to the administrators of William Baker. They indorsed it. The indorsement of Temple being in law that of second indorser he would appear to be entitled, as against the prior parties, to the proceeds of the note. The office of the memorandum we are considering, is to advise the bank or other party to whom it may be offered, that contrary to the *prima facies* of the note he is not the owner, that his indorsement is for the accommodation of the prior parties, and that as between him and them the drawer is entitled to have the proceeds of the note delivered to him, or passed to his credit. It is not a declaration that the maker is worthy of credit, nor a request that credit be given him upon the responsibility of the person signing the memorandum, but a statement that such person is not the owner in fact, though such in appearance, of the note to which the memorandum is attached, and disclaims any interest in its proceeds.

The Court below was wrong in treating the words "credit the drawer," as implying an undertaking to pay, or as affording any basis for liability on the part of Temple. It was also wrong to say that "the jury could look at the note, the indorsement, the words 'credit the drawer,' and all the parol testimony, and say whether the contract was original or collateral." Since the Statute of Frauds, in 1855, parol testimony is not admissible to show a contract for the payment of the debt of another if over fifty dollars in amount, and the jury had no right to consider the parol testimony on that subject. The indorsement was entitled only to the force which the general commercial law gives it; and the direction to credit the drawer was without significancy on the question of Temple's liability as an indorser. It neither increased nor diminished his liability in any particular. It has been urged that Roth *v.* Barner (2 Pennypacker, 214) is an authority in support of the ruling of the Court below, but we do not so understand it. In that case Kline, the irregular indorser, was held liable not upon his indorsement, or upon the words "credit the drawer," but upon a distinct and independent

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agreement to pay the note, founded on a sufficient consideration. In the opinion of this Court, delivered by our brother STERRETT, this appears very clearly. He says, on page 219, "In view of the explicit instructions thus given, the jury must have found that the plaintiff in error in consideration of obtaining the confession of judgment, promised absolutely and unconditionally to pay the balance due on the note, and that the judgment for $5000 was given by Kline on the faith of that promise." Such a promise furnished a distinct basis for liability to the payee, on which alone the recovery against Roth rested.

On the whole case, we conclude the plaintiffs, the payees, are not entitled to judgment on the special verdict for the following reasons:—

1st. The irregular or anomalous indorsement of Temple imposed upon him the liabilities of second indorser, and did not make him liable to the payees.

2d. His indorsement cannot be turned into a contract to guarantee payment of the note, by parol testimony, because of the Statute of Frauds.

3d. The words, "credit the drawer," imply no promise or undertaking on the part of him who uses them, but are a direction to all persons to whom the note may be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee. This was the question on which the case turned in the Court below, and the only one involved which was not well settled by our own cases.

It is apparent that the application of these principles to this case leaves the plaintiffs nothing upon which to stand, and the judgment is therefore reversed.

Opinion by WILLIAMS, J. W. M. S., JR.

Jan. '88, 56. March 14, 1889.

Hamlin v. Thomas.

Power of sale—Execution of power before happening of event on which it is limited—Consent of life-tenant to sale, how shown.

Where a testator devised certain real estate to his widow for life, and directed that after her death his executor should sell the same and pay the proceeds to certain of his children, if the executor sells part of it during the lifetime of the widow with her consent, for the payment of the decedent's debts, without an order of the Orphans' Court, his deed will pass a good title to the purchaser.

The power of the executor to make such a sale cannot be sustained upon his right to make sale for the payment of debts without an order from the Orphans' Court, but upon the widow's consent.

The widow's consent to such a sale may be by parol; it is not necessary that it should be evidenced by writing.

A question whether the debts could have been paid in any other way is immaterial, unless the widow's consent was obtained by fraud or misrepresentation.

Powers must be strictly pursued, and a power to be exercised upon a given event cannot properly be executed before the happening of that event; but where a power is complete, its exercise being postponed for the benefit of a particular person, the consent of that person will be equivalent to the happening of the stipulated contingency.

Gast *v.* Porter, 13 Pa. 533; Styer *v.* Freas, 15 Id. 339, and Sterrett's Appeal, 27 Id. 62, commented upon.

Error to the Common Pleas of Monroe County.

Ejectment, by Byron E. Hamlin, administratrator d. b. n. c. t. a. of John Widmer, deceased, against Reuben Thomas, James T. Carmer, Benjamin Tock and Julia Tock, his wife, and Edward Nevil, to recover possession of certain lots of land in Stroudsburg.

John Widmer died seised of the land in controversy on June 21, 1871. By his will, proved July 15, 1871, he provided, *inter alia*, as follows:—

I give and bequeath unto my dear wife Lydian Widmer the whole of my double dwelling house, being the same double house the half of which we do occupy at the present, with stable and other outbuildings, and the whole of the lot of land belonging to the same, adjoining lands of the land I purchased of James H. Stroud in the east, and land I sold to Jerome S. Williams in the south, and on lands of Zachariah Flagler in the west, situate on Sarah Street in the borough of Stroudsburg, for the use and benefit of my said wife during her life, and from and after her decease I order that my hereinafter named executor shall sell the same at public vendue, and convey the same by deed to the purchaser or purchasers thereof, and all the proceeds arising therefrom I do bequeath to my four children, two sons and two daughters (begotten by my first wife), to be paid to them by my hereinafter named executor, in equal shares, share and share alike. . . . And as to all residue of my real and personal estate, I order that my hereinafter named executor shall sell at public vendue all my real estate, collect all outstanding moneys due me, convey the said real estate by good deeds to the respective purchaser or purchasers, and likewise pay the whole of the proceeds thereof (after deducting expenses) to my four children aforesaid in equal shares, share and share alike.

Of this will he appointed John De Young the executor, to whom letters testamentary thereon were duly granted.

On November 20, 1871, the executor sold all the land except the homestead property devised to the wife, and in December, 1871, and January, 1872, sold portions of this property, being the lots in controversy, to certain persons, who or whose successors in title are the defendants in this case, and executed deeds therefor.

No application was made to the Orphans' Court for leave to sell, and although the widow of testator was living, she did not join in the deeds.

The executor died December 23, 1874, and

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the widow died January 29, 1884. On March 26, 1884, letters of administration d. b. n. c. t. a. upon the estate of John Widmer, deceased, were granted to the plaintiff, who brought this action of ejectment, alleging that the executor's deeds had passed no title, as he had no power to sell during the life of the widow. The defendants claimed under the deeds from the executor, alleging that the widow gave a parol consent to the sales which made them valid.

At the trial, before DREHER, P. J., defendants offered to prove by a witness, "that the widow Widmer came to the witness prior to the sale of the lots in question, and told him there were debts against the estate, and the real estate would have to be sold. That she urged him to buy one of the lots joining the homestead, and that she would get her daughter, Mrs. Amanda Fetherman, to buy the lot adjoining on the other side of the homestead, and some one else would buy the lot on Monroe Street, and by that means it would save the dwelling house and lot for a home for herself: and that subsequently it was agreed by parol between the widow and John De Young, the executor, that the lots in question should be sold to pay the debts, and save a home for the widow. That subsequently the lots were sold at public sale in pursuance of that agreement."

Objected to as immaterial, that the want of power in the executor to make the sale cannot be cured by verbal declarations of the widow to witness, and that witness was incompetent to testify in his own behalf as against the rights of the deceased widow.

Defendants added to offer, that the widow was present at the public sale of the lots to Nevil and Emery, and that she bid in a lot for her daughter, Amanda Fetherman, to whom it was subsequently conveyed by the executor, and that she acquiesced in the several sales up to the time of her death. Objection renewed. Objection overruled. (First assignment of error.)

Defendants also offered in evidence record of judgment against John Widmer, satisfied of record—to be followed by evidence of other indebtedness of the estate of John Widmer, to show that the widow consented to the sales for the purpose of paying these debts. Objected to as immaterial. The defendants must show power to make the sale; the disposition of the proceeds cannot cure the want of power to make the sale. Objection overruled. (Third assignment of error.)

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) If the jury believe that the widow gave her consent to such sale in ignorance of her rights, or under a misapprehension or misunderstanding of her rights, then such consent did not cure the defect in the sale of the real estate. *Answer.* I cannot affirm this point under the circumstances of this case. (Fourth assignment of error.)

(3) If the widow consented to such sale under the representation of the executor or any one else that such sale was necessary to pay pressing debts, and save her home, when there was no such necessity for such sale, then the sale was null and void. *Answer.* Negatived, unless the jury should believe, under the evidence, that such representation by the executor was a wilful misrepresentation, with intent to mislead or deceive the widow. (Fifth assignment of error.)

(4) That the evidence of Edward Nevil, Margaret Nevil, Wm. H. Nevil, and Anna Nevil, is not sufficient to establish the fact that the widow gave her consent to the sale. *Answer.* I cannot affirm this point. The evidence is for the jury; and you will bear in mind what I have said in the general charge as to the evidence, in respect to certainty, fulness, and undoubted character, to establish the consent of the widow. (Sixth assignment of error.)

(6) There being no evidence that the alleged consent of the widow was communicated to Samuel Emery, before or at the time he purchased, the sale as to him was null and void, and conveyed no title. *Answer.* Negatived. (Eighth assignment of error.)

(7) The waiver of the widow, or consent that the life estate devised to her should be sold, can only be determined by plain and unequivocal acts or declarations, under a full knowledge of all the circumstances and of her rights. She was not bound to make any choice until she was fully informed of the relative value of the things she was to choose between. *Answer.* Negatived. (Ninth assignment of error.)

Defendants presented the following points:—

(1) A power given to executors to sell at the death of the widow is well executed if the widow, for whose benefit the sale was postponed, waives said benefit by any means effective in closing her mouth against subsequent objections; and the remaindermen cannot complain that the particular estate was yielded before it would otherwise fall. *Answer.* Affirmed. The jury will remember what I said in the general charge as to the character or kind and quantity of evidence necessary to show the consent of the widow. (Tenth assignment of error.)

(2) If the jury believe from the evidence in the cause that the widow of John Widmer, the testator, agreed with John De Young, the executor, to waive her right as tenant for life in the real estate sold, and described in this writ, for the purpose of paying the debts of the estate, and saving a home for her, the sales were valid, and the verdict of the jury must be for the defendants. *Answer.* Affirmed. As I have said in the general charge, the evidence must be full, clear, cer-

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tain, and undoubted. (Eleventh assignment of error.)

The Court further charged, *inter alia*, as follows: "It is unfortunate for all parties that a competent lawyer was not consulted at the time the sales and deeds were made. He would undoubtedly have advised that the widow join in the deeds, or that the executor should apply to the Orphans' Court for an order of sale. This, however, was not done, and the question of the widow's assent must now be determined by the jury under the evidence. The burden rests upon the defendants to show by clear, certain, satisfactory, and indubitable evidence that the widow, before the sales were made, gave her full consent that the executor should sell these lots for the payment of the debts of the testator. Land is usually conveyed by writing, for the reason that being of so permanent a nature, the law, in its wisdom, requires that there shall be some deliberate act done as evidence of sale and purchase, and that there may be some public record made of the transfer of title and possession; but as [in the case of a power under a will to sell real estate, after the death of a life-tenant, the law permits the consent of the life-tenant to a sale to be in parol, or merely verbal,] yet it holds the very strict rule I have just stated as to the certainty and clearness of the evidence necessary to prove such consent."

Verdict for defendants and judgment thereon. Whereupon plaintiff took this writ assigning for error the assignments above noted and the portion of the charge included between brackets.

H. Wilson (*John B. Storm* with him), for plaintiff in error.

A power of sale must be strictly construed. The sale can be made only at the time or on the contingency appointed and for the purpose directed by the testator.

Clark *v.* Riddle, 11 S. & R. 311.
Risk's Appeal, 14 Out. 171.
Walker's Estate, 3 Rawle, 229.
Neel *v.* Beach, 11 Norris, 226.
Swigert *v.* Fry, 8 S. & R. 299.
Hay *v.* Mayer, 8 W. 203.
Loomis *v.* McClintock, 10 Id. 274.

The rule laid down in the above cases has been modified only to the extent of holding that a sale may be made by the executors, during the life of the widow, when she actually joins in the deed.

Gast *v.* Porter, 1 Harris, 532.
Styer *v.* Freas, 3 Id. 342.

A life estate can be conveyed only in the manner required to pass a fee.

Kling *v.* Hummer, 2 P. & W. 349.
Hart *v.* Carroll, 4 Norris, 508.

The evidence falls short of the character necessary to establish a title to land by parol. Nevil and his wife, if not entirely incompetent, were yet only equivalent to one witness.

Sower *v.* Weaver, 28 Smith, 443.

Charlton Burnett, for defendants in error.

The doctrine that a devise to executors to sell on a contingency, cannot be executed till the contingency happens, as laid down in the earlier cases (see Smith *v.* Folwell, 1 Binney, 546; Sweigart *v.* Frey, 8 S. & R. 299), has been departed from.

Gast *v.* Porter, 1 Harris, 533.
Styer *v.* Freas, 3 Id. 342.
Brown & Sterrett's Appeal, 3 Casey, 62.

The cases cited by plaintiff in error, to show that the right of the widow to convey her estate is within the Statute of Frauds, are not in point. The testimony goes to show that the conduct of the widow showed her consent to the sale; she is therefore estopped, and those who claim in any way through her, from denying her consent.

Chapman *v.* Chapman, 59 Pa. 214.
Miller's Appeal, 84 Id. 391.
Woodword *v.* Tudor, 81* Id. 382.
Putnam *v.* Tyler, 2 Crumrine, 570.

April 29, 1889. THE COURT. John Widmer devised his homestead to his widow for life, and directed that upon her decease his executor should sell the same and pay over the proceeds to certain of his children. The executor sold during the lifetime of the widow, but with her consent. It appeared at the trial that the rest of the estate was not sufficient to pay the testator's debts, and that the executor thought the best thing to do was to sell part of the homestead so as to retain the dwelling-house for the widow, and in this she concurred. It is not, however, contended that the sale, without a decree from the Orphans' Court, can be sustained upon the power of the executor to pay debts, but upon the widow's consent. As rightly ruled by the learned Judge, the question whether the debts could have been met in some other way was immaterial, unless the widow's consent was obtained by fraud or misrepresentation, of which there was no evidence. The proof of the widow's consent was satisfactory to the jury, even under the strict standard laid down by the Judge, that it must be "clear, certain, satisfactory, and indubitable," but it was all in parol, and we have thus the single question presented whether under such circumstances consent must be evidenced by writing.

The case does not call in question at all the settled rules that powers must be strictly pursued, and that a power to be exercised upon a given event cannot be properly executed before the happening of that event. But the exception is equally well settled that where a power is complete, but its exercise is postponed for the benefit of a particular person, the consent of that person will be equivalent to the happening of the stipulated contingency.

The devise to Mrs. Widmer was of "the

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whole of my double dwelling-house, being the same double house, the half of which we do occupy at the present time. . . . for the use and benefit of my said wife during her life, and from and after her decease I order that my executor shall sell the same," etc. The testator further directed the immediate sale by his executor, of all his personal estate, and all his other real estate, excepting only the homestead. It is thus beyond question that the power to sell was ample, and the postponement of its exercise was solely for the benefit of the widow, and that the interest of the only other parties who had any interest in the matter, the children who would be entitled to the proceeds, was to have the sale at once.

Gast *v.* Porter (13 Pa. 533), was very similar to the present case. The devise was to the widow for life, with a direction to the surviving executors to sell upon her death; the executors sold during her life; and the question of the validity of the sale arose upon ejectment by the administrator *cum testamento annexo;* the only difference being that the widow was one of the executors, and as such joined in the deed. This circumstance, however, was not adverted to by the Court as a ground of the decision. All that was said upon it, was "an immediate sale and distribution was for the interest of all except the widow, who by joining in the deed assented to the sale." The decision was put by ROGERS, J., entirely on the intention of the testator, and "as this provision in the will was intended for her (the widow's) benefit, it is text law that she had a right to waive it."

This case was followed by Styer *v.* Freas (15 Pa. St. 339), where again the widow had joined in the deed, but again the decision was put exclusively on the intention of the testator. "Where the time is postponed," says GIBSON, C. J., "for the protection of a particular person, it may be hastened by the assent of that person, as it was in Gast *v.* Porter; but where it has been postponed with a view to a probable rise in value, the persons entitled to the benefit of the chance, may insist on having it."

In neither of these cases was the *form* of the widow's consent discussed, but in Brown & Sterrett's Appeal (27 Pa. 62), where there was a similar devise to the widow for life, and direction to the executor to sell at her decease, the widow elected to take under the intestate law, and it was held that the executor took the estate with immediate power to sell. The intention of the testator was again held to be the guide. "It is manifest," says C. J. LEWIS, "that the sale was postponed for the benefit of the widow . . . and it is said to be text law that she may waive it by assenting to the sale before the period designated in the will. (Gast *v.* Porter, 1 H. 533.) If she may waive it in one way, she may certainly waive it by any other means equally effective in closing her mouth against subsequent objections. What can be a more decisive waiver than renouncing all benefit under the will? The widow did this in open Court, in pursuance of a citation which required her to make her election," etc.

These decisions rule the present case, and we do not see any compulsion to depart from them. The idea that the widow's consent must be in writing undoubtedly arose from viewing the sale as a conveyance of her freehold estate.

But her consent is not technically a conveyance of her estate, but the removal of a limitation upon the executor's power, otherwise sufficient, thereby not enlarging it, but making it presently exercisable. No question of the Statute of Frauds is really involved at all.

The evidence in the third assignment of error, as to the testator's indebtedness, was irrelevant, but it did no harm to plaintiff in error. The widow's consent being proved, her reasons, or inducements, short of fraud upon her, were, as already said, immaterial.

Judgment affirmed.

Opinion by MITCHELL, J. H. S. P. N.

Jan. '89, 309. March 7, 1889.

Gere v. Unger.

Affidavit of defence—Promissory note—Fraud—Payment of old debt by delivery of note—Procedure Act of 1887.

Where fraud in procuring a promissory note is sufficiently averred in an affidavit of defence to a suit upon the note, it establishes a good defence against any but a *bona fide* holder for value before maturity, and is sufficient to put the plaintiff upon proof of his right as such holder.

Where the affidavit of defence states that the note was delivered to the plaintiffs "in payment and satisfaction of an old debt," a sufficient defence is not made out.

If, however, the statement in the suit on the note avers only that the payee "by delivery transferred the same to plaintiffs," without giving any date of transfer or averring the value or consideration passing from the plaintiffs to the payee, the plaintiffs are not entitled to a summary judgment.

The distinction between taking a note as absolute or only as conditional payment and satisfaction of an old debt, is so narrow and depends so entirely on the exact facts, that a defendant should not be deprived of his right to have the facts fully developed upon a trial, unless the plaintiff's statement sets out such a *prima facie* case as would meet the defence set up by the affidavit.

Error to the Common Pleas of Berks County.

Assumpsit, by Theodore D. Gere, T. C. Platt, and C. F. Johnson, trading as Gere, Platt &

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Johnson, against John Unger, upon a certain promissory note.

Plaintiffs filed the following statement of claim:—

"The above-stated action is founded on a promissory note, dated the 18th day of December, 1885, drawn by the aforesaid John Unger, for the sum of three hundred dollars, and made payable to L. A. Beilhartz or bearer, at Mohrsville, Pa., without defalcation, on April 1, 1887, which said L. A. Beilhartz, by delivery, transferred the same to the plaintiffs. And the plaintiffs aver that the whole amount of said note, together with interest thereon, is due the plaintiffs.

"JAMES A. O'REILLY, *Att'y for Plaintiffs.*

"COPY OF NOTE UPON WHICH SUIT IS BROUGHT.

'$300.00 *Mohrsville, December 18th*, 1885.

'On April 1, 1887, I promise to pay to L. A. Beilhartz or bearer, Three hundred $\frac{00}{100}$ dollars. Value received, without defalcation, at 6 per cent. interest, payable at Mohrsville, Pa.

'Interest for one year only. JOHN UNGER.'"

To this statement of claim defendant filed an affidavit of defence, stating in general terms what is more particularly set out in the supplemental affidavit hereinafter set forth. After argument of a rule for judgment for want of a sufficient affidavit of defence, leave was given to file a supplemental affidavit within ten days; the supplemental affidavit not having been filed within the required time, judgment was entered for plaintiffs, which was afterward opened, and the following affidavit filed:—

"The note upon which this suit is brought is not an individual transaction, but is a part of other transactions entered into on the same day between the defendant and Irwin Becker on behalf of the Bohemian Oats Association. The note was given for thirty bushels of oats sold defendant under the representation that the same were of peculiar quality and productiveness. At the same time said Becker agreed to sell for said Unger at $10 per bushel, sixty bushels of oats, which said Unger was to raise from the thirty bushels so purchased. Said Becker at the time of said transaction delivered to defendant a paper, of which the following is a copy:—

No. 63. A BOND
from the
PENNSYLVANIA BOHEMIAN OATS ASSOCIATION.
To be signed by our Superintendent, T. Miller.
Bern Township, Berks County, State of Pennsylvania.
Mohrsville, December 18, 1885.

We do hereby agree to sell 60 bushels of BOHEMIAN OATS for Mr. John Unger, at Ten Dollars per bushel, for which the said Unger is to pay 25 per cent. commission for selling. The note given by Mr. John Unger to Mr. L. A. Beilhartz, due April 1, 1887, will not be called for until the above amount is sold at ten dollars per bushel.

(Sig.) T. MILLER, *Superintendent.*
$300. (Sig.) S. J. HILL, *Secretary.*

"The note in suit was therefore not payable except according to the terms of said agreement 'until the above amount is sold at $10 per bushel.' Said Becker, or Miller, or Bohemian Oats Association, never sold said sixty bushels of oats, but instead thereof made conditional contracts for the sale thereof, in pursuance of which said defendant afterwards delivered sixty bushels of oats to different parties for which he never received any pay, the same fraud having been practised upon said alleged purchasers as was practised on this deponent as above set forth, to wit, by the promise and condition that they should only pay on condition of future sales of their product, the same as was agreed with this deponent.

"Deponent therefore alleges that the whole transaction through which he was induced to sign and deliver the note in suit, was a fraud and deception throughout, and a swindle on him perpetrated by said association and its officers and agents. After the obtaining of the note in suit, defendant saw it in the hand of T. Miller, the superintendent, who signed said paper.

"Defendant is informed that while said Miller so held this note, and before its maturity, he delivered it into the hands of the plaintiffs, a firm of agricultural implement manufacturers, residing in Oswego, New York, in payment and satisfaction of an old debt that he owed them for goods of theirs previously obtained from them, with the expectation thereby of preventing this deponent from making any defence on the merits on a suit on the note. Plaintiffs are therefore not innocent holders for value before maturity by purchase in the ordinary course of trade. Defendant is entitled to make every defence against them that he could make against the original holder. After diligent inquiry deponent has been unable to find any such party as L. A. Beilhartz, and believes that no such person is in existence, but that the name of said payee was inserted in the said note by said Miller or Becker, with the intention of aiding the perpetration of the fraud.

"The deponent therefore never received any value for said note, the thirty bushels of oats delivered to him having been inferior to common oats, and not worth more than 30 cents per bushel, making a total of $9.00, so insignificant a sum in comparison to the amount of the note, that it can be regarded only as a bait to aid the fraud, and not as value received.

"All of which defendant is informed and believes to be true, and to constitute a full defence to the plaintiffs' claim, and expects to be able to prove upon a trial of this case."

The Court discharged the rule for judgment upon this affidavit, whereupon plaintiffs took this writ, assigning for error the action of the Court

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in discharging the rule for judgment, and in not entering judgment for plaintiffs.

James A. O'Reilly, for plaintiffs in error.

There was no warranty of the quality or productiveness of the oats in this case; mere representation of quality does not constitute a warranty.

Whitaker *v.* Eastwick, 75 Pa. 232.

The defence in this case was fraud practised on the defendant. If there was any fraud, the defendant entered into the contract with his eyes open, and hence was not defrauded.

Benjamin on Sales, 555.

Defendant admits in his affidavit that the plaintiffs received the note for a valuable consideration "in payment and satisfaction of an old debt." This is no defence, nor is the averment that the note was transferred to plaintiffs for the purpose of avoiding the defence of a claim against the payee.

Lerch Hardware Co. *v.* Bank, 109 Pa. 244.
Sloan *v.* Banking Co., 67 Id. 472.
Forepaugh *v.* Baker, 21 Weekly Notes, 299.
Bardsley *v.* Delp, 88 Pa. 420.
Moorehead *v.* Gilmore, 77 Id. 124.

C. H. Schaeffer (*F. K. Flood* with him), for defendant in error.

While in many of the States notes taken in the name of a fictitious person are valid, yet the burden of proof is on the holder to prove that the payee named is a fictitious person.

Foster *v.* Shattuck, 2 N. H. 446.
Manriot *v.* Roberts, 4 E. D. Smith, 83.
Byles on Bills, 84.
Chitty, Bills, 181.
1 Edwards, Bills and Notes, § 136.
Randolph, Com. Paper, §§ 161, 164.

An affidavit of defence setting forth that the note was obtained by misrepresentation is sufficient to prevent judgment for want of a sufficient affidavit.

Hutchinson *v.* Boggs, 4 Casey, 294.
Albietz *v.* Mellon, 1 Wr. 367.
Hoffman *v.* Foster, 7 Id. 137.
Royer *v.* Keystone Bank, 2 Norris, 248.
Carpenter *v.* National Bank, 106 Pa. 170.
Lenheim *v.* Wilmarding, 5 Smith, 76.
Smith *v.* B'ld'g Assoc., 12 Norris, 19.
Lerch *v.* Bank, 3 Out. 240.

April 29, 1889. The Court. The original and supplemental affidavits of defence set up a clear case of fraud in the procuring of the note upon which the suit is brought. The particulars of the fraud are given, and it is also averred upon information and belief that the note was passed to the plaintiffs by Miller the active agent in committing the fraud. It is well settled that this establishes a good defence against any but a *bona fide* holder for value before maturity, and is sufficient to put the plaintiff upon proof of his right as such holder.

This result would be beyond possibility of question in the present case were it not that the supplemental affidavit states that Miller delivered the note to plaintiffs "in payment and satisfaction of an old debt." This raises the only doubt in the case. Taken literally it makes out no defence, and under the former affidavit of defence law, which required the filing only of a copy of the note, and supplied by intendment therefrom all the necessary legal requisites to the cause of action, would not have been sufficient to prevent judgment. But the Procedure Act of 1887 requires not only a copy of the writing but a statement of his case, to be filed by the plaintiff, and if we examine the statement we find that it avers only that "said Beilhartz (the payee) by delivery transferred the same to plaintiffs." The peculiar language of this statement, not "paid," or "sold," or any similar word, but "by delivery transferred," and the entire absence of date of transfer, or averment of value or consideration passing from the plaintiffs to Beilhartz or Miller, deprive the statement of sufficient weight as a clear case for the plaintiffs to entitle them to a summary judgment. Moreover the distinction between taking a note as absolute, or as only conditional payment and satisfaction of an old debt, is so narrow, and depends so entirely on the exact facts, that the defendant should not be deprived of his right to have the facts fully developed upon a trial, unless the plaintiff has in his statement made out at least such a *prima facie* case as would meet the defence set up by the affidavit.

For these reasons we are of opinion the Court was right in discharging the rule for judgment, and remitting the parties to a full development of the case before a jury.

Order affirmed.

Opinion by Mitchell, J. H. S. P. N.

Jan. '89, 286. March 7, 1889.

Reading and Pottsville Railroad Co. v. Balthaser et al.

Eminent domain—Corporation—Damages for appropriation of land by—How estimated—Value of minerals, under surface of ground so appropriated, may not be proved—Interest not allowed as such in actions ex delicto.

A petition for the assessment of damages for the taking of land by a railroad company for the purpose of constructing their line of road, set forth that the petitioners were the owners in fee of a certain tract of land, etc. The defendants upon cross-examination elicited from one of plaintiffs the fact that A. was operating a stone quarry upon the lands of plaintiffs at the time the railroad was located under a lease from them. In order to explain this answer and show that the lease did not affect plaintiffs' right to recover, one of the plaintiffs, who made the lease, was called for the purpose of showing that it covered

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but a small part of the quarry and that the railroad did not touch or affect the part so occupied:

Held, that the evidence was properly admitted.

When the quarry was originally opened, a canal was the only available line of transportation for its products. The Reading Railroad afterwards built a branch in the neighborhood of the quarry but charged an additional rate of ten cents per ton on all freight passing over the branch. Defendants' road was subsequently built to and across plaintiffs' lands:

Held, that although the evidence as to whether this additional line of transportation was or was not an advantage to the owners of the quarry was a proper subject of consideration by the jury, yet evidence as to where plaintiffs sold stone they quarried on the property, and how they shipped it to market, was inadmissible.

Held further, that in consequence of the admission of this testimony, an offer by defendants to show that the rates of freight by rail had been reduced in consequence of the building of the new road, was improperly excluded.

Upon a former trial of the case, witnesses were allowed to estimate the damages sustained by plaintiffs by calculating the number of tons of limestone under the surface of the right of way and multiplying that by the estimated price per ton. The Supreme Court held that such a method of fixing the value of the land was speculative and could not be applied to land taken by virtue of the right of eminent domain, and sent the case back for another trial. Upon the second trial the same witnesses estimated the damages at precisely the same sum as at the first trial, but instead of separating the land and stone, called it "stone land." Defendants proposed to ask upon cross-examination, whether the witnesses had not made a new arrangement of the items, or elements of damage, so as to enable them to fix the damages at the same total as before, but by a different process, and whether this was not done in consequence of the decision of the Supreme Court as above mentioned:

Held, that the question was improperly excluded.

Where the Court has properly instructed the jury, but the latter have disregarded the instructions, the remedy is not a writ of error, but an application to set aside the verdict.

The Court instructed the jury "after you have ascertained that there is any damage, you will allow interest on that sum from May 19, 1885, to the present time:"

Held, to be error.

In actions resting on contract, interest is demandable as such; in actions growing out of a tort, it is not. In the former case the Court may properly direct its allowance; in the latter the question belongs to the jury. It may, or may not enter into their calculation of damages.

Error to the Common Pleas of Berks County.

Case by Mary Balthaser, widow of William Balthaser, Frank Balthaser, Walter W. Balthaser, Clara Herbein, wife of John Herbein, in right of said Clara, Mary B. Rieser, wife of James A. Rieser, in right of said Mary B. and Ellen Rothenberger, wife of Urias Rothenberger, in right of said Ellen, against the Reading and Pottsville Railroad Company, now the Pennsylvania Schuylkill Valley Railroad Company, to recover damages for about two acres of land of plaintiffs, taken and used by defendants for the construction of their railroad.

The property of the plaintiffs consists of about thirty-seven acres of limestone land, which is chiefly valuable for quarrying purposes. Previous to the construction of the railroad of the defendants, the facilities of the plaintiffs and of their tenants for transporting their product to market were limited to the Philadelphia and Reading Railroad, a branch of which extends from the main line of that company at Leesport to the plaintiffs' property, and the Schuylkill Canal, also operated by the Philadelphia and Reading Railroad Company under a lease. The line of the defendants is competitive to those of the Philadelphia and Reading Railroad Company.

A trial, which resulted in a verdict for plaintiffs of $8040.64, was reversed by the Supreme Court in Reading and Pottsville Railroad Company *v.* Balthaser (4 Crum. 472; S. C., 21 WEEKLY NOTES, 253), where the facts are reported.

Upon the second trial the following questions arose: The plaintiffs offered to show that a portion of their property was, at the time of the location and construction of the railroad, in the possession of tenants under a lease. The defendants objected because the property was not described in the petition as a reversionary interest, so that the testimony offered would create a variance, and because also the offer was irrelevant. The Court admitted the testimony. (First assignment of error.)

The plaintiffs offered to show where they sold the stone which they quarried on the property, and how they shipped their product to market. Objected to as irrelevant. Objection overruled. Evidence admitted. (Second assignment of error.)

The plaintiffs having been permitted, against objection by the defendants, to examine Walter W. Balthaser, with a view to showing that no advantages accrued to the plaintiffs' property from the construction of the railroad, the defendants proposed, upon cross-examination, to ask the witness whether the Philadelphia and Reading Railroad Company, whose branch extends from Leesport to the plaintiffs' property, did not, previously to the construction of the defendants' road, charge fifteen cents per ton for transporting the product of the plaintiffs' property from the branch to their main line at Leesport, and as to whether the said company did not, after the construction of the defendants' competitive road, discontinue the said charge, and carry the stone to Leesport free. Objected to. Objection sustained. (Third assignment of error.)

Walter W. Balthaser, one of the plaintiffs' witnesses, having, as aforesaid, been examined in chief with a view to showing that the defendants'

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railroad was of no benefit to the property, and having testified in chief that the plaintiffs shipped their stone to market by canal, the defendants proposed, upon cross-examination, to ask him as to whether, since the construction of their competitive railroad, the plaintiffs had discontinued getting the coal, which they used in burning lime, by canal. Objected to. Objection sustained. (Fourth assignment of error.)

Walter W. Balthaser had, upon the previous trial, made up his estimate of the difference in market value by adding to the value of the land a valuation which he placed upon the stone supposed by him to underlie the railroad, at so much per ton. The Supreme Court reversed the judgment which had been entered upon the verdict rendered upon such first trial, on the ground that the said company could not be charged with the value of the supposed stone. Upon the second trial, the same witness estimated the damages at precisely the same sum, but instead of separating the land and the stone, he called it "stone land," and retained his original figures. The defendants, with a view to showing his interest and motive, and so affecting his credibility, proposed to ask him whether he did not know that the Supreme Court after the other trial decided that the plaintiffs could not claim anything from the defendants for any alleged taking of stone, and whether he had not modified his mode of making up these damages in consequence of that decision, and in order to get around that decision, leaving the amount of his estimate the same, but pretending to get at it in a different way. Objected to.

THE COURT. You can inquire as to whether his estimate is different from what it was at the last trial, with a view to contradiction. I do not think you should inquire what the Supreme Court has decided. You may inquire as to whether he changed his estimates. Objection sustained. (Fifth assignment of error.)

All of the plaintiffs' witnesses, excepting one, upon cross-examination, admitted substantially, that in making up their estimates they had taken into account the quantity and value of the limestone which they supposed existed under the railroad. The defendants moved to strike out this testimony; the Court overruled the motion. (Sixth assignment of error.)

The defendants asked the Court to instruct the jury to disregard the said estimates; the Court affirmed the point, but subsequently charged the jury upon the point as follows: "What, then, is the evidence? A number of witnesses were examined upon the part of the plaintiffs, and the damages which these witnesses have testified to that the property has sustained, that is, the difference in the market value, ranges from $5000 to $12,000. The first witness examined was Walter W. Balthaser, and he estimates the damage to the property at $12,000. Isaac H. Rahn was the next witness, and he says $9000. Francis Kaufman names $9000. Reuben Wanner says $5000. Conrad Hock names $9000. William Grater says $9000. George C. Hartman says $7000. Harrison Epler says $8000. You see the several witnesses vary in their estimate of the difference in market value of the property. You are to take their testimony, examine it, and weigh it. You have been upon the premises, and you yourselves have seen the property, and therefore you will weigh the testimony in connection with what your own eyes have seen." (Seventh assignment of error.)

The defendants, by their first point, requested the Court to instruct the jury, that, as in the petition, "the plaintiffs had described their property, without excluding therefrom or mentioning the outstanding leasehold interest which Mary Balthaser and Walter W. Balthaser, two of the plaintiffs, testified was vested in Atkins Brothers as to part of their property at the time of the appropriation by the defendants, there could be no recovery under the pleadings and evidence." *Refused.* (Eighth assignment of error.)

The defendants, by their ninth point, requested the Court to instruct the jury that they should "estimate the damages by the difference in the market value of the plaintiffs' property before and after the construction of the railroad, as affected thereby; that they should not allow more damages because the property was taken without the plaintiffs' consent or because it was taken by a railroad company, but that they should make their estimate just as if the plaintiffs had voluntarily agreed to part with their property for a reasonable compensation, and as if they had so agreed to part with it to an individual to be used for the same purposes and in the same manner." The Court affirmed this point, with a qualification that the reasonable compensation should be "the market value of the property." (Ninth assignment of error.)

The Court also charged the jury, "After you have once ascertained that there is any damage, you will allow interest upon that sum from May 19, 1885, to the present time." (Tenth assignment of error.)

Verdict for plaintiffs for $6975.51. A rule for a new trial having been discharged, defendants took this writ and assigned error as above.

Cyrus G. Derr, for plaintiffs in error.

C. H. Ruhl (*Daniel Ermentrout* and *Adam B. Rieser* with him), for defendants in error.

April 29, 1889. THE COURT. The admission of the evidence complained of in the first assignment of error was entirely proper as the case stood at the time. The defendants' counsel had, by their cross-examination, drawn from Mary Balt-

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baser the statement that the Messrs. Atkins were operating the quarry on the lands of the plaintiffs at the time the railroad was located upon them, under a lease from herself and children. In order to explain this answer and show that the lease to Atkins did not affect the plaintiffs' right to recover, one of the sons, who made the lease, was called for the purpose of showing that the lease covered but a small part of the quarry and that the railroad did not touch or affect the part so occupied by the Atkins. This was no necessary part of the plaintiffs' case, and became important only because of the cross-examination of Mary Balthaser and for the purpose of explaining it. For that purpose it was competent and relevant.

The second assignment raises a very different question. When the quarry was opened originally it would seem that the canal was the only available line of transportation for its products. The Reading Railroad afterwards built a branch across the Schuylkill River in the neighborhood of the quarry, but charged an additional rate of ten cents per ton on all freight passing over this branch, so that shipment of heavy freight over this line does not seem to have been desirable for the owners of the quarry. The defendants' road was built to and across the plaintiffs' lands. Whether this additional line of transportation was or was not an advantage to the owners of the quarries was a proper subject for consideration by the jury, but the evidence referred to in this assignment threw no light upon that question. It was not important for the jury to know where the yield of the quarry had been marketed in years gone by, or what line of transportation had been employed before the new facilities were offered to its owners. The true inquiry was, whether a broader market and better facilities for shipment were put within their reach by the building of the defendants' road, or in other words, whether there were advantages to be set off against the disadvantages arising from the appropriation of the plaintiffs' land for the right of way of this road. The objection to this evidence should have been sustained. The inquiry which it entered upon was not helpful or relevant. But as the Court admitted it, and so opened the subject of the modes and cost of transportation existing in former years, it is not easy to see on what ground the defendants' offer, the rejection of which is the subject of the third assignment, was excluded. The offer was to show that rates of freight by rail had been reduced in consequence of the building of the new road. If this subject of freights had not been opened, the rejection of this offer would have been right. Having let the plaintiffs into this sort of proof, the defendants should have been permitted to reply. The door should have been closed to both. The fifth assignment is also well taken. On a previous trial of this case witnesses were allowed to estimate the damages sustained by the plaintiffs by calculating the number of tons of limestone under the surface of the right of way, and multiplying that by the estimated price per ton, reaching a value of several thousands of dollars per acre. This was one of the reasons for the reversal of the judgment by this Court and sending it back for another trial. We held that such a method for fixing the value of land was speculative, and could not be applied to land taken by virtue of the right of eminent domain. It involves an uncertain estimate of the quantity and quality of the stone, includes necessarily the use of labor and capital, requires skill and intelligent supervision on the part of the operator, and vigilance and success in the financial management. No human mind can foresee the presence of these elements of business success if the stone be removed at the ordinary rate of quarrying, or forecast the profit or loss of actual operations. The true rule is that which quits the realm of speculation and comes down to what is within the knowledge of business men living in the neighborhood, viz., what was the fair selling value of the property before the defendants entered upon it? What is its fair selling value as affected by that entry? The difference is the true measure of the loss sustained by reason of the entry. But notwithstanding the plain manner in which this rule was stated when this case was here before, the witnesses on the last trial placed their estimates of the plaintiffs' damages at the same sums as when they were examined on the former trial. Defendants' counsel asked them on cross-examination whether they had not made a new arrangement of the items or elements of the damage so as to enable them to fix the damages at the same total as before, but by a different process, and whether this was not done in consequence of the decision of this Court holding that the value of the stone in place could not be fixed by the ton, and the total so reached taken as the market value of the land. This the Court excluded. It was, however, a proper cross-examination. It reached after the real basis on which the witnesses made their estimate, and it afforded a test of the fairness and candor of the witnesses themselves. It was in no sense an examination upon a legal question, or upon the manner in which the witnesses understood the rule laid down by this Court, but into the reason on which they acted. Knowing that they had no right to make their estimate now as they had made it before, had they not, nevertheless, done so, and given a false color to their testimony? This was the force of the examination proposed and it was clearly within the lines of legitimate cross-examination. The errors assigned to the charge upon the subject of the duty of the jury in the ascertainment of the damages

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cannot be sustained. The rule was correctly stated by the learned Judge. He said: "All the testimony from any part of the plaintiffs' witnesses who spoke of valuing the limestone underlying the railroad must be disregarded by the jury, and the testimony of these witnesses must be taken not to the stone underlying the railroad, but what was the true market value; and if their market value that they testify to has reference to the limestone which underlies the railroad, and making that a special part of the difference in the market value, that must be disregarded by the jury." This instruction is in accordance with the rule laid down by this Court. The jury may have disregarded it, but it was plainly presented to them. The remedy for a disregard of instructions is not upon writ of error, but by an application to set aside the verdict, which under proper circumstances the trial Judge should not hesitate to do.

The ninth assignment relates to the direction to the jury to allow interest. This was technical error. The lapse of time between the happening of an injury and the time of trial is a proper subject to be considered by the jury in making up the amount of damages for which to render a verdict, but interest, as such, is not recoverable in actions *ex delicto*. In actions where a definite sum of money is demandable as a debt, interest at the legal rate is a matter of right, and the jury may properly be directed to include it in their verdict; but actions brought to recover unliquidated damages for a wrong done, proceed upon a different basis. The nature of the wrong, the attending circumstances, and the time when it was committed, are all for the jury, and may be properly considered in the adjustment of the amount of the verdict. The learned Judge said to the jury: "After you have ascertained that there is any damage, you will allow interest on that sum from May 19, 1885, to the present time." This would have been an appropriate direction in an action *ex contractu*, because interest is a legal incident of a debt, but is not justifiable in an action of trespass. We might not have reversed for this alone, but as the case goes back for other reasons, we again call attention to this well-settled distinction between actions resting on contract and those growing out of a tort, so far as interest is concerned. In the former interest is demandable as interest; in the latter it is not. In the former the Court may properly direct its allowance; in the latter the question belongs to the jury. It may or it may not enter into their calculation of the damages. Whether it shall or not depends on the judgment of the jury in view of all the circumstances of the case. If it is included in the verdict, it is simply as one element of the damages sustained by the plaintiff and liquidated by the verdict.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by WILLIAMS, J. H. C. O.

Jan. '89, 412. April 15, 1889.

Rizzolo v. The Commonwealth.

Criminal law—Practice—Change of venue—Jurors—Previously formed opinions—More names in jury wheel than required by Court rule, not ground for quashing the array—Confessions—Involuntary—Practice in questioning accused before passing sentence.

It is too late to ask at the trial for a rule to take the testimony of witnesses to prove facts alleged in a petition for a change of venue in a murder trial, on the ground that a fair trial could not be had by reason of the excitement and prejudice against the accused, when the latter has had a whole term in which to make such an application.

The fact that a witness swore that 1554 names had been placed in the jury wheel instead of 1550, as provided by an order of Court, is not sufficient ground for quashing the array of jurors or the indictment.

An opinion formed from reading the newspapers is not ground for excluding a juror who states that he can render a true verdict according to the evidence, uninfluenced by his previously formed opinions.

Allison *v.* The Commonwealth, 99 Pa. 17, followed.

The fact that a subordinate detective told the prisoner before he made a confession that "he had better tell the captain all he knew and it would be better for him," does not make the subsequent confession involuntary when the captain, before hearing it, spoke to him as follows: "I tell you now, anything you say to me I shall use against you. It is my duty to do so. Now, if you feel like telling me anything, go ahead; but tell me nothing or tell me the whole God's truth."

When, upon a capital charge, the jury have brought in their verdict of guilty, in the presence of the prisoner, if the Court asks him if he has anything to say why sentence should not be passed upon him, all the requirements of the law have been complied with. It is not necessary to say "sentence of death," when no sentence but that of death is possible.

Error to the Oyer and Terminer of Luzerne County.

Indictment against Michael Rizzolo for the murder of J. Brainard McClure. Plea, not guilty.

On the trial, before RICE, P. J., defendant moved for a change of venue, alleging that he could not have a fair trial by reason of the great excitement and prejudice against him in Luzerne County. He also asked for a rule to take the testimony of witnesses to prove the facts alleged in his petition. The Court refused to grant either the petition or the rule (first and second assignments of error), but offered to hear at bar any testimony in support of the petition.

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Defendant then moved to quash the array of jurors and the indictment, because the order of Court for filling the jury wheel for 1889 specified 1550 as the number of names that should be placed therein, and he produced a witness who testified that he had counted the names on the list, and the number was 1554. Motions refused. (Third and fourth assignments of error.)

The jury list having been called, counsel for defendant challenged for cause several jurors because they had formed opinions from what they had read in the newspapers about the murder, although they all said that they could render a verdict according to the evidence, uninfluenced by their previously formed opinions. The Court refused to allow the challenges. (Fifth assignment of error.)

On the trial the Court admitted the testimony of Captain R. J. Linden, detailing a confession made by the defendant to him in Philadelphia, under circumstances set out in the charge, *infra*, and also admitted the confession itself. (Sixth and seventh assignments of error.)

The facts of the case appear in the general charge, which, *inter alia*, was as follows:—

"It would appear that on the morning of the 19th of October, Bernard McClure and Hugh Flanigan started from the works of Mr. McFadden, above Miner's Mills, to come to Wilkes-Barre, for the purpose of getting money to pay the men employed at those works. They went to the Wyoming National Bank, and there obtained twelve thousand dollars in money, largely paper money, and also some silver and smaller coin. This was put in a satchel, and they started upon their return. They stopped for a moment at Miner's Mills, at the post-office, and then started up the road which has been described to you by the witnesses. Mr. McFadden that same morning started down the road for the purpose of coming to Wilkes-Barre. On his way down, a short distance, which has been described to you by the witnesses, above what is called the White House road, he found his horse standing in the road, and upon examination found the dead body of Bernard McClure under the wheel. He made no further examination at that time, apparently, but returned to his works, and having got his superintendent they again returned to this scene. They then found, about 500 feet below where McClure lay, the body of Flanigan, he also being dead, having been shot. The money that had been in the wagon was gone. The horse had been shot. The physicians have described to you the wounds which McClure received. They have also produced two bullets which were taken out of his body. They have described the third wound in the head, and have testified that either one of these would have been fatal. These circumstances would be very strong evidence that not only the crime of robbery, but the crime of murder had been committed. There is only one person who has given direct testimony as to what took place at that time, as to the circumstances surrounding that transaction, and that is the defendant. And for the purpose of bringing before your minds the circumstances of the killing, I will read an extract from the confession which he is alleged to have made to Capt. Linden, and then also an extract from the testimony which he gave upon the stand here. Speaking of McClure and Flanigan he says:—

"'When I got close to the forks of the road, McClure and Flanigan passed me, but I did not speak to them. When they got to the little hill they went slow and I followed them. I see Bevivino come out and shoot from the bushes. He shot McClure twice in the back; then he shot the other man, but I didn't think he hit him. Then Vallilo came up in front of them and shot the other man twice in the face. I had a revolver in my hand and was running after them. The horse run away and McClure was hanging with his feet under the wheel. When they had gone about twenty or thirty yards the old man fell out and Vallilo ran away down the road, and Bevivino looked at me mad, and told me to come. I went with him and when they got to the place where they afterward found the horse he stopped and then Bevivino shot the horse and shot McClure again in the head. He then shot a good many times at the horse. I was standing still and he cursed me and got very white and said: "Here, you hold this gun and if anybody comes you kill them." I held it, and with the knife he cut the straps that held the valise to the buggy, then put the valise on his shoulders and said: "Let us go through here." It was raining and muddy and we went up and took the money and hid it a couple of miles from the scene of he murder; also the gun.'

"In the same connection I read to you the testimony that he gave here upon the stand, as taken down by the stenographer:—

"'When I got to this place they passed me.' Q. 'Who passed you?' A. 'Mr. McClure and Flanigan, they passed me.' When they passed me, I supposed the old man spoke, and he says, "How do you do?" I say, "How do you do?" When they passed I walked with him, that is, the buggy was going not on a trot but pretty lively; and they got away from me—well, here to that officer out to the front door, little closer than that. When I got there, I was walking, I had an umbrella in my hand; I seen Bevivino come out of the bush and shot McClure once; after, he shot twice, I think, or three times, and McClure first. He was standing on the other side of the buggy, standing on the right side going up. After he shot McClure, McClure fell—he stood a little while and then fell on the side. After he fell he shot

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the other man; he shot him two or three times; this here Flanigan, he stands, then he falls. After a little while the horse got scared and the time he shot the first time he looks at me, and that is the time he cursed me to follow him, when he looked at me; this here Flanigan was living yet, I suppose; I don't know; but he was hanging after he spoke to me and cursed me.

"Q. 'Who cursed you? What did he say, how did he curse you?' A. 'He cursed me, you know.'

"Q. 'What did he have in his hand?' A. 'He had a rifle.'

"Q. 'How did he have it pointed?' A. 'He didn't have it pointed; he just look at me and look at me. So after he cursed me, you know'—

"Q. 'Tell what he said, how he cursed?' A. 'He says, "J—— C——, hurry up." He looked at me and he got kind of white. After he got white, you see I thought the man'—*Commonwealth's Counsel:*—'Never mind what you thought.' *Witness:*—'After he says that, I got scared from the way he spoke to me three or four days ago, that the man who would lose his courage he would got killed; that what made me pull out the revolver, and I shot three or four times while the horse was running, mind. The horse was running and those people they was most hanging pretty near dead; I don't know whether they were or not.'

"Q. 'What distance were they away at the time you shot?' A. 'They got a little farther; because the horse got scared.'

"Q. 'Go on.' A. 'When he was shot this here Vallillo he come out and shot in front, and after that they got scared and run away. This old man he fell. I walked slow and he runs. He turns back again but he didn't tell me anything after he'—

"Q. 'Who turns back and looked at you?' A. 'Bevivino. He turns and looked at me; he didn't say anything all, but he was running; he was out of wind, I suppose. After he got to the place where the horse was found, he went to work and shot the horse. After he shot the horse he went to work shot McClure head after he was dead. Then he told me—he go to work, he pulls out a knife, small pocket-knife, he cuts the strap and take this here what you call the satchel. After he take the satchel he give me the rifle; he says, "Mike, take this and shot whoever comes." I could not say anything; I could not hardly speak. We went across the road and we went to the place where the gun was hided.'

"Now, gentlemen of the jury, under this testimony as to the circumstances of the death of Bernard McClure, and the testimony of the defendant as to how that took place, we have no hesitation in saying to you that according to all of the testimony, the killing of Bernard McClure was murder. It was murder of the first degree. Because the killing was done by the persons lying in wait. It was murder in the first degree because it was done in the perpetration of the felony of robbery; it was murder because it was a wilful, deliberate, premeditated killing. Was the defendant responsible either as a principal or as an accessory to that crime? That is the issue which you have been sworn to try, and that is the issue to which your attention has been ably and eloquently directed by the counsel on both sides of the case. According to his own testimony he was present. According to his own testimony he fired several shots with the revolver which he claims he had. According to his own testimony he held the gun while Bevivino took the satchel containing the money. According to his own testimony he went with Bevivino to the place where it was hid, and on two subsequent occasions went to the same place and took a portion of the money.

"Now, gentlemen of the jury, we say to you that if this testimony be believed—it is his own—then his acts if unexplained, would make him a principal, notwithstanding you were not satisfied that any of the shots fired by him caused the death of Bernard McClure. There has been considerable argument upon the one side and the other as to whether or not the defendant was the instigator or promoter, or first suggestor of this crime. We do not regard that as an essential fact to be found.

[If he was there voluntarily aiding and abetting in the commission of the crime, although it was suggested and instigated by another, he would be a principal, and would be responsible in the eye of the law along with the others. The difference in the moral guilt between the parties would be one which the law would not recognize.]

. . . .

"With these general principles in view we now advert to what we said as to the effect of the defendant's admitted presence and acts. And we repeat, that unexplained, they would be sufficient to warrant a jury in inferring and finding that he was a principal, notwithstanding none of the shots fired by him had a fatal effect.

["What is the explanation? It is contended upon the part of the defendant, that he did not know the crime was to be committed on that day, and that he came upon the scene unawares; that he was not a free agent, but that he was coerced into what he did by fear of Bevivino and his alleged friends. This defence is to be considered in two aspects. In the first place, if you should find as a matter of fact from all of the testimony in the cause, beyond a reasonable doubt, that the fatal shots were fired by the defendant, then the fact that he was acting under the fear of Bevivino would not excuse or justify this act. Because while a man may take the life of his assailant for

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the purpose of preventing the infliction of grievous bodily harm upon himself, or for the purpose of preserving his life, there is no principle of law which would justify or excuse him in taking the life of an innocent person in order to protect himself.] [But in case you should find as a matter of fact that the fatal shots were not inflicted by the defendant, then you will inquire whether or not the acts which he performed there were coerced by fear of Bevivino, whether that explanation which has been given by the defendant is such as would show that he had not the power to form the wilful, deliberate, and premeditated intent to take the life of McClure.]

"Now, gentlemen of the jury, we do not mean to prejudice your minds against the theory which has been set up here by the defendant. It has been presented to you with great power and ability and eloquence by his counsel, and we say to you we do not purpose to interfere with your convictions upon this question of fact. It is our duty, however, we think, to call your attention to all of the circumstances surrounding the transaction, and to ask you to scrutinize this allegation carefully, coolly, impartially. As has been stated to you, the defendant, while a competent witness under the law, is a man deeply interested in the result of your deliberations. So great was such interest of a person accused of this crime considered to be, that during all the history of the English common law, and of our own common law, until a very few years ago, he was not permitted to testify; because it was feared that the temptation to perjury was so great as to unfit him to be a truthful witness. We think that the law as it is at present is much wiser. There may be cases where a man, though charged with a crime of this nature, may explain the circumstances in such a way as to convince the mind of the jury of the truthfulness of his testimony, and in such a case he ought to have the opportunity of so doing; because the jury are competent to judge, notwithstanding his interest, whether his testimony accords with the disinterested testimony in the case.

"I call your attention in the consideration of this theory, to the circumstances as they occurred at the time, and as they have been explained by the defendant himself, leaving out of view for the present, the confessions which it is alleged he made, and the statements which it is alleged he made before the commission of the crime.

["Upon this question as to whether or not he was acting under duress, and fear of Bevivino, and therefore not capable of forming a wilful and premeditated intent to take the life of McClure, I call your attention to his age. I call your attention to the power of will, to the courage, to the intelligence of the man as exhibited by himself while upon the witness stand, and as shown by the testimony of other witnesses. All of these are to be considered in determining as to whether or not he was acting under duress. I call your attention also, as to what threats were made at the time. Does the evidence show—does defendant's own evidence show—that there were such threats made at the time, in connection with what had transpired before, as led him as a reasonable creature to presume or fear that his own life or limb was in danger if he did not participate in the crime? These are questions of fact for the jury. I am expressing no opinion upon them, but I am calling them to your attention and consideration. You will take into consideration the place where this occurred. It has been argued that the defendant was going by an unusual road—that is to say, that he should have turned off to the right at the White House road instead of continuing to follow McClure and Flanigan by the other road. You have heard his explanation as to that. He says his intention was to go first to his mother before going to the shanty. I call your attention to the evidence as to the number of shots fired by him, and as to the direction in which they were fired, and as to the aim which was taken by him, if any. I call your attention also to the testimony as to the distance between the point where he says he first saw Bevivino, and the point where the horse stood when the money was taken out of the wagon. Was he in going to that point—traversing that distance—acting under the coercion or dominating will of Bevivino, and in fear that unless he did so he would be in danger of loss of life or of limb himself? I call your attention also to his testimony to the effect that while the money was being taken from the wagon he held the gun with which the firing had been done. Was he then acting under coercion? Was he then, as a reasonable man, in reasonable apprehension of danger to himself in case he should not continue to assist Bevivino in his conduct?]

"Now, I repeat, gentlemen of the jury, that while I deem it my duty to call your attention to these various circumstances, distinctly, I am not expressing any opinion; I am not trying to thrust indirectly into the jury box any opinion of my own. There is nothing in my judgment in the administration of the law of government so much to be admired as the conscientious, intelligent, and impartial verdict of a jury. But if it shall ever come to this, that a jury shall shirk the responsibility which rests upon them, and be the mere register of the judgment, opinion or will, even of the Judge who sits upon the bench, which they may infer from his conduct, or his declarations, or his manner, then the statement that trial by jury is the bulwark of our liberty will be a mere glittering generality. Neither I,

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nor the counsel, nor any one, has a right to interfere with your province in determining the question of fact. I am here to lead you to the consideration of those facts which are material and pertinent; but the conclusion as to the credibility of the witnesses, as to the inferences which are to be drawn from their testimony, rests with you, and there the responsibility must rest in any fair administration of this valuable right of trial by jury.

"Now, gentlemen of the jury, having called your attention to the circumstances which occurred at the time, as shown by the uncontradicted testimony in the cause, and as shown by the defendant's testimony, either here or elsewhere, I call your attention to the other circumstances in the case, from which it is claimed, upon the part of the Commonwealth, that this crime was planned beforehand, and that the defendant was a willing member of the combination which formed this plan.

"According to the defendant's own testimony and admission, he knew from the declarations of Bevivino that this crime was contemplated. He says that when it was first mentioned he thought it was a joke; but that the second time it was mentioned and thereafter, he appreciated that Bevivino was in earnest. You have heard the reason which he has given for not making known his knowledge. He says that it was by reason of threats which Bevivino made that either he or his friends would make away with him in case he should reveal the secret. That is for your consideration as explaining the fact that, possessing this knowledge that the crime was contemplated, he yet made no complaint to the officers of the law, and gave no warning to the men against whom it was contemplated. [I call your attention to the testimony with regard to the purchase of the gun which has been offered in evidence. I do not purpose to go over that testimony in detail. But does the testimony show that it was done with a knowledge of the purpose to which it was to be put, on the part of the defendant?] I call your attention to the testimony of Antonio Napalillo as to the declarations which he alleges were made by the defendant to him; and here there is a conflict of evidence; not an absolute conflict in all particulars, but a conflict in a material particular. Both Napalillo and the defendant agree in saying that the plan of murdering and robbing McClure was suggested to Napalillo. Both of these witnesses—that is, Napalillo and the defendant—agree that Napalillo declined to have anything to do with it. Napalillo testifies, however, in effect, that not only Bevivino, but also the defendant approached him for the purpose of inducing him to join the conspiracy, and made certain threats as to what would be done in case he should betray them. On the part of the defendant, he testifies that he never gave his assent to the undertaking, but that always when he gave a definite answer to Bevivino, it was to the effect that he could not do it. You will endeavor to reconcile the testimony of the witnesses, if possible. You are to take into consideration, in weighing their testimony, the interest which they may have in the case. You are to consider in the defendant's case the interest which he has in your verdict. You will consider in Napalillo's case whether or not he is testifying as he does in order to shield himself from punishment. You are to take into consideration the manner of the testimony, the impression which the witnesses make upon your mind as to being truthful and candid, or otherwise; and it is for you to decide what is the truth with regard to any disputed question of fact. For if the testimony be believed, and there is no reasonable doubt in your mind as to its truthfulness, that the defendant did make to Napalillo the proposition which he says defendant did, and accompanied it with threats which he says he did, that would be entirely inconsistent with the theory of the defendant upon the trial, that he was coerced into this by fear of Bevivino. In considering this allegation as to the defendant being under duress, I call your attention to the testimony of the defendant as to the nature of the threats. Is there any evidence that he was threatened by any person except Bevivino? He says that he was threatened by Bevivino that he would be killed or put out of the way either by Bevivino, or his friends, or the members of the society to which he belonged, in case he should lose his courage and not do his part, or words to that effect. [Is there any evidence in the case of knowledge upon the part of the defendant that Bevivino had such friends, or that he was a member of such a society, or that such would be the result, etc., except the statement which he says Bevivino made to him?] The point that I desire to call to your attention is this: In considering whether or not the defendant was acting under duress by reason of threats which Bevivino had made, it is important for you to consider what was Bevivino's ability to carry out those threats, or at least what was the defendant's belief as to Bevivino's ability to carry them out. Because if they were not such as to produce in his mind fear that the result threatened would be carried out, then he could not set them up as a defence for his act. I call your attention also, without rehearsing it in detail, to the testimony as to the declarations of the defendant made to William McDonald, to Balser Helrick, and to Mr. Quigley, in the jail after he was arrested. You will remember their testimony and take it into consideration. Is there any reason to doubt the credibility of these

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witnesses? Is there any motive apparent in their testimony, or in the other testimony in the case, for causing them to color their testimony, or to suppress any fact material to the defendant? Did they correctly understand the defendant? Did he correctly understand them? Have they accurately reported to you what was said? I also call your attention to the testimony of Cheviacco as to the conversation which he alleges took place between him and the defendant in November, after Bevivino and Vallillo had gone to Italy. I shall not undertake to repeat that testimony; because without giving it in whole it would scarcely be fair to select here and there a single remark. In considering the credibility of this witness, Cheviacco, you are to inquire whether or not he has any motive for falsifying—either of revenge or ill will towards the defendant, or motive of self-preservation. You will remember the testimony to the effect that he is himself under arrest and indictment as an accessory after the fact. If he were an accessory after the fact, he would then be an accomplice, and the testimony of an accomplice is never by itself sufficient to warrant the conviction of a criminal, unless it be corroborated by the testimony of other witnesses. So you are to inquire what corroborations there are of the testimony of Cheviacco. The defendant admits that he has had communication with Bevivino, both through Cheviacco and also directly, since Bevivino returned to Italy; that letters have passed through Cheviacco, and I understand that he admits that two letters were sent by him, the defendant, to Bevivino to the place where he supposed he was in Italy. This is a fact worthy of consideration in determining whether or not the defendant was a free agent at the time when he committed the acts which he admits that he did on the morning of the 19th of October last. So you will also take into consideration the testimony as to the disposition of the money. It would seem that only the coin was recovered; that the paper money was taken away. I think he testifies that on two occasions he took some money, and that on another occasion some of it was handed to him by one of the parties. All of this is pertinent to be considered by you in determining whether or not he was acting under duress, or whether he was knowingly, and as a free agent, participating in the crime and its results. Of course, in consideration of all of this testimony as to these circumstances, you will also consider what has been said with regard to the nature of the threats, and what fear the defendant had, and the allegation that he was at all times laboring under the same fear, and that all that he did, both before and after, was controlled by the same fear which operated upon his mind on the morning when this fatal affair took place.

"I call your attention now to the testimony with regard to the confession which is alleged to have been made to Captain Linden after the defendant had been arrested. In many particulars the confession as narrated by Captain Linden and as reduced to writing, is not different from the testimony given by the defendant upon the stand. There are, however, some important particulars in which they do materially differ, and therefore it becomes our duty to lay down the law to you with regard to the reception of confessions of persons accused of crime.

"Where a man freely and voluntarily—that is, without fear or hope of benefit—makes, and intelligently makes, a statement, of course it is evidence of a very high nature. But in order to warrant the admission in evidence of the confession of a person accused of a crime, it must appear, in the first instance, that it was free and voluntary, and was not wrung from him by fear, or by hope that he would be bettered or advantaged thereby. That is, the inducement for the confession must be the promise made to him, or hope held out to him, that it would be better for him to confess, by any person having authority. According to the evidence of Captain Linden, the defendant was in the company of his under-officer, Thayer, and while in his company, Thayer made statements to the defendant as to the propriety of his making a confession to Captain Linden, and as to the advantage which would accrue to him if he did make such a confession, which, if they had been the inducement for the confession, would have required us to reject it from evidence. A promise by an officer to a person in charge that it would be better for him in the end to confess and tell what he knows, is such a promise as prevents the reception of the confession in evidence. But in order to warrant the rejection of a confession upon the ground that it was induced by a promise, it must appear that the promise was the inducement to the making of the confession. If, therefore, the promise or inducement which had been held out by Thayer was not the inducement which led the defendant to make the confession, then it would be admissible in evidence. Upon this question there is a conflict of evidence. In the first instance it was the duty of the Court to decide as to its admissibility, and acting within the province committed to us we decided that it was admissible; and it was read in your hearing. But the defendant says that after he had returned from Thayer's room, Captain Linden then made promises to him as to what would be the advantage to him if he told all that he knew. On the other hand, you have the testimony of Captain Linden to the effect that he then cautioned him that he could make no promises to him, and that if he told him anything he must tell him the truth, and with the knowledge that he would use it against him.

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Now, if this had the effect of removing from the defendant's mind the hope which may have been born there by what Thayer had said, then we cannot say that this was not a free and voluntary confession. It is for you to determine, then, whether the confession made to Captain Linden was a free and voluntary one, under the instructions we have given to you upon this question of law, or whether it was induced by the hope that he would be advantaged by making it, and that this hope was caused by promises held out by the officer in charge. In case you should find that it was not a free and voluntary confession, then you will reject it from consideration. This applies, however, only to what was said to Captain Linden, and to what was done with regard to the confession itself. It would not operate to the rejection of the testimony as to what he and Captain Linden did after they got to Wilkes-Barre that night, with regard to finding the property which had been hidden in the woods above Miner's Mills. That would be evidence in any view of the case. In case you should decide that this confession was free and voluntary, then you will remember the testimony as to what took place the night that they had the first interview, and also what was reduced to writing the next day. You are, in view of the discrepancy between that and the testimony, in some particulars, given here upon the stand by the defendant, to consider whether or not it is correctly reported. Have the statements made by the defendant at that time been correctly, accurately reported? Has anything been omitted from that statement which would tend to qualify it or put a different light upon it? Has anything been interjected into that statement which was not said by the defendant? In deciding this question you are to consider all of the circumstances. You are to consider also the testimony as to the care with which it was prepared—the care exercised not only by the officers but by the defendant himself.

"Now, gentlemen of the jury, our duty as far as the trial of this case is concerned is ended. We have endeavored to secure to this man a fair and impartial trial. We have stated to you the law of the land as we understand it. We have called your attention to those facts which we think material to be considered by the jury in determining as to his guilt or innocence. It may be that in the hurry of our remarks we have omitted to refer to some fact or circumstance which has a material bearing upon the case. We trust that in case there has been such omission you will bear the testimony in mind, and that you will give it that consideration and weight which it deserves.

"I finally ask you, in accordance with the oath which you have taken, to take up all of this testimony and lay aside any former prejudice or opinion which you may have had, and, uninfluenced thereby, decide as to the guilt or innocence of the defendant.

"In case you find the defendant guilty of murder, then you will say whether it is of the first or of the second degree. If you find him not guilty of murder but guilty of voluntary manslaughter, you will so say by your verdict. If you find him not guilty you will also say that by your verdict.

"We have confidence from the care and patience with which you have watched the trial of this case, and the able manner in which it has been presented to you by the counsel on the one side and the other, that you will make a true deliverance between the Commonwealth and the prisoner at the bar."

Verdict, guilty of murder in the first degree, in the manner and form as charged in the indictment.

A rule for new trial having been discharged, the prisoner was called before the Court and asked if he had anything to say why sentence should not be passed upon him, and he replied that he had nothing to say; accordingly he was sentenced to be hanged by the neck until he is dead.

Defendant then took this writ, specifying for error the action of the Court (1) in refusing a change of venue; (2) in refusing to grant a rule to defendant, permitting him to prove the facts alleged in his petition for change of venue; (3) in disallowing the motion to quash the array; (4) in disallowing the motion to quash the indictment; (5) in disallowing the challenges; (6) in admitting the evidence of Captain Linden; (7) in admitting the confession of the accused in evidence; 8 to 12, inclusive, the portions of the charge in brackets; 13 to 15, inclusive, in presenting the strong points of the prosecution and omitting those of defendant; and, 16, because the record does not show that the prisoner was asked whether he had anything to say why sentence *of death* should not be pronounced against him.

Edward A. Lynch and *John M. Garman*, for plaintiff in error.

Alfred Darte, district attorney (*Henry A. Fuller*, *John T. Lenahan*, and *James L. Lenahan* with him), for defendant in error.

April 29, 1889. THE COURT. The first seven assignments of error are not in accordance with the rules of Court, and might well be dismissed for this reason alone. But we are not unmindful of the fact that a human life is at stake; that the defendant below is a friendless man, and a stranger in a strange land. We will consider the alleged errors as though they had been properly assigned.

The defendant moved the Court below for a

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change of venue. In support of this motion his affidavit was filed setting forth his belief that he could not have a fair trial in the county of Luzerne by reason of the great excitement and prejudice there against him. He therefore asked for a rule to take the testimony of witnesses to prove the facts alleged in his petition. The Court refused to grant the rule, but offered to hear at bar any testimony in support of the petition. The defendant asked for "more time to get the subpœnas, and get the witnesses." This was refused by the Court, and very properly. The application was not made until the case was called for trial. It might and should have been made at an earlier period in the term. It was said by the learned Judge: "We must decline to postpone it. We think he ought to be prepared now. He has had the whole of this term to make the application, and we think it would make a very bad precedent to lay it down that an application of this kind might be reserved in this way, and a rule granted permitting the taking of the testimony thereafter. We think it is the defendant's duty to produce his proofs now, to sustain the petition. We will hear them now." No proofs were offered, and the motion fell. There is no merit in these assignments.

The defendant also moved to quash the indictment, and also the array of jurors. These motions were based upon an alleged irregularity in filling the jury wheel. It appeared that the order of Court for filling the jury wheel for 1889, specified 1550 as the number of names that should be placed therein. It was alleged that the names of 1554 jurors were actually placed in the wheel, being four in excess of the number ordered by the Court. A witness was examined who had counted the names on the list, and he stated the number to be 1554. The certificate of the jury commissioners was produced stating that they had placed the proper number, viz: 1550, in the wheel. One of the said commissioners was examined, and testified that their intention was to put in 1550 names; that they did so, and had no knowledge of four additional names having been put in. It is very clear that if the wheel did contain 1554 names, it was a mere accident, probably the result of an error in addition, an error which might occur with the most careful and accurate commissioners. It was a mere irregularity, of harmless nature, and furnishes no ground to quash the array.

It was also alleged that the Court erred in disallowing the challenges for cause to certain jurors. The names of the jurors are not even given but I have gone through the type written copy of the testimony to ascertain whether the objection was well taken. The challenges were all properly overruled under Allison *v.* Commonwealth (99 Pa. 17), and the cases which have followed it. The jurors objected to had all formed opinions of greater or less strength from what they had read in the newspapers about the murder, but they all said they could render a verdict according to the evidence, uninfluenced by their previously formed opinions. There was a time when a stricter rule prevailed, and a juror was excluded from the box when he had formed an opinion as to the guilt or innocence of the accused. At that time intelligent jurors could be found who had formed no opinions in regard to a case, for the reason that they heard or read little about it. That was before the telegraph and the press brought to every man's door the news of every event, and every crime within a few hours of its occurrence, with full details of everything connected therewith. All this is now changed; within twenty-four hours of the commission of this murder it is safe to say that by means of the wire and the press, the details of it had been read by nearly every intelligent man, not only in Luzerne County, but in the State, and that but few persons had not formed some opinion in regard to it. The law upon this subject has necessarily advanced with the changed circumstances; it has merely kept abreast of the times, and adapted itself to what the common judgment and common sense of the people see is essential to the proper administration of the criminal law. To return now to the old rule would exclude from the jury box in many instances every man of average intelligence.

We find no error in admitting in evidence the testimony of Captain Linden in regard to the defendant's confession, nor to the admission of the confession itself. His testimony was competent and rebutted any allegation of undue influence in obtaining it. He said to the defendant: "If you have anything to tell me, in God's name tell me the truth; if not, tell me nothing. You have a right to keep your mouth shut. I tell you now as your lawyer would tell you, I can make you no promise, I cannot even ask you to tell me a word; but I tell you now, anything you say to me I shall use against you. It is my duty to do so. Now, if you feel like telling me anything, go ahead; but tell me nothing or tell me the whole God's truth." In view of this we regard what Thayer said to the defendant as unimportant; and as between the witness and the defendant, we are not surprised the jury believed the former, who was a reputable, disinterested witness, while the latter was testifying with a halter around his neck.

Most of the remaining assignments are made up of extracts from the charge of the Court. They are isolated from the charge, but whether we take the charge as a whole or in sections it is free from error. The question whether the de-

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fendant was acting under duress or threats on the part of Bevivino was submitted to the jury under proper instructions as to its effect upon the degree of guilt. This appears from that portion of the charge referred to in the ninth assignment, which is as follows: "But in case you should find as a matter of fact that the shots were not inflicted by the defendant, then you will inquire whether or not the acts which he performed there were coerced by fear of Bevivino, whether that explanation which has been given by the defendant is such as would show that he had not the power to form the wilful, deliberate, and premeditated intent to take the life of McClure." We need not pursue this branch of the case further.

There remains but to notice the sixteenth and last assignment, which alleges that "the record does not show that the prisoner was asked whether he had anything to say why sentence of death should not be pronounced against him." The record shows that the defendant was asked if he had anything to say why sentence should not be passed upon him. As no sentence was possible but that of death we think there was no omission. The rule is thus stated by Blackstone, Vol. 4, p. 376: "For when, upon a capital charge, the jury have brought in their verdict of guilty, in the presence of the prisoner, he is either immediately, or at a convenient time soon after, asked by the Court, if he has anything to offer why judgment should not be awarded against him."

This defendant has had all the advantages which our humane system of laws afford; with no claim except that of common humanity, he was assigned, without cost to himself, able counsel to defend him, who have performed that duty with zeal and ability, not only without fee or reward, but without the hope or expectation of any; his case was tried before an impartial jury by a learned and able Court, not only without error, but with conspicuous care and impartiality, and after a verdict of guilty he has had his case reviewed in the highest Court in the State. He was allowed to be heard here *in forma pauperis* to save him the cost of printing the testimony. It was his misfortune that a chain of testimony, in addition to his own confession, pointed to him with terrible distinctness as one of the perpetrators of a cold-blooded, mercenary murder.

The judgment is affirmed, and it is now ordered that the record be remitted to the Court below for the purpose of execution.

Opinion by PAXSON, C. J. W. M. S., JR.

Jan. '89, 4. April 16, 1889.

Bloomsburg Steam and Electric Light Co. v. Gardner.

Negligence—Contributory negligence—Streets and highways—Practice.

In an action to recover damages for injuries occasioned by negligence, there can be no recovery where the negligence of the plaintiff has contributed in *any* degree to the injury. It is not proper to instruct the jury in such case, that the plaintiff is entitled to recover unless his negligence contributed in a *material* degree to the injury.

In the present case the instructions of the Court as a whole were held to conform to the rule above laid down.

A steam and electric light company having entered upon a street of a certain town to lay its pipes took down barriers at the ends of a square before the work was entirely completed so as to open the street to traffic. The passage way for vehicles up to the afternoon of a certain day was on the west side of the street, the east side being obstructed with piles of earth and a cross ditch. On said afternoon the cross ditch was filled up and the earth so removed as to open the east side to traffic. At the same time a cross ditch was dug on the west side of the street thus obstructing that side. At the close of work no barrier was put up at the cross ditch except the earth dug from it. A barrel was set up on a heap of earth near at hand and a lantern placed on it. As to the exact location and sufficiency of this light the evidence was conflicting. A., a doctor who had driven frequently along the street during the work using the west side and thought he had done so that morning, drove in the evening down the same side. His horse and carriage fell into the cross ditch and he was injured. The night was dark. A. stated he saw no lights and did not know of the existence of the cross ditch into which he fell. In an action by A. against the company to recover damages, the Court left all disputed facts and also the questions of negligence and contributory negligence to the jury:

Held, that this was not error.

Error to the Common Pleas of Columbia County.

Case, by B. F. Gardner against the Bloomsburg Steam and Electric Light Co. to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

On the trial, before ARCHBALD, P. J., of Lackawanna County, the following facts appeared: On Oct. 1, 1885, the company defendant obtained permission from the town council of Bloomsburg to lay down its pipes in the streets of said town upon condition, *inter alia*, that all openings which might be made in the public streets or ways must be inclosed with sufficient barriers and red lights maintained at the same at night, and all other necessary precautions taken to guard the public effectually against all accidents, from the beginning to the end of the work.

The work was at once commenced upon the streets, and the general work under which the

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plant was constructed was completed about February 1, 1886. After this work was completed, in the summer of 1886, the defendant company extended their pipes, as there was demand for their plant, through the various streets.

Some time in September, 1886, work was commenced on Iron Street, and for about ten days prior to September 30, 1886, defendant was working on Iron Street between Fourth and Fifth streets laying down its main pipe. During the early part of the work barriers were put up at Fourth and Fifth streets to prevent travel along Iron Street, but some days before September 30, these were removed and travel upon the street was resumed. The evidence was conflicting as to how far the travel was obstructed by the continuance of the work. During this whole period and up to the afternoon of September 30 the east side of the street was entirely closed up by earth and stones and by a cross ditch leading into a certain house. By the afternoon of September 30 this cross ditch was filled in and the earth on the east side of the street so far removed as to open that side to travel. At the same time a cross ditch was begun from a point near the head of the main ditch leading into a house on the west side of the street, thus obstructing that side which had previously been open to travel.

On the evening of September 30th, the employés of defendant on leaving the work placed a barrel on the top of a heap of earth near the head of the main ditch and near the cross ditch, and placed an ordinary lantern on it, which became somewhat obscured by the glass being covered with smoke. The evidence was conflicting as to the exact location of the heap of earth and of the light, some fixing it near the head of the main ditch, and others near the cross ditch. There was no barrier at the cross ditch except the earth dug from it, as to the height and amount of which the evidence was conflicting.

Plaintiff was a doctor who had driven along Iron Street frequently during the work, and thought he had driven upon it on the morning of September 30. He had, of course, used the west side of the street. On the evening of that day he drove between 7.30 and 8 o'clock down Iron Street on the west side. The horse fell into the cross ditch, and the plaintiff was thrown out sustaining severe injuries. The plaintiff testified that the night was very dark, that he did not remember seeing any lights, and that he drove on the west side of the street because he supposed that that side was unobstructed.

The Court refused numerous points presented by defendant, in substance to the effect that there was no sufficient proof of negligence, and that plaintiff was debarred from recovery by contributory negligence.

Plaintiff requested the Court to charge, *inter alia*, as follows:—

"(1) That the neglect of the defendant steam company to comply with the regulations prescribed by the town council of the town of Bloomsburg for the protection of public travel, as set out in the permit under which the pipes of defendant were laid in the streets of said town, was a culpable omission; and the carelessness of plaintiff which would excuse it, would have to be of a very gross character, clearly proven." *Answer.* "You see this asks me, not to declare what inference you may draw from the facts, but to charge you this is the law. I cannot do that. An inference from the facts, such as is here suggested, might be drawn by you; but I cannot affirm it as a legal proposition, therefore, I refuse it." Exception. (Tenth assignment of error.)

The Court left to the jury all questions of fact, and also the questions of negligence and contributory negligence.

Verdict and judgment for the plaintiff for $15,000. Whereupon defendant took this writ, assigning for error, *inter alia*, the answers to plaintiff's and defendant's points as above.

H. M. Hinckley (*Grant Herring* and *L. S. Wintersteen* with him), for the plaintiff in error.

The case was a clear case of contributory negligence, in which it was the duty of the Court to give binding instructions for defendant.

Barnes *v.* Sowden, 4 Crum. 60.
Carlisle *v.* Brisbane, 3 Amer. 554.
Baker *v.* Fehr, 1 Out. 72.
King *v.* Thompson, 6 Norris, 369.
Hoag *v.* R. R. Co., 4 Id. 297.

The rule as to contributory negligence was wrongly laid down by the Court.

Reeves *v.* D., L. & W. R. R. Co., 6 Casey, 464.
Goshorn *v.* Smith, 11 Norris, 438.
Railroad Co. *v.* Heaton, 12 Harris, 469.
Krum *v.* Anthony, 5 Amer. 435.
Monongahela City *v.* Fischer, 1 Id. 13.
Catawissa R. R. Co. *v.* Armstrong, 13 Wr. 137.

The knowledge of the plaintiff as to the condition of the highway exacted from him special care.

Hotchkin *v.* Phillipsburg, 6 Cent. Rep. 398.
Altoona *v.* Lotz, 4 Amer. 238.
Fleming *v.* Lock Haven, 15 Weekly Notes, 216.
Forks Township *v.* King, 3 Norris, 233.
D., L. & W. R. R. Co. *v.* Cadow, 5 Crum. 587.

James Scarlet and *Charles R. Buckalew* (*L. E. Waller* and *C. W. Miller* with them), for defendant in error.

April 29, 1889. The Court. A careful examination of this record discloses no substantial error. The assignments are numerous, mostly relating to the charge of the Court. The only portion of it which is not free from criticism is the answer to the plaintiff's first point. (See tenth assignment.) The point is as follows: "That the neglect of the defendant steam company to comply with the regulations prescribed by the

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town council of the town of Bloomsburg for the protection of public travel, as set out in the permit under which the pipes of the defendant were laid in the streets of said town, was a culpable omission; and the carelessness of the plaintiff, which would excuse it, would have to be of a very gross character, clearly proven." The answer of the Court was as follows: "You see this asks me not to declare what inference you may draw from the facts, but to charge you this is the law. I cannot do that. An inference from the facts, such as is here suggested, might be drawn by you; but I cannot affirm it as a legal proposition, therefore I refuse it." This point is obscurely stated; the first sentence is plain enough; it called upon the Court to declare the failure of the company to comply with the regulations of the town councils, as set forth in the permit, a culpable omission. The obscurity is in the second sentence. If its meaning was that the plaintiff could recover, unless his own carelessness had been very gross, it was error. The learned Judge refused the entire point as a question of law, with a qualification which I think was intended to apply only to the first part of the point. If the said point was intended to convey the impression that the contributory negligence of the plaintiff must be very gross to prevent a recovery, it would have been error in the Court to say: "An inference from the facts, such as is here suggested, might be drawn by you." That the Court did not mean to give the jury the impression that the contributory negligence, if any, of the plaintiff must have been very gross to prevent a recovery, is apparent from his general charge, in which the law in regard to this subject is thus clearly stated: "If the negligence of the plaintiff has contributed in any degree to the injury received, he cannot recover. This is no arbitrary rule, but is founded upon the highest reason; in another, and perhaps a more intelligible form, it is this: that if the plaintiff, by the exercise of the care required of him under the circumstances, would have avoided the accident, then he cannot blame any one but himself for the result." This is in harmony with the cases. Our latest upon this subject is Monongahela City *v.* Fischer (111 Pa. 9), where it was said: "The affirmance of this point involved another error. It imposed a qualification upon the doctrine of contributory negligence that has not heretofore been recognized. It was, that if the negligence of the plaintiff did not contribute in a material degree to the accident, he could recover. Without referring to the cases, the doctrine of this Court has always been, that if the negligence of the party contributed in any degree to the injury, he cannot recover. This is a safe rule, easily understood, and cannot well be frittered away by the jury. But if we substitute the word 'material' for the word 'any,' we practically abolish the rule, for a jury can always find a way to avoid it. The rule itself is valuable, and rests upon sound principle. We are not disposed to allow it to be undermined." As before stated, we are unable to see any necessary connection between the fact that the defendant had not complied with the regulations prescribed by the town councils, and the question of the extent of the plaintiff's contributory negligence. The most that can be made of the tenth assignment is that for an obscure point the plaintiff received a somewhat obscure answer, which, if not strictly accurate, could not have damaged the defendant. In view of the correct ruling of the Court in the general charge upon this question we cannot give it the meaning imputed to it, and the jury could not have been misled. We need not refer to the other points in detail. It was not negligence to drive upon the street in question at the time of the accident. The barriers had been taken down some days before, which was an invitation to the public to use the street, or an intimation, at least, that the street was in order for travel. The plaintiff had passed over it earlier on the same day, and found it safe. How was he to know when he entered upon it that evening, the barriers still being down, that this cross ditch had been dug the same evening? Whether it was sufficiently guarded, and the existence and location of the light, were matters for the jury, and upon which there was a conflict of evidence. They have found for the plaintiff, and the verdict is large, but the injury was grievous, such as few men in plaintiff's position would be willing to receive for twice the amount. The case was fairly submitted to the jury by the Court below, and the judgment must be

Affirmed.

Opinion by PAXSON, C. J. L. L., JR.

Jan. '89, 157. March 14, 1889.

Dreisbach v. Serfass et al.

Deeds—Family agreements—Contracts between relations for support in consideration of conveyance of property.

A., a widower, without children, over 70 years of age, made a conveyance of his land to B., a niece, and a married woman, by an instrument called an indenture, wherein, for the consideration of one dollar and divers other considerations, he granted, bargained, sold, aliened, enfeoffed, released, and confirmed the land in question to her, "excepting, nevertheless, the residence of the said A. in the house and on the premises during his natural life, and which is to be a lien upon the premises until the death and burial of the said A." The deed further contained a covenant by B. for herself, her heirs, executors, and administrators, "to find good house-room, and sleeping and

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lodging apartments for the convenience of the said A. during his life, and to find good and sufficient board, lodging, meat, drink, clothing and nursing, medical attendance, and all other necessaries for him during his life, and a decent burial for him when he leaves this world of sorrows; all of which is to be and remain a lien upon the premises until the whole of the duties aforesaid are performed." This deed was signed and sealed by both A. and B. In a subsequent action of ejectment, brought by the heirs of B. against C., who was in possession, and claiming under a subsequent deed from A. to C., C. offered to prove breaches of the above covenants by B. in her lifetime, and absolute failure to comply therewith after B.'s death; that A. thereupon treated this as a forfeiture, and conveyed to C., for the express consideration of five dollars, and the implied consideration of support and maintenance until his death. This evidence was rejected, a verdict directed for plaintiffs, and judgment entered thereon. On writ of error:

Held (1), That the deed from A. to B. could not be considered a testamentary disposition, because it contemplated an immediate taking possession by B. (Turner *v.* Scott, 51 Pa. St. 126, distinguished.)

(2) That under all the circumstances and the language used in the deed from A. to B., it could not be considered as vesting an absolute estate in fee simple.

(3) That the deed from A. to B. must be treated as an executory contract, in which A. contracted to give his property for his future maintenance, and B. contracted to provide the maintenance in exchange for the property, and that only an equitable title was vested in B., the legal title during his life remaining in A. And therefore—

(4) That the right of B. and her heirs to the possession of the premises depended upon whether they had paid the consideration expressed in that deed, and that they were not entitled to recover unless they could show performance, but as they had not been required to prove such payment, the offer of the defendant to take upon himself the burden of proof and show affirmatively the non-performance of the contract, under which alone the heirs of B. could recover, should have been admitted.

Error to the Common Pleas of Monroe County.

Ejectment, by Henry Serfass *et al.*, heirs of Sally Ann Serfass, against Frank Dreisbach, for a tract of fifty acres of land in Monroe County.

On the trial, before DREHER, P. J., it appeared that the land in 1882 belonged to Peter Berger, a widower, with no children, and over seventy years of age. In December, 1882, Berger conveyed the land in question to his niece, Sally Ann Serfass, a married woman, by an instrument styled an indenture, reading as follows:—

For and in consideration of one dollar, as for divers other good and valid considerations in law, hereinafter mentioned, he the said Peter Berger hath granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and confirm unto the said Sally Ann Serfass, and to her heirs and assigns, all that certain messuage, etc. . . . excepting, nevertheless, the residence of the said Peter Berger, the grantor hereof, of the first part, in the house and on the premises during his natural life and which is to be a lien upon the premises, aforesaid, until the death and burial of the said Peter Berger, and I, the said Sally Ann Serfass, the grantee in the aforesaid premises, do hereby bind myself, my heirs, executors and administrators and every of them firmly by these presents, which are to be considered on my part as a deed of covenants to find good house-room and sleeping and lodging apartments for the convenience of the said Peter Berger during his life, and to find good and sufficient board, lodging, meat, drink, clothing and nursing, medical attendance, and all other necessaries for him during his life and a decent burial for him when he leaves this world of sorrows, all of which is to be and remain a lien upon the premises aforesaid, until the whole of the duties aforesaid are performed on the part of the said Sally Ann Serfass, grantee, herein named.

To have and to hold the said messuage or tenement and tract of fifty acres, seventy perches and a quarter of land, hereditaments and premises, hereby granted, or mentioned, or intended so to be, with the appurtenances (except as before excepted and which is herein expressly excepted by the said Peter Berger, the grantor hereof), unto the said Sally Ann Serfass, her heirs and assigns, to the only proper use and behoof of the said Sally Ann Serfass, her heirs and assigns forever.

In witness whereof, etc.

His
PETER ⋈ BERGER [seal],
mark

Her
SALLY ANN ⋈ BERGER [seal].
mark

The plaintiffs put this deed in evidence, and gave testimony to prove a compliance with the above covenant by Sally Ann Serfass until January, 1884, when she died, and that shortly after her husband, Henry Serfass, one of the plaintiffs, had gotten the defendant to take care of Berger, the defendant being given possession of the farm and all he could raise from it in payment of his services; that defendant continued to care for Berger until his death in 1886, but then refused to give up the premises.

The defendant put in evidence a deed from Berger to him of the same premises, for the consideration of five dollars, dated August 26, 1884, and then offered to prove by various witnesses as follows: That "Sally Ann Serfass didn't live up to her agreement during her lifetime, nor did anybody keep her promises after her death; that after the death of Mrs. Serfass, neither her husband nor her heirs, administrators or executors have provided anything for him, Peter Berger, to the day of his death and burial; to prove want of care while the woman did live, and a total failure to care for him after her death, and that they abandoned the premises; to follow this with the fact that Berger, after the death of Mrs. Serfass, when he was abandoned, got Dreisbach, the present defendant, to go on the place and take care of him, and for compensation was to give him the property—make it over to him—which he did; that the real consideration in the conveyance to Dreisbach was not five dollars alone, but his care and keeping of him all the days of his life—the consideration of the deed given in

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evidence by defendant—that Dreisbach was to care for him, feed him, nurse him, clothe him, tend to all his wants and necessities, and give him a decent burial, which he did; also, that Berger treated this abandonment as a forfeiture of the title, re-entered or its equivalent act; that the plaintiffs so accepted it and understood it, and that the consideration of one dollar, mentioned in the deed from Berger to Mrs. Serfass, never passed." Objected to as irrelevant, incompetent, and inadmissible. Objection sustained, and evidence rejected. Exception.

The Court charged the jury as follows: "I have given this case as much careful consideration as it was possible, during the argument of counsel, and in my opinion the defendant cannot set up in this case a defence on the ground of non-performance of the covenants of Mrs. Sally Ann Serfass in the deed from Peter Berger to her; that the remedy for breach of these covenants must be by action of covenant; and I therefore direct you to find a verdict in favor of the plaintiffs."

Verdict accordingly for the plaintiffs, and judgment thereon. Whereupon the defendant took this writ, assigning for error, *inter alia*, the rejection of the above offer of evidence and the charge of the Court.

Henry J. Kotz (*H. Hakes* with him), for the plaintiff in error.

Charlton Burnett, for the defendants in error.

April 29, 1889. THE COURT. The disposition of this case depends on the construction of the instrument under which the plaintiffs in the Court below claimed title to the land in controversy. They sought to recover on the theory that it was a deed vesting a present absolute estate in fee simple in the grantee. The position of the defendant was that the writing was in the nature of a will, a testamentary paper, revocable at the will of the maker and actually revoked by the subsequent conveyance to Dreisbach. Our inquiry then is into the character and legal effect of the so-called deed from Peter Berger to Sally Ann Serfass. It should be borne in mind at the outset of this inquiry that the transaction was intended to secure to the grantor a competent support during his life; that it was between an aged and infirm uncle and his niece; and that it contemplated the payment of the niece for her services by assuring to her the property of the uncle. With this in mind we look at the instrument. It styles itself "an indenture" made between Peter Berger, of one part, and Sally Ann Serfass, who is described as the wife of Henry Serfass, the "daughter of Thomas Berger, and the niece of the said Peter Berger," of the other part.

The agreement or undertaking of Peter Berger is then stated to be that "in consideration of the sum of one dollar . . . . as for other good and valid considerations in law hereinafter mentioned and to be strictly kept by the said Sally Ann Serfass . . . the said Peter Berger hath granted, bargained, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and confirm unto the said Sally Ann Serfass, and to her heirs and assigns, all that certain messuage and tract or piece of land . . . . containing fifty acres and seventy perches and a quarter . . . . excepting, nevertheless, the residence of the said Peter Berger, the grantor hereof, in the house and on the premises during his natural life, and which is to be a lien upon the premises aforesaid until the death and burial of the said Peter Berger."

Immediately following these paragraphs that speak for the grantor, are those that express the undertaking of the grantee, and state the real price or consideration to be paid for the land. They are as follows: "And I, the said Sally Ann Serfass, the grantee in the aforesaid premises, do hereby bind myself, my heirs, executors, and administrators, and every of them firmly by these presents, which are to be considered on my part as a deed of covenants, to find good house-room, and sleeping and lodging apartments for the convenience of the said Peter Berger during his life, and to find good and sufficient board, lodging, meat, drink, clothing, and nursing, medical attendance, and all other necessaries for him during his life, and a decent burial for him when he leaves this world of sorrows, all of which is to be and remain a lien upon the premises aforesaid, until the whole of the duties aforesaid are performed on the part of the said Sally Ann Serfass, grantee herein named." In the habendum and qualifying it are the further words, "except as before excepted, and which is hereby expressly excepted by the said Peter Berger, the grantor hereof." This instrument was signed and acknowledged by both parties, although the husband of Sally Ann Serfass did not join either in the execution or the acknowledgment of it. Without stopping to consider the consequences of the non-joinder of the husband, we proceed at once to inquire whether this is a testamentary paper. The most general and comprehensive definition of a will is that which describes it as a declaration of the intention or wish of the maker touching what he would have done after his death. It is a provision made in view of his death, and to take effect when that event shall happen. The paper before us, however, is a provision for the care and support of the maker in the present, and so long as he shall live, in consideration of his property, which is to pass at once into the possession of his niece. In Turner *v.* Scott (51 Pa. 126), cited and relied on by the plaintiff in error, the grantor embodied in the indenture, as the instru-

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ment in that case also was called, this provision, "this conveyance in no way to take effect until after his (grantor's) decease." With this limitation the instrument could vest no present interest in the grantee. It was to take effect by its express terms only upon the happening of the death of the grantor. For this reason it was held to be testamentary. The title to the land remained in the father, the grantor, during his life, and upon his death, and not sooner, was to pass to and vest in the son. The instrument being testamentary was revocable at the pleasure of the maker. The paper now under consideration contains no such limitation, makes no declaration of what the maker wishes done after his death, but contemplates and authorizes an immediate taking of possession by the grantee. Moreover it makes provision for the protection of the grantor by informal, but repeated reservations and exceptions and covenants all looking not to the death of the grantor, but to the preservation of his life by securing constant and continuing and adequate care. We are clearly of opinion that the paper of December 5, 1882, signed by both Peter Berger and Sally Ann Serfass is not testamentary in its character. On the other hand, we do not regard it as a deed vesting an absolute estate in fee simple upon its delivery to Sally Ann Serfass. We have seen that the object of the transaction was to secure the continued performance of such services as his age and condition might render necessary. It is important also to remember that this was an arrangement between near relatives, and that the services of the niece are stated to be the consideration which she pays and is to pay for the property of her uncle. He is to have the right to live in the house, to remain in possession, and she is also to take possession, and live in the same house in order to fulfil her agreement.

The scrivener was applied to to prepare for them "a writing in the nature of a will," to carry out their understanding, and his effort to put it on paper resulted in the anomalous instrument before us. It is quite clear that no deed was intended. It is equally clear that the exceptions and covenants were intended to protect the grantor against the words importing a present grant. That such words do not necessarily pass a present fee has been repeatedly held. The whole instrument and the nature and object of the transaction must be considered. In Williams *v.* Bentley *et al.* (27 Pa. 294), it was held, that the strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument the intention appears to be otherwise. In Ogden *v.* Brown (33 Id. 247), the same principle was stated in very nearly the same words: "whether an informal instrument transferring an interest in real estate shall be held a conveyance or only an agreement for a conveyance, depends not on any particular words or phrases found in it, but on the intention of the parties as collected from the whole contract." Shirley *v.* Shirley (59 Id. 267), was like Williams *v.* Bentley and Ogden *v.* Brown, an action of ejectment in which a writing securing the maintenance of a father came under consideration, and the general rule was laid down that "Courts should be slow to give effect as an absolute conveyance to instruments for provisions made between parents and children unless the intention be very clear." If we look at this instrument without the light which the testimony throws upon it, and upon the intentions of the makers, we shall find that it is by no means "very clear" that the intention was to pass a present fee simple. Words of present grant are used, but they are limited by exceptions and reservations by covenants and conditions in a manner that shows the purpose to limit the grant and fasten the obligations of "the party of the other part" upon the land itself. The consideration of the grant is executory. It is to be paid day by day during the life of "the first party." If the position of the plaintiff in the Court below be adopted, Mrs. Serfass might have taken her "indentures" and recorded them, and though she had never furnished a farthing's value toward the care of her uncle or rendered him the slightest service, her title would have been indefeasible. She could have retained the land and refused to pay the price. What an action of covenant would have realized, brought against a married woman upon an instrument under seal, in which her husband had not joined, it is difficult to see. It certainly would have been of no service to Peter Berger. He might have starved while learning by an action at law the difficulty of enforcing a contract of this kind against a married woman. The only way in which the intentions of the parties can be carried into effect and justice done, is to treat this instrument as an executory contract in which Berger contracts to give his property for his future maintenance, and Mrs. Serfass contracts to provide the maintenance in exchange for the property. An equitable title vested in Mrs. Serfass; the legal title during his life remained in Berger.

Mrs. Serfass and her husband went into possession, and entered upon the work which was to pay for the land. She died not long after. After her death her husband tried to have Berger declared a pauper, and supported at the public expense. Failing in this he abandoned the premises, and declined to carry out the agreement which his wife had made.

Berger was compelled to look elsewhere for care. He was a vendor in possession, his vendee refusing to pay the purchase-money, and out of

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possession. In this situation he made an arrangement with Dreisbach, to whom he made a deed, and by whom he was properly taken care of for two or three years, and until his death. After the consideration which Mrs. Serfass was to pay has been paid by Dreisbach, her heirs-at-law bring this action of ejectment to recover the possession. Upon the trial the defendant offered to prove the conduct of Serfass, his refusal to carry out the contract of his wife and his abandonment of the premises, and removal from the neighborhood, together with the arrangement between Berger and himself. This the Court excluded, holding that Sally Ann Serfass took a fee which descended to her heirs-at-law, and that Berger's only remedy for her non-performance was an action of covenant against her. This was error. This was an equitable action of ejectment by a vendee in default, and out of possession. As was said in Shirley *v.* Shirely, "To obtain specific execution of such a contract, the children must show that they have been ready, prompt, and eager to perform their part of the contract." In Williams *v.* Bentley *supra*, Justice LEWIS, who delivered the opinion of the Court, used this language, "The plaintiff in this case has nothing more than the privilege of going into a Court of Equity to call for specific performance of the contract. His action is therefore subject to all the considerations which influence Courts of Equity in refusing or granting such demands. It is certainly a necessary preliminary that he should himself do equity. He must under this head show that he has paid or was ready and willing to pay the consideration so far as it was due at the time of trial. This remark applies to the covenants for maintenance as well as to the other covenants."

The right of Serfass to recover the possession in this action depended upon whether the consideration agreed upon had been paid. Being out of possession he could not recover upon the contract unless he could show performance.

This he was not required to do. The defendant then proposed to take up the burden of proof that rested on the other side, and to show affirmatively the non-performance of the contract under which alone the plaintiffs could recover. This evidence should have been admitted. It would be contrary to the original intentions of the parties as well as against good conscience to permit the vendee to recover the possession of land from his vendor, or one holding his title, without rendering or offering to render the equivalent contracted for.

The 2d and 3d assignments of error are sustained. The judgment is reversed, and a *venire facias de novo* awarded.

Opinion by WILLIAMS, J. C. K. Z.

Jan. '89. March 8, 1889.

Hoch's Appeal.

Mining lease—Forfeiture of, for non-payment of royalties—Clause as to, construed—Remedy in case of.

In a lease to mine ochre, the lessees covenanted to pay to the lessor "for every ton of ochre taken twenty-five cents, payable quarterly," and agreed "to take away, each and every year, not less than 500 tons of said ochre, or pay for the same at the end of each and every year, in default of which the lease is to be null and void. It is to be understood that if the lessees during any previous year or years, have taken away more than 500 tons of ochre, they shall not pay more tons of ochre than they have taken away during any year unless the aggregate number of tons amounts to less than 500 tons per year. It is further agreed that if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease is to be null and void." The lease was dated October 21, 1884. The lessor on November 30, 1885, filed a bill in equity to enjoin the lessees from mining, claiming that the lease had been forfeited for non-payment of the royalties for the preceding year. The bill having been dismissed, on appeal:

Held, that although the rent under the lease was due and demandable at the end of the year, yet as it was not a sum certain, due on the days stated, but varied, and required a computation to determine it, it must be presumed that the parties intended that the clause of forfeiture for breach of covenants for the term of three months applied to the covenant to pay rent; that therefore no forfeiture had occurred when the bill was filed, and the bill was properly dismissed.

Whether the lessor's remedy in case of a forfeiture under the above lease was at law or in equity, not decided.

Appeal of Hannah Hoch from a decree of the Common Pleas of Berks County.

Bill in equity, for an injunction, wherein Hannah Hoch was complainant, and Albert Bass, Henry Weiler, J. Shannon, Samuel Long, and Nicholas Long, the defendants.

The facts of this case were not disputed. On October 21, 1885, the complainant had leased for ten years the right of mining clay and ochre upon certain land to one Albert R. Bass, who had assigned the lease to the above-named defendants. The defendants had not taken away or paid for five hundred tons of clay or ochre at the end of the first year that they had worked the lease. The complainant contended that under the provisions of the lease as set forth in the opinion of the Supreme Court, *infra*, the lease was thereby forfeited. This the defendants denied, and they further averred that the complainant's remedy was not in equity, but by an action of ejectment, and that a demand for the rent must precede the action of ejectment.

A preliminary injunction having been granted the case was referred on bill and answer to Hor-

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ace A. Yundt, Esq., as Master, who reported that there had been no forfeiture of the lease, and recommended a decree dissolving the injunction and dismissing the bill.

Exceptions to this report were dismissed by the Court in an opinion by HAGENMAN, P. J., wherein he said, *inter alia:* "At the time the bill in equity was filed and injunction granted, November 20, 1885, the royalty on the 500 tons was not due and demandable, and no right of action had accrued to the plaintiff. Before the expiration of three months from October 21, 1885, the defendants tendered the balance of the royalty which was due under the lease. It is therefore not necessary to consider the ground on which the Master principally decided the case. He held that as no demand was made at any time on the defendants or either of them, by the plaintiff or her agent for the payment of the royalty, the plaintiff cannot maintain her bill. That the first requisite was a demand for the royalty, and as none was made there was no forfeiture. We differ with the Master. If this case turned on this question it would be with the plaintiff. The law in England and some of the neighboring states is as it was held by the Master. The English decisions establish, that where the lease provides that the estate shall become null and void, or that the landlord may re-enter on breach of condition by the tenant, yet it is not void at all events, but voidable only, and until the landlord does some positive act to take advantage of it, the forfeiture is not absolute. In Pennsylvania the law is different. Here it depends on the terms of the instrument; unless the landlord does some act by which he waives the forfeiture, the forfeiture is complete. No demand is necessary. The cases of Schaeffer *v.* Schaeffer, (1 Wr. 525), Davis *v.* Moss (2 Wr. 346), establish this position. As the case does not turn on this point, we will not pursue the inquiry further."

A decree was accordingly entered dissolving the injunction and dismissing the bill. Whereupon the said Hannah Hoch took this appeal, assigning for error, substantially, the construction placed upon the lease by the Court below, and the decree entered.

C. H. Ruhl (*Daniel Ermentrout* with him), for appellant.

Henry C. G. Reber (*D. N. Schaeffer* with him), for appellees.

April 29, 1889. THE COURT. The lease between the parties contains the following clauses:—

"The said parties of the second part . . . covenant to pay to the said Hannah Hoch . . . for every ton of clay or ochre taken . . . twenty-five cents . . . payable quarterly. . . . The said party of the second part . . . agree to take away, each and every year, . . . not less than five hundred tons of said clay or ochre, or pay for the same at the end of each and every year, in default of which the above lease is to be null and void. It is to be understood that if the said parties of the second part, . . . during any previous year or years, have taken away more than five hundred tons of said clay or ochre, they shall not pay more tons of clay or ochre than they have taken away during any year, unless the aggregate number of tons amounts to less than five hundred tons per year.

"It is further agreed, that if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease is to be null and void, and the said parties of the second part, . . . shall have the right of taking down and removing from said premises any buildings and machinery by them erected and remaining on said premises at the end of said term, providing they do so within three months after the expiration of said term."

The principal question in the case is whether the stipulation for termination of the lease for non-payment of the royalty *at the end of the year*, is a separate agreement which stands by itself, or whether it is included in the general stipulation, in the next clause, for termination of the lease if *any of the covenants above mentioned should not be complied with for the term of three months.*

The learned Judge below held, and rightly, that the two must be read together, and the first included in the second.

The language of the first covenant—"pay for the same at the end of each and every year, in default of which the above lease is to be null and void"—taken literally, and by itself, might be construed to impose the forfeiture for failure to pay on the day named, but the context makes it quite clear that such was not the intention of the parties. An examination of the whole clause shows that the amount of rent payable at any particular day is not fixed or ascertainable beforehand. It is to be computed at the rate of twenty-five cents a ton on all the clay mined, but without any stipulation that any mining shall be done in any particular quarter. The whole five hundred tons might be mined in the first quarter, and the year's rent would then be due on the first quarter day. If no more should be mined during the next three quarters, there would be no rent due at the end of the year. On the other hand, if more were mined the additional royalty would be due therefor, and this could not be determined until the end of the day itself. But this is not all. The stipulation is to pay for five hundred tons each year, whether mined or not, but if a thousand tons should have been mined and paid for last year, and none at all this year, still no rent would be due this year, nor until the aggregate

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should be less than five hundred tons per year for the whole time.

It is thus clear that the rent was not a sum certain, due on the days stated, but varied from time to time, and required a computation, if not a settlement of accounts, not only from quarter day to quarter day, but even from year to year. That the parties meant to impose a forfeiture sharply for failure to pay on the very day a fluctuating sum thus incapable of ascertainment until the day itself, would be sufficiently improbable, even if this clause stood alone. But taken in connection with the very next following clause, which in express terms applies to all the covenants of the lease, including the payment of the rent, it is entirely clear that a margin is intended to be allowed for accidents and delays, and forfeiture is not to be imposed until a default or breach for three months. The two clauses can stand quite harmoniously together with this reading. The first is intended to declare in express terms that payment of the minimum annual rent is a necessary condition to the continuance of the lease, and the second to fix the duration of the breach which shall incur the forfeiture. The learned Judge below went a step too far in saying that the rent was not due when the bill was filed. It was due and demandable, and could have been sued for, at the end of the year, but the forfeiture did not arise until it had been thus due and unpaid for three months.

As this view of the covenants in the lease sustains the judgment upon substantially the same grounds as those taken by the learned Judge below, it is not necessary to discuss the other questions whether this was a case in which a bill would lie, or whether the remedy at law by ejectment was not adequate, and whether a demand for the rent was a pre-requisite to complainant's enforcement of the forfeiture.

Judgment affirmed.

Opinion by MITCHELL, J. C. K. Z.

July '88, 14. February 20, 1889.

County of Schuylkill v. Boyer.

County auditors—Powers and duties of—Settlement of accounts of county officers—How to be made—Common Pleas has no original jurisdiction in such cases—Acts of March 21, 1806; *April* 15, 1834; *June* 12, 1878; *and April* 2, 1868.

The Act of April 15, 1834, which defines the powers and duties of the county auditors, constitutes a special tribunal for the settlement of the accounts of the officers named in it, with the necessary authority to compel the attendance of witnesses and the production of papers, and to determine the indebtedness by, or to, the officer, and to enforce its collection. The right to resort to a common law action is precluded.

Under this Act the jurisdiction of the statutory tribunal and the Common Pleas is not concurrent in the adjustment of accounts; the jurisdiction of the former is original and that of the latter appellate.

In the absence of evidence to the contrary it is to be presumed that the auditors performed their duty.

B. was sheriff of Schuylkill County from January, 1883, to January, 1886, and presented bills for his official services under the Act of June 12, 1878, which were allowed and paid by the county commissioners, but it did not appear whether they had been passed upon by the county auditors. After the expiration of B.'s term of office the Act of 1878 was declared unconstitutional, and he brought assumpsit to recover the difference between the amount of the bills rendered and paid, and the amount for the same services under the Act of April 2, 1868:

Held, that the Common Pleas had no jurisdiction and therefore plaintiff could not recover.

Error to the Common Pleas of Schuylkill County.

Assumpsit, by J. Monroe Boyer, ex-sheriff of Schuylkill County, against said county, to recover balance of fees alleged to be due by the defendant. Plea, payment with leave, etc.

Upon the trial, before GREEN, J., it appeared that plaintiff was elected sheriff of Schuylkill County on November 7, 1882, and served in that capacity from the first Monday in January, 1883, to the first Monday in January, 1886. He settled for his fees with the commissioners of Schuylkill County according to the Act of June 12, 1878 (P. L. 137). After plaintiff's term had expired this Act was declared unconstitutional in the case of Morrison *v.* Bachert (112 Pa. St. 322; S. C., 17 WEEKLY NOTES, 353). He then brought suit against the defendant to recover the difference in fees between the Act of June 12, 1878, and the Act of April 12, 1868. It did not appear whether the bills for fees had been examined and passed upon by the county auditors, or not.

The Court charged the jury, *inter alia*, as follows:—

["Gentlemen of the jury, we have already said we think under all the evidence in this case that the plaintiff is entitled to a verdict. It appears that this was a mutual mistake that arose by reason of the passage of a law in 1878 fixing the fees of the sheriff in certain cases and making it less than it was under a previous fee bill.] . . . .

["The question has arisen here as to whether the sheriff is estopped from making out his bill according to the fee bill of 1868, because he presented his bill under the fee bill of 1878 and accepted his pay under that bill and therefore that he is estopped from claiming any further amount of money, but we say to you for the present that that will not estop him from making his claim

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for the balance of the fees according to the Act of 1868, and for that reason he is entitled to recover in this suit the difference between the amount that he received and the amount he should have received if the bill had been made out according to the fee bill of 1868. That, according to the testimony, amounts with the eight cases I have spoken of to $659.40, and the sheriff would be entitled to demand interest on this amount from the time that he made demand for his fees, and if there is no proof here of any prior demand it would be interest from the time of the institution of the suit I presume.] . . . .

["As I have said before there is no dispute as to the different items of this claim, and the interest is now reckoned upon this claim from the time of the institution of the suit, because the institution of the suit shows that demand is made for the money. The amount to which the plaintiff would be entitled to a verdict would be $689.06, and we direct a verdict, if you find that amount with interest to be correctly calculated. I presume there is no difficulty about that."]

Verdict for the plaintiff for $689.06 and judgment thereon. A motion for a new trial having been refused, defendant took this writ, and assigned for error the portions of the charge inclosed in brackets.

John W. Ryon (*J. F. Minogue* with him), for plaintiff in error.

Under the provisions of the Act of March 21, 1806 (Purd. Dig. 74), the Courts have uniformly held that whenever a remedy was provided by any Act of Assembly, the common law remedy was no longer available. As illustrations of this point, see—

Bowman *v.* Herr, 1 P &. W. 283.
Downer *v.* Downer, 9 Watts, 60.
Thomas *v.* Simpson, 3 Pa. St. 60.
Taylor *v.* Birmingham, 29 Id. 306.
Mussleman's Appeal, 65 Id. 480.
Whiteside *v.* Whiteside, 20 Id. 474.
Com. *v.* Garrigues, 28 Id. 9.

The Act of April 15, 1834 (Purd. Dig. 376, 377), provides for a settlement of the accounts of certain officers, of whom the sheriff is one, by the county auditors, subject to an appeal to the Common Pleas. The plaintiff has therefore misconceived his remedy and brought suit in a Court having no jurisdiction.

Brown *v.* White Deer Twp., 3 Casey, 109.
Dyer *v.* Covington Twp., 4 Id. 186.
Willard *v.* Parker, 1 R. 448.
Northumberland Co. *v.* Bloom, 3 W. & S. 542.
Northamplon Co. *v.* Yohe, 12 Har. 305.
Gladfelter *v.* Com., 24 P. F. Sm. 74.
Blackmore *v.* Allegheny Co., 1 Id. 160.
Northampton Co. *v.* Herman, 4 Crum. 373.
Commr's *v.* Co. of Lycoming, 10 Wr. 496.
Huchison *v.* Com., 6 Barr, 124.

George J. Wadlinger (*Jacob C. Kline* and *Charles N. Brumm* with him), for defendant in error.

The county auditors not having audited the account of the plaintiff below, this case is not within the ruling of—

Northampton Co. *v.* Herman, 119 Pa. St. 373.

The right to recover for the deficiency of fees paid is recognized in—

Northampton Co. *v.* Herman, *supra*.
Skinner *v.* Franklin Co., 3 Pa. Co. Ct. Rep. 424.

The cases cited upon the question of jurisdiction are not in point. The Act of 1834 does not provide a remedy for, nor enjoin a duty upon, the sheriff, such as is contemplated by the Act of 1806.

The right to sue cannot be taken away without negative terms or necessary implication.

Bank *v.* Com., 10 Barr, 448.
Street *v.* Com., 6 W. & S. 209.
Shinn *v.* Com., 3 Grant, 205.
Rhines *v.* Clark, 51 Pa. St. 96.

The question of jurisdiction was not raised in the court below, and it is now too late to do so.

Schenley *v.* Com., 36 Pa. St. 29.

April 8, 1889. THE COURT. J. Monroe Boyer was sheriff of Schuylkill County from the first Monday of January, 1883, to the first Monday of January, 1886, and for his official services, where the county was liable, he presented bills, under the Act of June 12, 1878, which were allowed and paid by the county commissioners. After that Act was declared unconstitutional (112 Pa. 323) he brought this action of assumpsit to recover the difference between the amount of the bills rendered and paid under it and the amount allowed for the same services by the Act of April 2, 1868. This difference was ascertained on the trial to be $659.$\frac{40}{100}$, and for this amount with interest upon it from the institution of the suit, he obtained a verdict and judgment.

It did not appear on the trial whether the bills originally rendered by him for these services had been examined and passed upon by the county auditors, and because of the absence of proof on this point an effort is made to distinguish this case from Northampton Co. *v.* Herman (119 Pa. 373). The first step in this effort is an assumption that the auditors failed to discharge a duty enjoined by the statute, which requires that they shall annually audit, settle, and adjust the accounts of the commissioners, treasurer, sheriff, and coroner of the county. The correctness of this assumption may well be doubted, as it appears to conflict with the ordinary rule, that in the absence of evidence it is presumed the officers did their duty (Pike *v.* Rowland, 94 Pa. 238). But if it be conceded that these accounts were not presented to the county auditors and were not examined and passed upon by them, it does not follow that the sheriff may maintain a common law action against the county for the fees which the law requires it

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to pay him. It has been repeatedly held by this Court that the Act of April 15, 1834, which defines the powers and duties of the county auditors, constitutes a special tribunal for the settlement of the accounts of the officers named in it, with the necessary authority to compel the attendance of witnesses and the production of papers, and to determine the indebtedness by or to the officer, and to enforce its collection. A reference to all the cases in which this construction has been placed upon it is not deemed necessary. Many of them are collected in Northampton Co. *v.* Herman, *supra*, and in Blackmore *v.* The County of Allegheny (51 Pa. 160). It is true that in most of these cases there was an adjudication by the special tribunal created by statute, the effect of which was discussed and considered in connection with the rights and duties of the auditors and the officers whose accounts they are authorized and required to settle, but there is no intimation in any of them that the statutory tribunal and the Court of Common Pleas have concurrent jurisdiction in the adjustment of these accounts; that the former has original and the latter appellate jurisdiction of the subject matter of this controversy is conceded. It is the right and duty of the officer to have his accounts examined and passed upon by the county auditors, and if he is not satisfied with their decision he may appeal from their report to the Court of Common Pleas, and have an issue and trial by jury; but he has no right to elect in which forum he will first proceed for the settlement and enforcement of his claims. The statute has provided an adequate remedy; its directions must be strictly pursued, and it precludes a common law action.

The learned Judge of the Court below did not allude to the question discussed here, and the record does not show that it was raised before him. It is, however, covered by his instruction, that the plaintiff was entitled to a verdict for the amount of his claim, with interest, and is fairly before us on exception to the charge. Besides, this is a case in which action "agreeably to the provisions of the common law" is expressly forbidden by the Act of March 21, 1806, sec. 13, and it is not too late to raise and consider a question of jurisdiction. All the assignments of error relate to the instruction that the plaintiff was entitled to recover, and they are sustained. We decide that a common law action will not lie against the county for this claim, and therefore

The judgment is reversed.

Opinion by McCollum, J. H. C. O.

Common Pleas.

C. P. No. 2. April 6, 1889.

Todd v. Todd.

Divorce—Duress—Threats—Fraud—False representation of pregnancy.

Where a false representation was made by a woman to a man prior to their marriage, that she was pregnant by him, but he did not believe the representation or rely upon it at the time of the marriage, such representation is not a ground for divorce.

It is doubtful whether such a representation, even if false and relied upon in good faith, would constitute sufficient ground for granting a divorce.

In order to justify a divorce under the statute, upon the ground of threats, they must be such threats against the life, or to do bodily harm, as would overpower the judgment and coerce the will.

The evidence in this case showed that while there were threats of bodily harm made by the sons of the respondent, the libellant was not coerced by the threats, but was induced to enter into a marriage to remedy a wrong and save the respondent's family from disgrace.

Sur exceptions to the report of a Master in divorce, who reported in favor of granting the divorce prayed for.

The facts are stated in the opinion of the Court.

Thomas A. Fahy, for the respondent, exceptant, cited—

Hoffman *v.* Hoffman, 30 Pa. 417.

De Forrest Ballou, contra.

April 6, 1889. The Court. It is admitted that the parties to this proceeding in divorce had had illicit intercourse some time in January, 1885, and they were married March 12, 1885. The libel charges that the respondent "did by fraud, covin, deceit, and duress, practised on the libellant directly previous to the time of said marriage, cause him to become a party to said marriage ceremony by representing to him that she was pregnant and with child as a result of illicit intercourse with libellant, and by threats of bodily harm made through her sons and other persons, and by anonymous letters which libellant has since ascertained were written by the respondent, procured and induced the libellant against his free will to become a party to said marriage ceremony."

The Act of May 8, 1854, provides, *inter alia*, that a divorce may be granted where "the alleged marriage was procured by fraud, force, or coercion, and has not been subsequently confirmed by the acts of the parties."

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The grounds upon which the Court is asked to grant this divorce are that the respondent procured the marriage by fraud and by duress *per minas*. The alleged fraud consists in the fact that the respondent told the libellant before marriage that she was pregnant in consequence of the intercourse between them. In order to constitute a fraud, it is necessary that the statement should be untrue in fact, and that the libellant should have been deceived by it. The respondent testifies that she was pregnant at the time and subsequently had a miscarriage. There was nothing to corroborate her statement except the testimony of a woman who judged by appearances, and whose testimony was shaken by testimony on the part of experts that she could not form a correct conclusion in this way. The Master has found as a fact that the statement was untrue. But was the libellant deceived by it? The intercourse occurred in January, and the marriage took place March 12th following. It may well be doubted whether a woman within that period could herself have any certainty as to her condition. He nowhere says that he believed the statement to be true, and in fact the only inference to be drawn from his testimony is that he did not believe it. He says, "About a week after the intercourse above referred to by me, she informed me that she was pregnant, and she persisted in stating this up to the time of the marriage. When she first told me she was pregnant, I told her that could not be, because I thought she was too old." There is no evidence of his reliance upon, or even belief in the truth of her representation at the time of the marriage. It is doubtful whether such a representation, even if false and relied upon in good faith, would constitute sufficient ground for granting a divorce. (Hoffman *v.* Hoffman, 6 Casey, 417.)

It is not alleged that there was any force used to compel the marriage, and in order to justify a divorce under the statute, upon the ground of threats, they must be such threats against the life, or to do bodily harm as would overpower the judgment and coerce the will. There must be such a mental condition as a result of the threats that the libellant did not and could not in reality consent to the marriage. It does not appear from the evidence that the respondent made or knew of any threats against the libellant. She had two sons who were young men. One of them, at the commencement of a Dental College in Baltimore, on the fifth of March preceding the marriage, pointed a cocked pistol at the head of a brother of the libellant, and by this means obtained the diploma of the libellant. At the same time he said that he would hunt the libellant until he found him and then shoot him. These facts were communicated to the libellant. Dr. Winder, one of the witnesses, testified that a son of the respondent said to him that, "If George Todd did not marry his mother, he intended to kill him," and further that he, witness, was "perfectly satisfied that they would have killed him," but whether or not this was brought to the knowledge of the libellant does not appear.

The libellant was a man of twenty-seven years of age. He was in Syracuse, New York, and the respondent and her sons were in Baltimore.

The libellant in his examination in chief said nothing as to the effect of these threats upon him or upon his action in consenting to the marriage, but on cross-examination he testified: Q. Do you say it was through any fear of bodily harm that you were induced to marry the respondent? A. I do.

This is the only evidence there is to prove the coercion required by the statute. Dr. Winder wrote to the libellant promising to protect him from any violence on the part of the sons of the respondent until the marriage ceremony could be performed.

The libellant went of his own will to Baltimore and the ceremony was performed by a clergyman in the presence only of Dr. Winder and a wife of one of the sons of the respondent. No force and no threats were at that time made.

Dr. Winder testifies as to a contemporary conversation with the libellant: "He said either that he was going to, or that he had married Mrs. Finney out of respect for Dr. Finney, and to remedy the wrong he had done him, and that he would never live with her as his wife, and that she would never see him again after the ceremony. That he intended to apply for a divorce. . . . . This conversation did occur prior to the marriage. . . ."

The libellant left the respondent immediately after the marriage, and the same day wrote to her:—

"Mrs. Finney:

"I cannot call you by another name, although you have it. I have this day done that which will save your family and yourself, and only did it for your sons Willie's and Gordon's and your daughter's sake, not for yours. You knew you were trying to do wrong, and the idea of your ever thinking of me is ridiculous. I cannot express my contempt for you. . . ."

It seems therefore to be reasonably clear that while there were threats of bodily harm made by the sons, the libellant was not coerced by these threats, but that he was induced to enter into the marriage in order to remedy the wrong and save her family from disgrace, in hope of speedily securing a divorce.

Neither of the grounds necessary to bring the case within the statute is made out, and the exceptions are therefore sustained.

Opinion by PENNYPACKER, J. A. B. W.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, MAY 10, 1889.* [NO. 2.

Supreme Court.

Jan. '89, 376. April 24, 1889.

Peoples' Mutual Accident Association v. Smith.

Accident insurance—"Immediate" notice of injury—Proofs of injury as evidence.

Where a policy of insurance against accident provides that in case of an accidental injury "immediate written notice shall be given the association," the word "immediate" must be construed to mean within a reasonable time under all the facts and circumstances of the case.

What is a reasonable time must be decided by a jury, unless the delay in giving notice has been so great that the Court may rule it as a question of law.

A person insured under such a policy, whose eye was injured on September 4, but the injury was not considered dangerous until some days afterward, was held under the facts and circumstances of the case to have complied with the provision requiring "immediate" notice when he notified the association on October 1.

Proofs of loss may be admitted to show that such proofs had been made in compliance with the policy, but they are not competent evidence of the plaintiff's claim.

Error to the Common Pleas of Blair County.

Assumpsit, by George W. Smith against the Peoples' Mutual Accident Association, upon a policy of insurance in said association, to recover for the loss of an eye, as provided in said policy.

The policy under which plaintiff claimed was a policy or certificate of membership in the defendant association, containing a contract of insurance and a promise to pay the sum named therein—

"on receipt of sufficient and satisfactory proof at the principal office of the association, in Pittsburgh, that the member at any time, within the continuance of this certificate, shall have sustained bodily injury, effected through involuntary, external, violent, and accidental means, within the intent and meaning of this certificate and the conditions herein contained and complied with, and such injuries wholly and alone, independently of all other causes, shall occasion death within one hundred and twenty days from the happening thereof; or if the member shall sustain bodily injuries by means as aforesaid, enumerated in the schedule of injuries recited herein, he shall receive a weekly relief not to exceed twenty-five dollars per week, for the number of days fixed in schedule on the back hereof, which is made a part of this certificate; or shall sustain bodily injuries by means as aforesaid, not named in schedule, which shall independently of all other causes immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is rated and accepts membership, he shall receive like weekly relief for such period of continuous total disability as shall immediately follow the accident and injuries, not to exceed, however, twenty-six consecutive weeks from the happening of such accident.

"The relief for partial permanent disablement, viz., the loss of one hand, arm, foot, leg, or eye, by means as aforesaid, shall not exceed twelve hundred and fifty dollars.

"And the relief for total permanent disablement, viz., the loss of any two members, as above, by means as aforesaid, shall not exceed twenty-five hundred dollars. The benefits for permanent disablement, or weekly relief, shall be due and payable on receipt of sufficient and satisfactory proof of injury at the principal office of the association, in Pittsburgh. . . .

"*Provided further*, in the event of any accidental injury, for which a claim may be made under this certificate, immediate written notice shall be given the association in Pittsburgh, giving full particulars of the accident and injuries, and sufficient and satisfactory proof of loss, either for death or relief, shall be furnished the association within six months from the happening of the accident, otherwise all rights to recover under this certificate for said accident shall be null and void and forfeited to the association."

At the trial, before DEAN, P. J., the following facts appeared: On September 4, 1887, the plaintiff, a physician, whose policy was then in full force, while driving in the pursuit of his profession, accidentally struck himself in the eye with the lash of his whip. The blow, while causing considerable pain, was considered to have occasioned but a slight injury. The eye, however, grew more painful, and by the 20th of the month the sight was almost gone, and shortly the pain ceased, but the sight was gone. Plaintiff at first treated the eye himself, applying the ordinary remedies, and also using cocoaine. Some testimony was offered by defendant to show that plaintiff had injured the eye by the use of cocoaine. On September 6, Dr. Ross, of Altoona, began treating the eye, and on the 20th Dr. Keyser, an oculist from Philadelphia, was called upon. Dr. Keyser approved the treatment that had already been given, but was unable to save the sight of the eye, which soon was entirely gone.

On October 1, 1887, plaintiff sent notice of the accident and injury to the defendant association, and afterward filed his proofs. Defendant alleged that the notice was not filed in time as the certificate provided for "immediate" notice.

Plaintiff offered in evidence the proofs of loss dated October 9, 1887. Objected to because the proof itself is not evidence. Objection overruled. (Third assignment of error.)

Defendant submitted the following point:

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That the notice given by the plaintiff on the 1st of October, 1887, and received by the company, is insufficient and the plaintiff cannot recover. *Answer.* This point is denied; in our view of the case it is not the law. (Second assignment of error.)

The Court further charged, *inter alia*, as follows: "If, however, the weight of the evidence should satisfy you that the plaintiff was injured by an accident which, 'wholly and alone independently of all other causes,' occasioned the loss of his eye, then did he give immediate written notice to the association of the accident or injury? The notice was not mailed until the 1st of October following the injury, twenty-seven days after the accident, and the defendant asks us to say that the plaintiff failed in this particular to comply with the specifications of his policy and therefore he cannot recover. Unquestionably, if the plaintiff did not give immediate written notice of the accident and injury he cannot recover. This is a condition precedent to any recovery. But we cannot undertake to say to you, as a matter of law, that the written notice mailed on the first day of October was not an immediate notice under the circumstances, on a reasonable construction of this provision."

Verdict for plaintiff for $1357.08 and judgment thereon, whereupon defendant took this writ assigning for error the action of the Court in admitting the above offer of evidence; the foregoing answer to defendant's point, and in charging the jury as above set forth.

Samuel S. Blair, for plaintiff in error.

What is unreasonable delay has been decided in the following cases:—

Trask *v.* Ins. Co., 5 Casey, 199.
Edwards *v.* Ins. Co., 25 Smith, 380.
Ins. Co. *v.* Helfenstein, 4 Wr. 290.
Ins. Co. *v.* Stauffer, 9 Casey, 402.
Ins. Co. *v.* Hazen, 14 Out. 530.

The proof of loss should not have been admitted in evidence.

Commonwealth Ins. Co. *v.* Sennett, 5 Wr. 161.
Lycoming Ins. Co. *v.* Schreffler, 6 Id. 190.

Aug. S. Landis (*Matthew Calvin* with him), for defendant in error.

Notice of loss when required to be given immediately is in time if given with due diligence in view of all the circumstances; and what is unreasonable delay is a question of fact for the jury.

Wood on Insurance, §§ 413, 695.
May on Insurance, § 462.
Ins. Co. *v.* Updegraff, 7 Wr. 359.
Griffey *v.* Ins. Co., 1 Central Rep. 529.
Donahue *v.* Windsor, 56 Vt. 374.
Lockwood *v.* Ins. Co., 47 Conn. 568.
Cashau *v.* Ins. Co., 5 Biss. (C. C.) 476.
Ins. Co. *v.* Bedford, 2 Weekly Notes, 529.
Ins. Co. *v.* Davis, 2 Out. 280.
Ins. Co. *v.* Flynn, Id. 627.
Ins. Co. *v.* Hazen, 14 Id 530.
Lyon *v.* Assurance Co., 46 Iowa, 631.

May 6, 1889. The Court. The plaintiff brought this action of assumpsit in the Court below against the defendant company, on a policy or certificate of membership, for the loss of sight of an eye alleged to have been caused by an accidental stroke of a whip when handled by himself. The main question is whether he was sufficiently prompt in giving notice to the company of the accident. The policy contains this provision: "*Provided, further*, In the event of any accidental injury, for which a claim may be made under this certificate, immediate written notice shall be given the association in Pittsburgh, giving full particulars of the accident and injuries, and sufficient and satisfactory proof of loss, either for death or relief, shall be furnished the association within six months of the happening of the accident, otherwise all rights to recover under this certificate for said accident shall be null and void and forfeited to the association."

The accident which resulted in the loss of the plaintiff's eye occurred on September 4, 1887. He was a physician, and while riding in his buggy, engaged in his professional duties, by some accident his eye was struck by the lash of his whip. It was not at first thought to be dangerous, at least to the extent of losing his eyesight, and for some days the plaintiff treated the injured eye himself. It was not long before he was confined to his room and called in other medical aid. He testified that it was not until the fifteenth of the following October that he became convinced that he would lose the use of his eye. He gave a formal notice in writing to the company of the accident on the first of October and claimed for said loss. The contention of the defendant is that the notice should have been given immediately after the accident, and the Court below was asked to so instruct the jury. This the learned Judge refused to do, saying: "Unquestionably, if the plaintiff did not give immediate written notice of the accident and injury he cannot recover. This is a condition precedent to any recovery. But we cannot undertake to say to you, as a matter of law, that the written notice mailed on the first of October was not an immediate notice under the circumstances, on a reasonable construction of this provision."

It is our duty to give the policy in question a fair, business-like, common-sense interpretation. It is in such sense that the parties to the contract probably understood it. The plaintiff was not claiming for weekly benefits. Had he done so there would have been more force in the defendant's position that he should have given notice of the accident immediately after its occurrence on September 4. His claim, however, was for the loss of his eye, and it is difficult to see how he could with any propriety make such a claim until he had actually lost it or it had become clear that

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he would lose it. How could he have truthfully made such a claim on the fifth of September? And had he done so and his eyesight been restored the probability is the defendant company would have criticised his claim even more closely than it has done now. In the case of Lyon *v.* Railway Passenger Assurance Company (46 Iowa, 631) the insured was injured whilst travelling on a railway train. He brought suit to recover a weekly allowance. By the terms of the policy he was required to give "immediate notice to the company at Hartford, Connecticut." The injury was received on the 27th of September and notice was sent to the company at Hartford on the 28th of October following, thirty-one days afterwards. During this time he was under medical treatment for eight or nine days at one place when he returned to his home and came under the treatment of other physicians. The Court held that under all the circumstances it was not error in the Court below to refuse to instruct as a matter of law that the notice was not given in proper time. The question was left to be determined by the jury as one of fact. It is true the delay in such cases may be so great as to justify the Court in ruling it as a question of law. There was no such delay in the case in hand, however. The word "immediate" in the contract must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case, and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the Court may rule it as a question of law. A person might be so injured as to be physically unable to give notice for weeks. Hence it is that such questions are referred to the jury to say whether under all the circumstances there has been an unreasonable delay in giving notice. In the present case we are not required to go so far as the Court did in the Iowa case. I see no reason which requires notice to be given of the loss of an eye, until the eye is destroyed, any more than that in a life policy a man should give notice of his death before he dies.

The third assignment, in reference to the proofs of loss, is not in accordance with the rules of Court. I do not find the proofs in the paper-book. If admitted for the purpose of showing that such proofs had been made in compliance with the policy, they were competent. If offered and read to the jury as *prima facie* evidence of the plaintiff's claim, their admission would have been error. (Com. Ins. Co. *v.* Sennett, 41 Pa. 161; Lycoming Ins. Co. *v.* Schreffler, 42 Id. 188.) I do not understand this to have been the case. If it was it has not been sufficiently pointed out to us.

Judgment affirmed.

Opinion by PAXSON, C. J. H. S. P. N.

Jan. '89, 168, 162, 243. April 2, 1889.

Commonwealth Title Insurance Co.'s Appeal.
Craige's Appeal.
Douglas and Pennell's Appeal.
Holmes's Estate.

Decedent's Estate—Will—Construction of—Remainder, vested or contingent.

A testator who died in 1855, directed: "In the event of my son's decease, and of his wife Ann while his widow, or in the event of her second marriage, I will that my whole estate shall be immediately divided into two equal portions, . . . and that one-half of said estate thus divided shall be distributed in equal proportions to the children of my son Edmund and his wife Ann, living at the time of their death, or said Ann's second marriage, giving hereby to my daughter Caroline, the choice of one-half of said estate thus divided." Edmund died May 15, 1878, and his widow, Ann, died without remarriage September 11, 1888. Edmund left two children to survive him, George W. who survived his mother, and Hattie, who died before her.

Held, That the estate of the remaindermen was contingent, and became vested in possession upon the death of both Edmund and Ann Holmes, and only in those of their children who were living at that time.

It is unwarranted to assume that something different from the clear meaning of the words used, was the testator's intention, when the assumption rests upon nothing in the will itself, but solely upon conjecture.

When real or personal estate is devised or bequeathed to such children, or such child or individuals as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. Until the age is attained, the character is sustained, or the act is performed, the person is unascertained.

McBride *v* Smyth, 54 Pa. St. 245, followed.

Appeals of the Commonwealth Title Insurance and Trust Company, trustee for George W. Holmes; of T. Huston Craige, and of Anna M. Douglas and Elizabeth R. Pennell from the decree of the Orphans' Court of Philadelphia County, in the matter of the adjudication of the account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, substituted trustee under the will of Thompson Holmes, deceased.

The contention case arose under the construction of the fourth clause of the will of Thompson Holmes, deceased, which was as follows:—

"In the event of my son's decease, and of his wife Ann, while his widow, or in the event of her second marriage, I will that my whole estate shall be immedi-

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ately divided in two equal portions by my trustee herein named, or his successor, calling to his aid the advice of my daughter Caroline, and such other friends of the family as they may choose to consult; and that one-half of said estate thus divided shall be distributed in equal proportions, to the children of my said son Edmund and his wife Ann, living at the time of their death or said Ann's second marriage, giving hereby to my daughter Caroline the choice of one-half of said estate thus divided."

Other parts of the will are cited in the opinion of the Supreme Court.

Testator died in 1855, and Edmund A. Holmes, his son, died May 15, 1878, leaving to survive him his widow, Ann, and two children, George W. Holmes and Hattie A. Jamison.

Ann Holmes, the widow of Edmund A., died September 2d, 1888, leaving to survive her one child only, the said George W. Holmes, Hattie A. Jamison having died April 30, 1887. Mrs. Jamison left to survive her two children, Benton K. Jamison, Jr., and William S. Jamison.

Edmund A. Holmes had a number of other children, who all died in his lifetime, of whom one daughter, Maria, intermarried with Charles H. Craige and left one son named T. Huston Craige; and Margaret, intermarried with Edward Robbins, who left three children named Minnie, Grant, and Lizzie. Mrs. Caroline T. Ely, the daughter of the testator, is still living.

The account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, substituted trustees under the will of Thompson Holmes, having been filed, the Auditing Judge, FERGUSON, J., awarded one-half of the balance to the Commonwealth Title Insurance and Trust Company, trustees for George W. Holmes, under a certain deed of trust executed by him to it, and the other half to Caroline T. Ely.

To this finding exceptions were filed on behalf of B. K. Jamison, administrator of Hattie A. Jamison, deceased, who claimed one-half of the award to the Commonwealth Title Company; and by T. Huston Craige, Anna M. Douglas, and Elizabeth R. Pennell, claiming that they were entitled to the share of the estate to which their respective parents would have been entitled had they been living at the time of the death of Mrs. Ann Holmes.

The Court sustained the exceptions filed by the administrator of Hattie A. Jamison, and dismissed the others. (Holmes's Estate, 22 WEEKLY NOTES, 546). Whereupon the Commonwealth Title Insurance and Trust Company, trustees for George W. Holmes, T. Huston Craige, Anna M. Douglas, and Elizabeth R. Pennell, appealed, assigning for error the decree of the Court.

Alexander P. Colesberry (*Frank R. Shattuck* with him), for the Commonwealth Title Company, trustees, etc.

Theodore F. Jenkins, for T. Huston Craige (*William B. Robins*, for Anna M. Douglas and Elizabeth R. Pennell, with him).

Henry T. Dechert, for B. K. Jamison, administrator, etc., appellee.

May 6, 1889. THE COURT. These are three appeals by different parties in interest from the same decree, and as they raise the same question they are considered together. The adjudication made by the Auditing Judge gave the whole of the fund in controversy in two equal parts, one-half to Caroline T. Ely, and the other half to the trustees of George W. Holmes. It is the distribution of the latter half which is the subject of the present contention. The adjudication of the Auditing Judge was based upon the theory that the bequest to the children of Edmund and Ann Holmes was contingent upon the death of both parents, and the survivorship of those children who were then living. George Holmes being the only one of the children who was then living, was awarded the whole of the fund in dispute. The Orphans' Court, however, took a somewhat different view of the language of the will, and while recognizing the correctness of the rule that grandchildren are not included within the description, "children," as legatees, held that the case came within the exception to this rule, that where there are grandchildren and no children living at the time of vesting, grandchildren will be treated as if they were children, and that also where there is ambiguity in the language describing the legatees, and the contingency is the death of two persons, the death of either is the period of vesting. In accordance with this view the Orphans' Court awarded one-half the fund in controversy to the administrator of Mrs. Hattie A. Jamison, who was a child of Edmund and Ann Holmes, and died after her father and before her mother. The theory upon which this was done was that the language of the will was ambiguous as to whether the period of vesting was the death of either, or the death of both the life-tenants, and therefore the construction should be most in accordance with the statutory distribution. We cannot agree with this view of the case, because we cannot discover any ambiguity in the language of the will. The question arises under the fourth clause of the will, and it is in these words:—

"In the event of my son's decease and of his wife Ann, while his widow, or in the event of her second marriage, I will that my whole estate shall be immediately divided into two equal portions by my trustee herein named, or by his successor, calling to his aid the advice of my daughter Caroline, and such other friends of the family as they may choose to consult and that one-half of said estate thus divided shall be distributed in equal proportions to the children of

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my son Edmund and his wife Ann, living at the time of their death or said Ann's second marriage, giving hereby to my daughter Caroline the choice of one-half of said estate thus divided."

Edmund, the son, died May 15, 1878, and Ann, his widow, died without re-marriage, September 11, 1888. The question is, did the estate of the legatees in remainder become vested at the death of the testator, in 1855, or at the death of his son Edmund, in 1878, or at the death of Ann, the son's widow, in 1888? We are clearly of opinion that the estate of those in remainder is contingent and becomes vested in possession upon the death of both Edmund and Ann Holmes, and only in those of their children who were living at that time.

The event upon which the estate is to be divided and distributed is twice defined. In the first clause of the fourth section it is thus described: "In the event of my son's decease, and of his wife Ann, while his widow, or in the event of her second marriage, I will that my whole estate shall be immediately divided into two equal portions by my trustees," etc. It is perfectly manifest that there is to be no division under these words until two facts have transpired, to wit: First, the son's death, and second, the death or second marriage of his widow. It is the death of both, and not of either one, which must precede division. In this part of the fourth clause there are no words of gift or disposition, division only being provided for. After division into two equal portions has been made the last part of the clause directs the distribution thus: "and that the one-half of said estate thus divided shall be distributed in equal proportions to the children of my son Edmund and his wife Ann, *living at the time of their death or said Ann's second marriage.*" Here again, the death of both Edmund and Ann is fixed as a period of vesting. It is not the death of either but of both that must transpire before vesting can take place. Then the persons who are to take are the children of Edmund and Ann, living at the time of *their* death—not the death of either but of both. There are no words of gift except those which also describe the legatees. The fund is to be distributed to the children, etc. It is therefore not the case of a previous gift and a postponement of the time of payment, but an immediate and direct gift to a class of persons who must fulfil the description contained in the very words of the gift in order to take it at all. They are not donees in any sense unless they are children of Edmund and Ann, living at the death of Edmund and Ann. There is but one such person, and if the words in which the estate is given are to receive their plain, simple, inevitable meaning, that one person must take the estate.

It is impossible for us to say either that there is any ambiguity in the language of the will, or that there was any meaning in the mind of the testator other than that which his own chosen words clearly express. In the case of Varner's Appeal (87 Pa. 427), we said: "It is true, words may in some cases be supplied to carry out a defectively expressed intent, but not to create another intent, where one is distinctly expressed by the language of the will. They can be supplied only in cases necessary to give effect to the most unquestionable purpose of the testator." In McBride *v.* Smyth (54 Pa. 245), we said: "It is unwarranted to assume that something different from the clear meaning of the words used was the testator's intention when the assumption rests on nothing in the will itself, but solely on conjecture." In this last case the words of the will were quite similar to those we are considering, to wit, "And upon the youngest of my children who may be living attaining the age of twenty-one years," the estate was given, "to such of his children as might be living at that time." We said: "This is not a mere postponement of the time of enjoyment. It is a selection of individuals from a class to be donees of a right; a description of persons not a regulation of the interest given. It is impossible to admit that a gift to such a number of persons as may meet a defined description is a gift to all the persons, whether they meet the description or not. The rule of legal construction as well as the testamentary intent in such cases is well stated in Smith on Executory Interests, page 231. It is this: 'When real or personal estate is devised or bequeathed to such children or such child or individuals as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For until the age is attained, the character is sustained or the act is performed the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee.' If then we are to seek for the intention of the testator in the language of his will, we must conclude he gave no vested interest in his residuary estate to any of his children, that the devises were contingent and became vested only when the youngest child living attained the age of twenty-one years in such children as were then in life." And so here we are obliged to conclude that the estate given to the children of Edmund and Ann Holmes was contingent and became vested only upon the death of both, and in such children as were then in life.

If there were any need to resort to the context

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of the will to find support for the foregoing conclusion it is readily discovered in the fifth section of the will. The testator there disposes of the other half of the estate in favor of his daughter Caroline, with power to dispose by will of the whole of her half to her surviving children or their lawful issue, "and if no such child or children or their lawful issue should be living at the time of her death, then to be distributed" either to her brother Edmund or to his children living at the time of her death. Here when the testator wishes to introduce grandchildren as legatees in remainder he does so by appropriate words. He carefully includes the lawful issue of such of Caroline's children as may be dead among the ultimate legatees, and again limits to the children of Edmund, without including their issue, the possible enjoyment of Caroline's share in the event of her total failure of issue. It is impossible to resist the conclusion that the testator knew well how to include grandchildren as the objects of his bounty if he so desired, and that when he did not do so it was because he did not so intend. We sustain the ruling of the Auditing Judge.

The decree of the Court below is reversed at the cost of the appellees in the several appeals, and the record is remitted, with direction that the distribution of the fund in the Court below be made in accordance with this opinion.

Opinion by GREEN, J. H. C. O.

July '88, 178. March 27, 1889.

Morrison v. Henderson.

Mechanics' liens — Precision with which claim must be stated — Distinction between claims filed under the Act of June 16, 1836, *and those under the Act of* 1868.

Mechanics' liens are of two classes, arising under different Acts of Assembly; they are purely statutory in their creation, and each is required to conform strictly to the provisions of its own law.

A mechanics' claim was filed against "all that certain two-story brick building, with two-story back building or addition attached," etc. The said sum "being a balance of a debt contracted for work and labor done and materials furnished in and about the erection and construction of a two-story back building . . . . according to the terms of the contract hereto annexed." The said contract showed that the work done was an alteration and addition to an old building:

Held, that this lien was fatally defective, and was properly stricken off. It was not good under either of the classes of mechanics' liens. It purports on its face to be for a new structure, but that is contradicted by the fact that it is filed against the old as well as the new building, and by the further fact that the annexed contract shows that the work was done, as alterations and repairs.

Error to the Common Pleas No. 1, of Philadelphia County.

This was a lien for the erection and construction of a two-story brick back building or addition to the dwelling house of the defendant, in the city of Philadelphia. The following is a copy of the lien:—

Samuel Morrison, of the city of Philadelphia, hereby files this his claim for the payment of the sum of one hundred and eighty-three dollars, against all that certain two-story brick building, with the two-story back building or addition thereto attached, and lot or piece of ground and curtilage appurtenant thereto, situate on the southwestwardly side of Letterly Street, at the distance of one hundred and thirty-three feet five and one-half inches southeastwardly from the southeastwardly side of Kensington Avenue, in the Thirty-first Ward of the city of Philadelphia. Containing in front or breadth on the said Letterly Street fourteen feet, and extending of that width in length or depth southeastwardly seventy-one feet four inches, to a certain four-feet-wide alley leading northwestwardly, and connecting with another four-feet-wide alley running from said Letterly Street to Adams Street. The said sum of one hundred and eighty-three dollars being a balance of a debt contracted for work and labor done and materials furnished in and about the erection and construction of a two-story back building, at the request of the said Hugh Henderson by the said Samuel Morrison, continuously within six months last past, furnished to and supplied for and towards the erection and construction of, and on the credit of, the said building, according to the terms of the contract hereto annexed, and made part hereof, to wit: from the twentieth day of October, A. D. 1887, to the thirty-first day of December, 1887, which contract said claimant prays may be taken and considered as part of this lien against said building, of which the said Hugh Henderson then was and now is the owner or reputed owner, and the said Samuel Morrison was the contractor for the erection of said back building, and the said Samuel Morrison claims to have a lien on said building and the curtilage appurtenant thereto, for the amount of his claim from the commencement of said building, according to the Act of Assembly in such cases made and provided.

The following is a copy of the contract under which the said work was done:—

I, Samuel Morrison, agrees to put up a back building, two story high; first floor is to be brought out 10 feet, with one window. Same height and width as it is now. Put in a new Excelsior range, new sink and dresser, and water-pipes removed to wherever required. Painting to match. Top room to be carried out 10 feet, with 6 feet of a hanging window at end. Bath-tub removed over R., etc., and inclosed in with lath and plaster; doors painted to match other, leaving all complete. Yard water to be removed 10 feet further down, putting in a new hydrant. Bricking same as it is. Putting up shed at end of building, boarding floor, and roofing same, putting all pipes, spouts . . . required to complete same properly, for the sum of $378, which I agree to pay.

(Signed) H. HENDERSON.

The claimant allowed the following credits on account of above contract:—

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By cash paid on account	$140 00
By allowance agreed upon for assumption by defendant of the putting in of range . .	35 00
By allowance agreed upon for assumption by defendant of plumbing work	20 00
	$195 00

Plaintiff averred that all of said work contracted for has been done, except the putting in of said range and said plumbing work, both of which defendant agreed to assume in consideration of the allowance of above credits.

A rule was taken to strike off the lien on the ground that the work being the erection of an addition to an already existing building the lien could only be sustained under the Act of 1868; that the Act of 1868 was repealed or "amended" by the Act of May 18, 1887; that the last-named Act required the giving of notice of intention to file a lien, and that no such notice being averred, the lien was defective. The Court made the rule absolute, without delivering an opinion.

Plaintiff then took this writ, assigning for error, *inter alia*, the action of the Court in making absolute the rule to strike off the lien.

George W. Norris, for the plaintiff in error.

The judgment of the Court below striking off this lien cannot be sustained unless this Court can hold—

(1) That the lien is not sustainable under the Act of 1836.

(2) That the Act of August 1, 1868, is absolutely repealed by the Act of May 18, 1887.

Because—(1) If the lien is sustainable under the Act of 1836, it is unaffected by any subsequent legislation.

(2) (*a*) If the Act of 1887 is supplementary to the prior legislation, the claimant here, not asking its benefits, is not subjected to the condition imposed upon those so doing.

(*b*) If the Act of 1887 amends, alters, or modifies the Act of August 1, 1868, or any other Act, except that of 1861, it is unconstitutional.

James M. Beck (*F. Pierce Buckley* with him), for defendant in error.

This lien was rightly stricken from the record: (1) Because the said claim was a claim for repairs and alterations; (2) Because the Act of 1868, which permits such a lien, is necessarily amended and supplemented by the Act of May 18, 1887, which provides as a prerequisite to such a lien that a certain notice shall be given; (3) Because the plaintiff's claim failed to aver the giving of such notice.

[MITCHELL, J. I do not think the notice prescribed by the Act of May 18, 1887, is required of an original contractor, but only of subcontractors.]

The Act expressly says that to entitle any one to its benefits, a notice must be given. It is not limited to sub-contractors or material-men. If, however, the Court be of opinion that no notice is required of an original contractor, then I shall argue, (1) that this lien on its face is for an original construction and is therefore improperly filed against the old building to which it is attached; and (2) that it is in part for alteration and repairs and therefore should not have been included in a lien for an original construction.

May 6, 1889. THE COURT. The contract upon which this claim is based was evidently drawn by the parties themselves. It starts out as the contract of plaintiff: "I, Samuel Morrison agrees to put up a back building," etc., and after specifying what plaintiff is to do, and the price, closes with the words, "which I agree to pay," and is then signed by the defendant, and not by the plaintiff at all. There may of course be a counterpart, signed by the plaintiff, though we have no evidence of it, but I refer to the contract only to illustrate the unscientific nature of the paper, and because the same confusion of thought has unfortunately pervaded the claim filed.

The claim does not refer to the Act under which it is filed, and an examination of it shows an entire failure to follow consistently the requirements either of the statutes relating to original erections and constructions, or those as to additions, alterations, and repairs. There is a hopeless confusion of the two. On its face it is "for work and labor done, and materials furnished, in and about the erection and construction of a two story back building" and therefore purports to be for a new structure under the Acts of 1836 and 1845. But in this view it is bad because it is filed against "all that certain two story brick building, with the two story back building, or addition thereto attached," thus treating the old and the new building as one, and contradicting the averment that the work done was upon a new and independent structure.

On the other hand, the details of what was done, as they appear in the contract, which is attached to the claim, show quite clearly that the work was really an alteration and addition to an old building. Regarded in this light as properly belonging under the statutes for alterations and repairs, the claim would encounter other difficulties perhaps equally serious.

But it is unnecessary to discuss these, because it is sufficient for the present case, that the claim is not filed for alteration and repair, but for erection and construction. The two kinds of claims arise under different Acts of Assembly, and being purely statutory in their creation, each would be required to conform to the provisions of its own

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law, even if the difference between them was merely technical. But the difference is substantial in several respects, both as to the requirements of the claim and its consequences, and it is therefore important that it should be maintained.

As this claim was not good under either class it was properly struck off.

Judgment affirmed.

Opinion by MITCHELL, J. W. M. S., JR.

Jan. '89, 239. April 10, 1889.

Pennsylvania R. R. Co. v. Mooney.

Railroads — Negligence — Contributory negligence—Crossings—Rule of "stop, look, and listen."

A., in company with other laborers employed by a railroad company, was walking on the track to his work. Just before reaching a road crossing, without gate or flagman, he walked to one side to attend to a call of nature. His companions passed on to a point about 100 or 150 yards beyond the crossing, and one of them, looking back, saw A. struck by a passing train, "just about in the act of stepping across the crossing. . . . In the act of going across the track at the crossing. . . . Right at the crossing, and instantly struck." There was no other witness of the accident. A. was killed. In a suit by his widow and children against the railroad company to recover damages, the theory of plaintiffs was that decedent was prevented from seeing the coming train by the smoke of another train which hugged the track:

Held, that the decedent was either a trespasser, or else guilty of contributory negligence, and that no presumption arose that he had performed his legal duty of stopping, looking, and listening.

Held further, that the theory of the obscuring of decedent's vision by smoke was completely disproved by the distance at which the witnesses to the accident observed it.

Held therefore, that plaintiffs were not entitled to recover.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Margaret Mooney *et al.*, widow and children of Thomas Mooney, deceased, against the Pennsylvania Railroad Company, to recover damages for the death of said Thomas Mooney, alleged to have been caused by the negligence of defendant.

On the trial, before FINLETTER, P. J., the facts of the case appeared to be as follows: Mooney was foreman of a gang of laborers who, for some time before the accident, had been engaged in laying an additional track upon the line of the railroad. At the time of the accident their work had progressed to a point between Bristol and Tullytown. On the morning of the accident the "gang" had started to walk along the track from Bristol to the point at which they were to continue their work. They were scattered along the track in small groups. Before reaching the point at which they were working, they would cross over "Green Lane," a highway of the county. Mooney was walking with Michael Welsh, a co-laborer. When within about fifteen yards of Green Lane, Mooney gave his dinner-kettle to Welsh, and went behind some sleepers that were piled up along the railroad, for the purpose of attending to the necessities of nature. Welsh continued on walking up the track. The next that was seen of Mooney was by another laborer, Patrick Archer, who saw Mooney as "he was just about in the act of stepping across the crossing," when he was struck by a coming train and killed. Evidence was introduced to show that smoke from another locomotive hugged the ground and obscured vision. Welsh, however, had gotten about one hundred and fifty yards beyond Green Lane when he heard the whistle and saw the train *below* the crossing, "a quarter of a mile or more;" and Archer, the witness who saw Mooney struck, saw one hundred and fifty yards. It appeared that there was no flagman or gate at the crossing.

Defendant requested the Court to charge, *inter alia*, as follows:—

(6) Under all the evidence in this case, your verdict must be for the railroad company defendant. *Refused.*

The Court, in its general charge, left to the jury the questions of negligence and contributory negligence.

Verdict and judgment for plaintiffs in the sum of $8000. Defendant thereupon took this writ, assigning for error, *inter alia*, the answer to the above point, and the charge of the Court as above.

David W. Sellers (*Gavin W. Hart* with him), for the plaintiff in error.

Under the circumstances the conduct of the decedent precluded recovery.

R. R. Co. *v.* Norton, 24 Pa. St. 465.
Mulherrin *v.* R. R. Co., 81 Id. 366.
R. W. Co. *v.* Collins, 87 Id. 405.
Cummings *v.* R. R. Co., 92 Id. 82.
Cauley *v.* R. R. Co., 95 Id. 398.
Cauley *v.* R. R. Co., 98 Id. 498.
Moore *v.* R. R. Co., 99 Id. 301.
Moore *v.* R. R. Co., 108 Id. 349.

David H. Ross and *Charles F. Warwick* (*James Harland* with them), for defendants in error.

In the total absence of testimony on the point it must be presumed that decedent exercised such care as the circumstances required.

Brown *v.* Penna. R. R., 39 Leg. Int. 179.
Railroad *v.* Weber, 76 Pa. St. 157.

May 6, 1889. THE COURT. There was no evidence but that of the plaintiff on the trial of

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this case. Three witnesses were examined who were present at the occurrence of the accident, but only one of the three saw and described the actual collision which caused the death of the plaintiff's husband. It was testified by all the witnesses that the deceased and several others, all in the employ of the defendant, were walking along the railroad track on their way to do some work on the road. The deceased left the track shortly before reaching Green Lane crossing to attend to a call of nature. No witness seems to have observed his return to the track and no one describes it. Archer, the only witness who saw the very fact of the collision, thus describes it: "Q. Where were you at the time of the accident? A. About one hundred or perhaps one hundred and fifty yards below the crossing to the best of my knowledge. I didn't measure it, but to the best of my knowledge." . . . "Q. Did you see Mooney struck by that passenger train? A. Yes, sir. Q. Where was he at the time he was struck to the best of your knowledge? A. To the best of my knowledge he was just about in the act of stepping across the crossing." . . . "Did you see from where Mooney came? A. No, sir. Q. He was just walking along the track then the same as the rest of you? A. No, sir. Q. What was he doing? A. He was in the act of going across the track at the time I saw him. There was a man walked with me, and the track I was walking on was just only made. I was walking along and the man made the remark. Q. What did you see? A. At the time I saw him he was just struck by the train. Q. And he was struck by the train at this crossing? A. To the best of my knowledge; I judge it was about the crossing. Q. Are you positive of it? A. To the best of my knowledge. Q. Are you positive of it? A. Yes, sir; for we examined it there the next day—that afternoon. Q. How was it that you did not see where Mooney came from if you saw him struck? A. This man made the remark to me first walking down; I happened to look up. Q. And you looked up and saw Mooney right at the crossing and instantly struck? A. Yes, sir."

The witness Mulhearn says nothing about seeing Mooney until after he was struck, and the only remaining witness, Welsh, said he had passed on about one hundred or one hundred and fifty yards beyond Green Lane crossing when the accident occurred, and that he did not see the killing, and that he next saw Mooney's body about ninety feet on the other or western side of the crossing. Neither Welsh nor Mulhearn saw the actual collision, and the only witness to that fact was Archer, the whole of whose testimony on that subject is quoted above. The consideration of the case becomes very much simplified in view of the state of the testimony upon this vital subject. There was much contention in the argument as to whether Mooney was walking along the track and on it, or across it on the highway called Green Lane, at the moment he was struck. It is difficult to understand how he came to be crossing the track transversely on the highway, when he and all the others were proceeding lengthwise along the track on the way to their work, but Archer testifies to it, and although he says he was one hundred to one hundred and fifty yards away, he says he saw Mooney as he was struck, and that he was at that moment crossing the track.

It matters but little however whether Mooney was crossing the highway lengthwise and between the rails of the track, or crossing the railroad and between the rails in the highway, at the moment he was struck. He was on the track or he would not have been struck. If he was crossing the highway he was a trespasser and there could be no recovery, and if he was crossing the track he was guilty of most manifest contributory negligence in stepping upon the track immediately in front of an approaching engine. We have passed decisively upon these facts in a number of our recent decisions. In Carroll *v.* Penna. R. R. Co. (12 WEEKLY NOTES, 348) we held there could be no recovery although the plaintiff testified that before he stepped upon the track he stopped and looked and listened but neither saw nor heard the approaching train. We said: "The injury sustained by the plaintiff was attributable solely to his own gross carelessness. It is in vain for a man to say that he looked and listened if in despite of what his eyes and ears must have told him he walked directly in front of a moving locomotive." Similar cases are Monongahela City *v.* Fischer (111 Pa. 9), Mulherrin *v.* Railroad Co. (81 Id. 366), Moore *v.* Railroad Co. (108 Id. 349), B. & O. R. R. Co. *v.* Schwindling (101 Id. 258), Penna. R. R. Co. *v.* Bell (122 Id. 58).

In the present case there was no proof that Mooney stopped, looked, or listened before stepping up on the track. In this respect the plaintiff's case has nothing to sustain it but the presumption that the deceased performed his legal duty of stopping, looking, and listening, but that presumption, slight and faint at the best in this class of cases, is completely overborne by the affirmative proof to the contrary that he was struck the moment he set foot on the track.

It is impossible that he could have looked and listened when the indisputable fact is that he stepped on the track immediately in front of an approaching locomotive. In the very recent case of Marland *v.* The Pittsburgh and Lake Erie R. R. Co. (23 WEEKLY NOTES, 93), we said: "On the trial of this case the plaintiff testified that he stepped upon the track and was instantly struck

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and injured. It is true he said he looked up and down the track and saw nothing, but it is necessarily true also that if he made use of his eyesight he must have seen the approaching train. He could not possibly look along the track in the direction of the approaching train and fail to see it, since his presence on the track and the collission were simultaneous."

It was suggested in the argument of the case at bar that Mooney's view of the approaching train might have been obscured by the smoke of another train which was passing in the opposite direction and which, it was said by some of the witnesses, hugged the track. But that theory is entirely dispelled by the affirmative testimony of Archer, the plaintiff's chief witness, who testified that he saw the train strike Mooney although he was a hundred to a hundred and fifty yards away. Moreover the law requires a listening, as well as a looking, for a coming train, and obscuration of vision is no defence against a failure to listen. These considerations sustain the seventh assignment of error and it is unnecessary to consider the others.

Judgment reversed.

Opinion by GREEN, J. L. L., JR.

Jan. '89, 137. April 1, 1889.

Pereyra's Appeal.

Attorneys-at-law—Partition—Costs in—Counsel fees—Refusal of—Appeal from, not allowed to counsel, but to plaintiffs or petitioners—Act of April 27, 1864, § 1.

The provision of the Act of April 27, 1864, § 1 (P. L. 641), that "the costs in all cases of partition . . . . with a reasonable allowance to the plaintiffs or petitioners for counsel fees, to be taxed by the Court, or under its direction, shall be paid by all the parties in proportion to their several interests," is a provision in relief of the plaintiff or petitioner who is primarily liable for such counsel fees, and not in favor of the counsel, and therefore the counsel employed in a partition proceeding has no status to appeal from a decree of a Court refusing to allow such counsel fees.

Appeal of Jules E. Pereyra from a decree of the Common Pleas No. 3, of Philadelphia County.

Bill in equity, praying a partition of real estate wherein, Catharine Edwards was complainant, and Mary Sefer, John G. Bennett, James B. Simpson and Sarah Simpson, his wife, in right of said Sarah, Lewis K. Bennett and James H. Bennett were respondents.

In this case, the bill was taken *pro confesso*, and subsequently on motion of the appellant, who was the counsel for the complainant in the partition proceeds, the Court appointed Thomas B. Reeves, Esq., as Master, to make sale of the real estate and divide the proceeds among the parties entitled. The sale was duly made for $6805. Before the Master the appellant claimed $500 for services rendered Mrs. Edwards from the first day of August, 1885, to June 12, 1888. The Master thereupon took testimony as to the quantity and quality of the services rendered, and filed a report allowing the fee of $500.

Exceptions to this report were taken by the respondents, and said exceptions were sustained by the Court below, on the ground that "the Court is of opinion that the attorney for complainant has not acted in good faith to the estate."

The Master thereupon withdrew his report for the purpose of amendment, and then filed an amended report wherein he said, *inter alia:* "The Master further reports that he has declined to allow any fee to the counsel for the plaintiff, preferring to leave the entire matter, under Act of 1864, to the Court in whom is vested by said Act the power to determine the amount of fee to which attorney for plaintiff is entitled."

Exceptions to this report were filed by the appellant, on the ground that the Master erred in refusing to allow the counsel fee claimed, and in referring the matter to the Court. These exceptions were dismissed and the report confirmed by the Court without an opinion and without the allowance of any counsel fee. Whereupon the said Jules E. Pereyra took this appeal assigning for error the action of the Court in refusing him the counsel fee of $500, and in not allowing a reasonable counsel fee.

F. Carroll Brewster and *E. Hunn Hanson* (*David W. Sellers* with them), for the appellant.

S. N. Rich, for the appellees.

May 6, 1889. THE COURT. Upon a careful reading of the evidence we find nothing to justify the charge of bad faith on the part of Mr. Pereyra. That he rendered valuable services in conducting the proceedings in partition is undoubted, and either Catharine Edwards his client or the estate of Mary Wilson, deceased, should compensate him. He may, from lack of experience or other cause, have over-estimated the value of his services, or he may have embraced in his claim items which were properly chargeable to his own client alone, but the partition was conducted to a successful conclusion, and he is certainly entitled to a reasonable compensation from some source for the services actually rendered in the partition. The fact that he claimed too much, is no reason why he should receive nothing. The whole matter was for the Court, upon a dispassionate consideration of the evidence, and the amount and value of the services rendered.

But we cannot see that the appellant has any

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standing in this Court to complain of the decree. The appellant's claim is under the first section of the Act of April 27, 1864 (Purd. Dig. 1295, pl. 35), which provides as follows: "The costs in all cases of partition in the Common Pleas or Orphans' Courts of the Commonwealth, with a reasonable allowance to the plaintiffs or petitioners for counsel fees to be taxed by the court, or under its direction, shall be paid by all the parties in proportion to their several interests." This allowance it will be seen is to be made to the plaintiff or petitioner, not to the counsel; it is a provision in relief of the party to pay counsel fees, and if Catharine Edwards the plaintiff is satisfied with the decree, we cannot see that the counsel has any legal status here on an appeal. There is no judgment or decree against Mr. Pereyra from which an appeal will lie. If an allowance had been made, it would not have been in his favor, but in relief of his client, and in her favor, and the refusal to make the allowance is a decree against her. Mr. Pereyra, in the absence of any statutory provision made for him, must look to his client; if she declines to be reimbursed, he cannot complain. A reference to Snyder's Appeal (54 Pa. 67); Grubb's Appeal (82 Id. 23); The Fidelity Co.'s Appeal (108 Id. 340), and Biles's Appeal (119 Id. 105) will show that the practice is in conformity with this view of the law. The legal principles which govern the rights of all parties in interest are similar to those declared in McAllister's Appeal (59 Pa. 204), relating to attorney's commissions for collection, etc. The obligation in the case cited is created by contract, whilst in this case it exists by statute, but in both it stands upon the force of the words imposing it, and the legal effect is the same.

For the reasons stated, we cannot see our way clear to sustain this appeal.

The appeal is therefore dismissed at the cost of the appellant.

Opinion by CLARK, J. C. K. Z.

July '88, 117. April 16, 1889.

Davenport v. Jones.

Writ of error—Ejectment—Act of June 24, 1885—Commissioners' sales—Practice.

A writ of error will not lie to a proceeding not according to the course of the common law, unless specially provided for by statute.

A writ of error will not lie to the action of a Court making absolute a rule, obtained under the provisions of the Act of June 24, 1885 (P. L. 152), by the claimants in possession of a tract of land upon the purchasers thereof at a commissioners' sale to bring an action of ejectment therefor within ninety days.

All questions as to said proceedings including the question of the constitutionality of said Act may perhaps afterwards arise upon writ of error to a final judgment in an action of ejectment brought either within said period of ninety days or thereafter.

Error to the Common Pleas of Luzerne County.

Petition, by John Jones *et al.*, under the provisions of the Act of June 24, 1885 (P. L. 152), for a rule on Asher L. Davenport and A. Byron Davenport to bring an action of ejectment for certain land within ninety days or show cause why the same should not be brought. An answer was filed and depositions taken. After hearing the Court made the rule absolute, WOODWARD, J., filing the following opinion:—

"This petition is founded on the Act of June 24, 1885 (P. L. 152), and the only question of importance raised by the petition and the answer thereto seems to be this: Are the petitioners in possession of the premises 'by occupany, lease, coverture, or otherwise?' If this question be answered in the affirmative by the evidence then the plaintiffs are entitled to have granted a rule on the defendants to bring their action of ejectment within ninety days from the time the rule shall be made absolute. If the evidence does not establish such a possession in the plaintiffs as the Act defines, then they are not entitled to have the order which they ask for.

"Without going into the merits of the controversy as to the title to that portion of the Phineas Bradley tract now in dispute, or expressing any opinion upon the subject, which might amount to a prejudgment, we content ourselves with the statement that the depositions show:—

"First. That at the time of filing the present petition the plaintiffs were in possession of that portion of the Phineas Bradley tract in dispute, and had erected thereon a saw-mill, a dwelling house, and a barn.

"Second. That the tract of land of which the premises in dispute form a part was sold to the defendants by the commissioners of Luzerne County at a commissioners' sale on the 5th of November, 1885, and that this sale was followed by a deed to them acknowledged December 24, 1885.

"These facts being clearly established by the depositions it is not necessary for us to consider any of the questions which relate to the validity of the title, either of the plaintiffs or the defendants, or the effect of the proceedings in equity heretofore had relative to the continuance of the injunction.

"The rule is made absolute."

The respondents thereupon took this writ, assigning for error the action of the Court and particularly in not holding that the Act of Assembly of June 24, 1885, was opposed to the provisions of the Constitution of the United States

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and of this Commonwealth securing the right of trial by jury.

Q. A. Gates (*Michael Cannon* with him), for plaintiffs in error.

George R. Bedford and *Alexander Farnham*, for defendants in error.

The Act of Assembly provides for no writ of error or appeal. The judgment entered in the proceeding is not final and conclusive upon the ultimate rights of the parties. The time to meet the question raised here would be when we invoke the order made in this proceeding as a bar to an action of ejectment that may be hereafter brought against us by the plaintiffs in error. If the latter never attempt to bring such action they are not harmed by having this order stand upon the record. If, on the other hand, they do at any time institute an action of ejectment, and the defendants in error then set up this order, it will be quite early enough for this Court to pass upon the propriety of the action of the Court below. Meantime it is a mere abstract question which this Court will hardly care to occupy time in either discussing or deciding.

May 6, 1889. THE COURT. This proceeding under the Act of June 24, 1885 (P. L. 152), is not according to the course of the common law. It is well settled that a writ of error does not lie in such cases unless it is expressly provided for. No such provision appears to have been made either in that or any other Act. It follows, therefore, that the questions intended to be raised are not properly before us. They may, perhaps, arise hereafter on writ of error to final judgment in the action of ejectment, in case the same is brought either within the time required by the Act or afterwards, and the judgment is adverse to plaintiffs in error; but inasmuch as there is nothing properly before us, at present, we forbear to express any opinion on the subject.

Writ of error quashed.

Opinion by STERRETT, J. L. L., JR.

Jan. '89, 49. April 15, 1889.

Shiffer v. Broadhead.

Referees—Luzerne County—Acts of April 6, 1869, *March* 23, 1870, *and June* 22, 1871—*Recommittal of report—Acknowledgment—Form of—Effect of, before justice of the peace—Trespass for cutting and carrying timber—Action for treble damages therefor—Right of entry for other purposes, no defence.*

Under the Act of June 22, 1871 (P. L. 1363), providing that in proceedings before Referees in Luzerne County "it shall be the duty of the Court of Common Pleas to hear and decide upon all exceptions so filed, to the report of the Referee, reserving to the Court, however, the power of committing the report again to the Referee, should justice require it," the said Court has the power to recommit a report of a Referee in which the Referee had found that it was impossible to ascertain a certain disputed fact, viz., the age of trees at a certain date, with instructions to take further evidence and report thereupon.

Articles of agreement for the sale of standing timber, dated October 18, 1867, were acknowledged November 27, 1884, by B., the subscribing witness, before a justice of the peace, the witness deposing "that he was present and did see the above-named A. seal and, as his act and deed, deliver the said agreement, and that he, the said B., did thereupon subscribe his name as a witness to the same." The articles were recorded November 28, 1885:

Held, that this agreement was sufficiently proved to make the record thereof competent evidence.

In an action of trespass brought in 1885 to recover treble damages, under the Act of March 27, 1824 (8 Sm. 283), for entering upon land and cutting and converting growing timber thereon, done in the year 1885, the defendants justified under the purchase in 1867 from the plaintiff's grantor, the then owner of the land, of "all the white pine and hemlock timber now being, standing, or growing upon that certain lot of land, etc." The case was referred to a Referee, who found that by custom the above contract would only convey the standing and growing trees of or exceeding a certain diameter; that of the trees cut 69 were of that or a greater diameter in 1867, while the remaining 314 were of a less diameter in 1867. The Referee found as a conclusion of law that as the defendants had a right of entry to cut said 69 trees, the plaintiff was not entitled to recover in this form of action, and recommended a judgment in favor of defendants and against the plaintiff of no cause of action. Exceptions to this report were dismissed by the Court, the report confirmed, and judgment accordingly entered for the defendants. On writ of error:

Held, that the defendants' right of entry on the premises at the time the cutting was done was not a right of entry for all purposes, and that in cutting trees to which they had no right they became trespassers, and as such liable in this form of action.

Error to the Common Pleas of Luzerne County.

Trespass *vi et armis, de bonis asportatis*, and *quare clausum fregit*, wherein J. B. Shiffer was plaintiff, and John A. Broadhead, Abram Bellas, Wm. Bellas, Roland Bellas, Albert Dubois, Jacob Sax, George Sax, and Albert Magrum were defendants.

The case was referred, under the Acts of April 6, 1869, § 1 (P. L. 729), March 23, 1870 (P. L. 540), and June 22, 1871 (P. L. 1363), regulating arbitrations in Luzerne County, to O. F. Nicholson, Esq., as Referee. Before the Referee the following facts appeared: On January 24, 1885, one Gilbert Shiffer conveyed certain land in fee to J. B. Shiffer, the plaintiff. Between January 12, 1885, and March 5, 1885, the defendant, John A. Broadhead, assisted by the other defendants, his employés, entered upon this land and cut down and converted to their own

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use certain white pine trees of the value of $171.75. The defendants to justify their action offered in evidence the following record:—

"Articles of agreement made and entered into this 18th day of October, A. D. 1867, between John A. Broadhead, of the one part, and Gilbert Shiffer, of the other part, as follows: The said Shiffer hereby covenants and agrees to sell said Broadhead all the white pine and hemlock timber (and no other) now being, standing or growing upon that certain lot of land situate in Buck Township, known as the Broadhead lot (with all the rights and privileges of ingress and egress to and from the same for the purpose of cutting and hauling the same), for the sum of five hundred dollars.

"In witness whereof the said parties have hereunto set our hands and seals the day and year aforesaid. GILBERT SHIFFER. [Seal.]
J. A. BROADHEAD. [Seal.]

"Sealed and delivered in presence of
[U. S. 5ct. Stamp.] A. B. WINDER."

To this was appended the following acknowledgment:—

"*Luzerne County, ss:*

"Be it remembered, that on the 27th day of November, 1884, before me, an alderman of the city of Wilkes-Barre, and *ex officio* justice of the peace, in and for said county, personally came A. B. Winder, the subscribing witness to the above agreement, and being duly sworn according to law, doth depose and say, that he was present and did see the above-named Gilbert Shiffer seal, and as his act and deed, deliver the said agreement, and that he, the said A. B. Winder, did thereupon subscribe his name as a witness to the same.

"In testimony whereof I have hereunto set my hand and seal the day and year first above written.
"A. B. WINDER. [Seal.]

"Affirmed and subscribed before me this 28th November, 1884. W. S. PARSONS, Alderman."

This paper so acknowledged had been recorded in the recorder's office on November 28, 1885.

This record was objected to by the plaintiff "because it does not appear in the certificate of probate, either that the grantor in the said deed was dead or could not be had for the purpose of acknowledging the deed, and therefore the record offered is not constructive notice to a subsequent purchaser and the same is void." Objection overruled and evidence admitted. Exception. (Second assignment of error.)

The plaintiff then proved by various witnesses that in the years 1868–1870, Broadhead had cut all the white pine and hemlock timber then standing, ten inches and upwards in diameter; that then and for a long time prior thereto by the custom of the country pine and hemlock trees less than ten inches in diameter at the top of a log twelve feet long first cut from the stump, were not regarded or used as timber trees nor used for mechanical or building purposes. That between 1870 and 1885 Broadhead had only taken about 3000 feet of white pine from this land, and that was taken in 1870 when he was occupying the land as tenant, and most of it was used in repairing fences and buildings; that in the winter of 1870 Broadhead told Gilbert Shiffer "that they had all the timber cut;" and by the testimony of Gilbert Shiffer himself, there was a contemporaneous oral agreement between him and Broadhead that Broadhead under the above contract should only take trees fit for the saw and merchantable purposes. Broadhead denied this contemporaneous agreement and his statement in 1870 that all the timber had been taken.

The Referee found that the contemporaneous agreement had been entered into, that Broadhead was only entitled to take such trees as were ten inches or more in diameter in 1867, and that from measurements made now of the trees cut in 1885 the diameter of these trees on October 18, 1867, could not be ascertained. The Referee then found as conclusions of law that the contract of October 18, 1867, had been proved, but that plaintiff was entitled to judgment in the sum of $515.25, viz., three times the value of the timber cut. The defendants excepted to the finding that the diameter in 1867 of the timber cut in 1885 could not be ascertained.

This exception and others were argued before WOODWARD, J., who, on April 22, 1887, made an order referring the case back to the Referee in the following language: "It seems indispensable to an intelligent judgment of all the points involved, that we have further and more satisfactory proof as to the size and diameter of this timber, at the date of the contract; therefore we now direct that the report be referred back to the Referee, for the purpose of ascertaining, as nearly as possible, the size and diameter and age of the timber trees in dispute, at the date of the contract."

Subsequently the exceptions were reargued, and the Court then filed an opinion, *inter alia*, as follows:—

"It is a well known fact that the age of a tree is readily ascertained by counting from the centre to the circumference of a cross cut, or section of the tree, the successive rings formed annually one by one as the tree grows. There is no other method of ascertaining the age of a tree with accuracy and in all cases where it becomes important to decide upon the age, growth, and probable dimension of a tree at any given time, it is customary to count off from each side of the tree, beginning at the outside, the number of growths formed since the date in question. The growths that are left after deducting the number thus counted off, will give the age and size of the tree at the required date.

"Upon the trial before the Referee the defendants showed the age of the trees in question. They also showed the diameter of the trees as they were

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found in 1885. They then asked the Referee to find that all the trees shown to have been twenty-four years of age and upwards in 1867 must of necessity have been timber trees at that time. In other words the Referee was asked to adopt a formula or rule which would enable him to work out the problem of the diameter of the trees in 1867 by a mathematical calculation rather than by an actual count. This the Referee declined to do, and perhaps correctly, for the reason that the plan which he was asked to adopt, assumed as a fact, that the growth of each year had been equal and uniform. Why the witnesses were not asked to make the actual count, and thus be prepared to testify with certainty upon the vital question involved in the case, we are at loss to understand. The truth and justice of the case require, that the Referee and the Court shall be informed on this subject, and the means for furnishing this information are shown by the evidence to exist and to be readily obtainable. The finding of the Referee on this subject is as follows: 'And that from said measurements made in July, 1886, from stumps of timber trees cut in February, 1885, the diameter of trees at the making of contract between Gilbert Shiffer and John A. Broadhead, on the 18th day of October, 1867, cannot be ascertained and found as a conclusion of fact by the Referee.' To dispose of this case without a definite finding as to the main and almost the only question involved in it, and that, too, when the evidence upon that question is within easy reach, would be unjudicial, if not absurd.

"We adhere to the order made by us on the 22d April, 1887, and re-commit the report to the Referee for the purpose therein stated."

The order of the Court recommitting the report and directing further evidence to be taken constituted the second assignment of error.

At the subsequent hearing the Auditor heard further testimony, and filed a supplemental report, finding as a conclusion of fact that 69 of the trees that had been cut in 1885, were in 1867 ten inches and upwards in diameter at the top of a log twelve feet long first cut from the stump, and the remaining 314 trees measured less than said ten inches, and that this diameter was ascertained from actual measurement of the stumps of the same trees cut in 1885, deducting from the whole number of annular rings formed seventeen of the outer rings, and then measuring the diameter of the inner portion remaining. Such latter measurement giving and being the diameter taken and received by the Referee as the true diameter in 1867 of the trees in controversy, cut in 1885.

He further found as a conclusion of law:—

"That the written contract of 18th October, 1867, between Gilbert Shiffer and John A. Broadhead must be, and is construed to have been entered into with their knowledge of the general custom then there prevailing, that the minimum size of white pine timber trees then standing and growing, was that ten inches in diameter at the top end of the log twelve feet in length the first cut from the but, and that in the absence of a fixed size being limited by the contract, the general custom of the particular business of lumbering in the region where contract was to be enforced, will prevail to control and limit its construction in accordance therewith. And that the custom as found in the Referee's conclusion of fact number thirteen appearing to be a good custom, and not conflicting with the settled rules of law nor go to defeat the essential terms of the contract, must control its construction of the meaning of the language used: 'All the white pine and hemlock timber now growing or standing,' to indicate and mean only that which would measure ten inches in diameter at the top end of a log twelve feet long, first cut from the but.

"That as the defendants' right of entry upon the Broadhead tract to cut and remove that portion of the white pine timber which in the tree would measure ten inches in diameter at the top of a twelve foot log, first cut from the but, was not determined at the time of the entry thereon by them, as claimed in this case, the plaintiff is not entitled to recover against the defendants in the present form of action. And in the event of no exceptions being filed thereto the prothonotary is directed to enter judgment hereon in favor of defendants and against the plaintiff of no cause of action."

Exceptions to this supplemental report were dismissed by the Court, WOODWARD, J., in the following opinion: "The exceptions to the supplemental report of the Referee in this case are overruled and judgment directed in accordance with said report."

Judgment accordingly for defendants, whereupon the plaintiff took this writ, assigning for error the admission in evidence of the record of the above agreement, the recommittal of the report to the Referee, and the judgment of the Court.

F. M. Nichols, for plaintiff in error.

William S. McLean, for defendants in error.

May 6, 1889. THE COURT. There was no error in recommitting the report of the Referee for the purpose of taking additional testimony in relation to the size of the trees in controversy. The supplementary Act of June 22, 1871, P. L. 1363, referring to the provision for filing exceptions, etc., declares "It shall be the duty of the Court of Common Pleas to hear and decide upon all exceptions so filed to the report of the Referee,

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reserving to the Court, however, the power of committing the report again to the Referee should justice require it." The power thus reserved is an ample warrant for such action of the Court as is complained of in the first specification. Indeed the exercise of that power is sometimes necessary to prevent a miscarriage of justice.

The agreement referred to in the second specification was sufficiently proved to make the record thereof competent evidence. Under the Act of 1791 and subsequent Acts, justices of the peace are authorized to receive proof of deeds and other instruments of writing in the same manner as Judges of the Supreme Court or Court of Common Pleas under the Act of March 18, 1775.

The first and second specifications of error are not sustained.

The third specification involves a question of more importance. In his second report (conclusions of fact, paragraph nine), the learned Referee finds as follows, viz: "9th. That of the said forty-nine thousand and seventy-one feet of white pine timber in the log, mentioned in the last before conclusion of fact, 'No. Eight,' there were *sixty-nine* trees, *ten inches* and upwards in diameter at the top of a log twelve feet long, first cut from the stump, which together would make thirteen thousand feet of timber, the market value of which in the stump was three dollars and fifty cents per thousand, or forty-seven dollars and twenty-five cents. And that there were of the same forty-nine thousand and seventy-one feet of white pine timber in the log, *three hundred and fourteen* other trees, measuring *less* than *ten inches* in diameter at the top of a log twelve feet long, first cut from the stump, which would make thirty-six thousand and seventy-one feet of lumber, the market value of which in the stump was three dollars and fifty cents per thousand feet, or one hundred and twenty-four dollars and fifty cents. And that the said diameter above given is the diameter of the several trees mentioned as it existed and was in 1867 when the said written contract between Gilbert Shiffer and John A. Broadhead was entered into, ascertained from actual measurement of the stumps of the same trees cut in 1885, deducting from the whole number of annual rings formed, seventeen of the outer rings, and then measuring the diameter of the inner portion remaining. Such latter measurement giving and being the diameter taken and received by the Referee as the true diameter, in 1867, of the trees in controversy, cut in 1885."

These facts, in connection with other findings of fact and conclusions of law in favor of plaintiff, would have logically resulted in an award in his favor, if it had not been for the learned Referee's last conclusion of law, wherein he in substance held that plaintiff was not entitled to recover in the present form of action. The reason for that legal conclusion, in the Referee's own language, is as follows, to wit: "That as the defendants' right of entry on the Broadhead tract to cut and remove that portion of the white pine timber which in the tree would measure ten inches in diameter at the top of a log twelve feet long, first cut from the but, was not determined at the time of the entry thereon by them, as claimed in this case, the plaintiff is not entitled to recover against defendants in this action." The Referee accordingly reported in favor of defendants and against plaintiff "no cause of action." To this, among other things, plaintiff excepted. The exceptions were all overruled by the Court and judgment entered in accordance with the report of the Referee. This action of the Court in ordering judgment for defendants, etc., constitutes the third and last specification of error.

As we have already seen, the learned Referee found, *inter alia*, in substance, that in 1885, on the lot referred to in the agreement of 1867 as "the Broadhead lot," the defendants cut certain trees, which, under said agreement, they had a right to cut; and during the same time they cut on said lot certain other trees, which, under said agreement or otherwise, they had no right to cut; but, inasmuch as they had a right to enter on the premises for the purpose of cutting and removing the first-mentioned trees, he concluded, as matter of law, that they were not liable in this action of trespass, etc., for cutting and removing the last-mentioned trees. That conclusion, we think, is a *non sequitur*. It is true they had a right of entry on the premises at the time the cutting was done, but it was not a right of entry for all purposes. It was solely for the purpose of cutting and removing such trees as, under the agreement, they had a right to cut, and nothing else. In cutting and removing other trees which they had no right, and must have known they had no right to cut, they became trespassers as to such unauthorized and illegal acts, and as such they were liable in this action. The extent, or rather the basis of their liability is fixed by the finding of the Referee as to the value of the timber cut by them without any authority so to do. The third specification is sustained.

Judgment reversed, and record remitted for further proceedings in accordance with this opinion.

Opinion by STERRETT, J. C. K. Z.

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Jan. '89, 454. April 18, 1889.

Commonwealth ex rel. Zirnhelt v. Smoulter.

Classification of Cities—Liquor license—License Act of May 13, 1887—*Municipal Act of* 1887—*Acts of May* 23, 1874, *and April* 11, 1876.

The License Act of May 13, 1887 (P. L. 108), provides that persons licensed to sell by retail, resident in cities of the first, second, and third class, shall pay the sum of $500, those resident in all other cities shall pay $300. The population of the city of Wilkes-Barre, according to the last decennial census, was between 23,000 and 24,000, and therefore, according to the classification of the Act of May 23, 1874 (P. L. 231), was a city of the third class. By the Act of April 11, 1876 (P. L. 20), cities containing a population of between 12,000 and 30,000 were put in the fourth class. By the Municipal Act of 1887, cities containing less than 75,000 inhabitants were put into the fourth, fifth, sixth, and seventh classes. At the time of the passage of the License Act Wilkes-Barre was not supposed to belong either to the first, second, or third class. The Act of 1876, and the Municipal Act of 1887, were subsequently declared to be unconstitutional, and the classification of the Act of 1874 was reaffirmed:

Held, that the city of Wilkes-Barre is a city of the third class, and the fee for a retail liquor license therein is $500.

Error to the Common Pleas of Luzerne County.

Petition of William Zirnhelt for a mandamus to John Smoulter, Jr., treasurer, of Luzerne County, commanding him to execute and deliver to petitioner his receipt in proper form to file with the clerk of the Quarter Sessions of said county for petitioner's retail liquor license upon the payment by petitioner of $300.50.

It appeared that on February 28, 1889, the Quarter Sessions of Luzerne County granted to the relator a license to sell vinous, spirituous, malt, or brewed liquors at retail, in the city of Wilkes-Barre. On March 4th he tendered to respondent the sum of $300.50, and demanded a receipt therefor to be filed with the clerk of the Quarter Sessions, as provided by section 9 of the Act of May 13, 1887. Without the filing of this receipt it was impossible to obtain the license. The treasurer refused to receive the money and give the receipt, claiming that the license fee was $500.50.

The Court, Rice, P. J., refused the writ, and dismissed the petition, saying:—

"The precise question for decision is whether the county treasurer is warranted in demanding from a retail liquor dealer within the city of Wilkes-Barre the sum of five hundred dollars before issuing to him a receipt, as provided in section 9 of the License Act of May 13, 1887 (P. L. 108). A decision of this question will also control in the case of wholesale dealers and bottlers.

"The language of the Act under which this sum is demanded reads as follows: 'Persons licensed to sell by retail, resident in cities of the first, second, and third class shall pay the sum of five hundred dollars; those resident in all other cities shall pay three hundred dollars.'

"The population of the city, according to the last decennial census, was between twenty-three thousand and twenty-four thousand, and therefore, according to the classification made by the Act of May 23, 1874 (P. L. 231), was a city of the third class. But in 1876 the Act of 1874 was amended, and the cities of the Commonwealth divided into five classes—cities containing a population less than thirty thousand and exceeding twelve thousand being put into the fourth class (Act of April 11, 1876, P. L. 20). Again, in 1887, they were divided into seven classes, and all cities containing less than seventy-five thousand inhabitants were put in the fourth, fifth, sixth, and seventh classes. It will be observed therefore that, according to the classification of the Act of 1876, supposed to be in force at the approval of the License Act of 1887, as well as according to the classification of the Municipal Act of 1887, passed a few days after the Retail License Act, the city of Wilkes-Barre does not belong to either the first, second, or third class of cities. But both of these Acts are wholly unconstitutional and void, and have been so declared by the Court of last resort.

"The decision in Ayars's Appeal (23 Weekly Notes, 97), goes farther than simply to declare the Municipal Act of 1887 unconstitutional; it deals with the subject of classification generally, the grounds upon which it is warranted, and the limits beyond which the legislation cannot go.

"Whilst recognizing and re-affirming the constitutionality of the Act of 1874, and the classification therein made, it unequivocally decides that any further enlargement of the number of classes cannot be sustained. Speaking of the Acts of 1876 and 1887 specifically, the learned Judge who delivered the opinion says, 'Those Acts doubtless contain many wise and wholesome provisions, but they are so interwoven with and dependent on others that are unconstitutional and void, that neither of the Acts of 1876 or 1887 can be sustained even in part.'

"It follows that so far as they affect this question, they are the same as no Acts, and that the city of Wilkes-Barre is now, and always has been, since the approval of the Act of 1874, a city of the third class. What authority have we for saying that it is not governed by a general law relating to licenses in cities of that class? If by any rule of construction we are authorized to interpolate words referring to a classification made by some particular Act, to what Act shall we refer, the Act of 1876 or the Act of May 24, 1887?

"But it is argued that the Legislature in grad-

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ing the amounts to be paid for licenses, had in view a classification of cities, which, although since declared unconstitutional, was at the time supposed to be valid; and it is contended that they would not have graded the amounts as they did had they not so supposed. Hence, it is claimed that a different effect from what they intended is being given to the law. If there were any ambiguity in the language adopted by them, there would be force in this argument, for it is a cardinal rule in the interpretation of ambiguous language in statutes, that the intention of the Legislature, where that can be ascertained with certainty, is to control. But where there is no such ambiguity it is perfectly safe to assume that the Legislature meant just what they have said. We may surmise that the Legislature would have legislated differently had they foreseen the decision in Ayars's Appeal, but this is pure matter of surmise; there is no legal presumption to that effect and no way in which the surmise can be verified. The presumption is that the Legislature understood perfectly well that the classification made by the Act of 1876 was not fixed and irrevocable, but was liable to be abolished or changed by a subsequent Legislature, and to be declared unconstitutional by the Courts. Hence they did not grade the licenses according to the classification made by any particular Act, but left the question as to what class any particular city might belong, to be determined by valid and constitutional general laws in existence, or to be passed on that subject. If a subsequent Legislature had repealed the Municipal Acts of 1876 and 1887, no one would deny that the city of Wilkes-Barre would fall back into the third class and licenses therein granted would be governed by the general law relating to that class of cities. We can see no difference in legal effect between a repeal of those laws and a judicial determination that they are unconstitutional and void. The provisions of the eighth section of the License Act are plain and unambiguous in terms, and were wisely made flexible so as to adapt themselves to the changed condition of things, and to any valid classification or rearrangement of classes which might be made in the future. Judge McPherson, in a recent opinion, concurred in by Judge Simonton, pertinently says: 'If a remedy is needed it must be sought before the Legislature. The Courts are bound by the plain and unambiguous words of a constitutional statute and ought not to construe them away in mere conjectures that they would not have been used if certain consequences had been foreseen.' (Hoffman *v.* Matthews, 6 Lanc. Law Review, 89.)

"Our conclusion is, that the city of Wilkes-Barre being a city of the third class, retail and wholesale liquor dealers therein are each required to pay a license fee of five hundred dollars, and bottlers a license fee of two hundred dollars."

Whereupon relator took this writ, assigning the action of the Court for error.

Edwin Shortz (*E. Robinson* with him), for plaintiff in error.

William S. Kirkpatrick, Attorney-General, and *William S. McLean*, counsel for the city of Wilkes-Barre and Luzerne County, for defendant in error, were not heard.

April 29, 1889. The Court. This case is affirmed upon the opinion of the learned President of the Court below.

Per Curiam. H. C. O.

Jan. '89, 196. March 7, 1889.

Fox v. Borkey.

Trespass—Blasting—Negligence—Contributory negligence—Damages—Practice.

F. owned a farm. He hired B. as a tenant on shares. During the term of his contract with B., and at a time when B. and his wife were at work in the fields husking corn, F. put off two blasts with dynamite at a distance of about eighty yards from where B. and his wife were at work. B.'s wife claimed that she was injured thereby, and brought suit against F. The testimony submitted by the plaintiff showed that the blasting was done in the usual manner, and that no external injury was done to her, nor was she struck by anything, her injuries being internal only from the shock. It appeared that there were two blasts, and that the plaintiff remained where she was after the first blast. Also that the distance at which the plaintiff was from the blast would be considered by those engaged in the operation of blasting as a safe one to which to retreat. The jury found a verdict for plaintiff for $900:

Held, that no negligence was shown on the part of defendant; that the injury was not the natural and proximate result of the act complained of, and that if it had been, the plaintiff herself was guilty of contributory negligence in subjecting herself to the risk of it:

Held, therefore, that a peremptory instruction should have been given to find for defendant.

Error to the Common Pleas of Berks County.

Trespass *vi et armis* by William Borkey and Louisa his wife, for the use of said wife, against Benjamin Fox. Plea, *liberum tenementum*.

On the trial, before Hagenman, P. J., the following facts appeared: Fox, the defendant, owned a farm, and hired Borkey, the plaintiff's husband, to do the work upon it, giving him therefor one-half the grain. Fox resided upon the premises and retained possession thereof. The contract of hiring was for a year, from April 1, 1885, and was renewed for an additional year, which ended April 1, 1887. On the 25th day of October, 1886, Fox went into the field to blast some rock, of which he desired to clear the property, and at which he had been at work, from time to time, for a year or more. Borkey, his

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wife, and two children were at the time husking corn in the same field, and 240 feet distant from the rock. Fox first put off a light blast, whereupon Mrs. Borkey said to her husband "she would go home, she could not stand this shooting, this blasting, nor the smoke." After the first blast Fox left the rock to go for a crowbar, and in going passed near by the place where Borkey and his family were. Borkey dissuaded his wife from going home by saying that he thought Fox "was only going to blast the small rock; that he would not blast any more; that he was going away." Soon afterward Fox returned with a crowbar, and subsequently set off another blast, which Borkey, in his testimony, described thus: "All of a sudden there was an explosion that the earth trembled; fine dirt flew over us like drizzling or hailing." Mrs. Borkey thus describes this blast: "Then they blasted again, a very severe blast; . . . it was a hard blast, a very hard blast, . . . it made a report that the whole earth shook." Borkey says, as to the effect of the shock upon his wife: "She fell forward onto the shock; she was trembling all over; then she got up, sat on the corn, and I went down to him," meaning Fox. Mrs. Borkey says that she was unconscious, her words being, "I did not know anything until my husband came back." She also said: "It scared me, and I became very nervous; . . . I had trouble with my heart, and I did not know anything of myself."

Mrs. Borkey was not struck by any flying stones or injured by any other material that came in contact with her, the allegation being that she was nervously prostrated by the mere concussion of the atmosphere. No one else was injured. At the time of the blast the plaintiff's husband and children were right by her, and neither of them was hurt.

Fox, who stated that he was at least sixty feet nearer, was not injured. There was no testimony showing or tending to show, that the subsequent appearance of the rock and the ground around it indicated a blast of unusual power, or indicated the use of an unusual quantity of dynamite. There was some evidence that there had been a dispute between Fox and Borkey, and that Fox had refused to renew the contract with Borkey as a cropper after April 1st, 1887, and that he had said that he would blast, just to prove to Borkey that he had a right to do so. James F. Dumn, a witness for the plaintiff, testified that with such a cartridge as was used in this blasting, the distance at which the plaintiff was from the blast would be considered by those engaged in the occupation of blasting as a safe distance to retreat.

Upon this evidence the defendant asked the Court to instruct the jury to find a verdict in his favor, which the Court refused to do, leaving the question of negligence to the jury.

Verdict for plaintiff for $900, and judgment thereon, wherupon the defendant took this writ, assigning for error the refusal of the Court to direct a verdict for the defendant.

Cyrus G. Derr (*Augustus S. Sassaman* with him), for the plaintiff in error.

The defendant had a right to blast on his farm so long as he did not do so in a reckless or negligent manner, and of this there was no evidence.

Fry *v.* Jones, 2 Rawle, 12.

It was contributory negligence for the plaintiff to remain where she did, after the first blast.

Lehigh Valley Coal Co. *v.* Jones, 5 Norris, 432.
Shearman & Redfield on Negligence, § 45.

J. Howard Jacobs (*H. P. Keiser* and *Rothermel Bros.* with him), for the defendant in error.

May 6th, 1889. THE COURT. This is one of those verdicts, unfortunately too frequent, which are dictated by the sympathies and not by the common sense of juries. According to the plaintiff's account, a perfectly healthy young woman was reduced to a physical wreck by the grossly negligent, if not intentional, misconduct of the defendant. It was a case that called loudly for exemplary damages, if for any, and yet the jury gave but $900. It is manifest that the jury themselves did not believe in the plaintiff's case, but on the communistic principle that as somebody was hurt, somebody else, right or wrong, ought to pay for it, rendered a verdict which in no possible view of the case, did justice to either party. It is the duty of Courts to handle such cases without gloves.

There was no ground upon which the plaintiff should have been allowed to recover at all. There was no negligence on the part of the defendant; the injury was not the natural or proximate result of the act complained of, and if it had been, the plaintiff herself was guilty of the plainest contributory negligence in subjecting herself to the risk of it.

The defendant was in the exercise of his legal right upon his own land. His motive therefore is not relevant or material, unless he exercised his rights in a negligent or unlawful way. Of this there is not a word of evidence in the case. True, his conduct was not handsome or amiable, but that of the plaintiff's husband was not much better, and neither was a legal cause of action, or had anything to do with the case. Not a single word of testimony is given on the plaintiff's side to show that the blasting by defendant was done in an unusual, or dangerous, or negligent manner. On the contrary, the only witness whose testimony bears at all closely on this point, Dumn, testifies that the cartridge was of ordinary size and strength, and that the distance from where plaintiff was to the blast, would be considered by those engaged in the occupation of blasting as a safe

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distance to retreat, when about to explode such a cartridge. On this branch of the case alone the plaintiff should have been nonsuited at the close of the evidence on her side.

But there was no evidence beyond a scintilla, if that much, that the injury complained of could have been foreseen or expected, as an ordinary, or natural, or proximate result of the defendant's act. The plaintiff was not struck by anything. Her husband says, "fine dirt flew over us, like drizzling or hailing," but plaintiff herself says she saw nothing of that kind and none fell on her. The sole cause alleged for the injury was the noise and concussion of the explosion, which plaintiff says was "a very severe blast . . . . a hard blast, a very hard blast," and her husband that "there was an explosion that the earth trembled." The two children, being healthy country boys, though only one and four years old respectively, do not seem to have been at all disturbed. This is all the testimony there is on the unusual or extraordinary character of the shock, and though one physician did gravely testify that the explosion of a six-inch cartridge of ordinary forty-five per cent. dynamite, between two tons of rock half embedded in the ground, could so bounce the solid earth as to concuss the spine of a woman eighty yards off, who did not remember whether she was sitting or standing at the time, yet one specimen of expert testimony, as thin as this, was not enough to carry such a case to the jury.

Lastly, the plaintiff was in the most culpable degree negligent herself in staying after the first blast. The testimony of defendant, called for cross-examination as a part of plaintiff's case, was that both blasts were by cartridges of the same kind, but whether they were or not, the plaintiff had notice by the first of what defendant was doing, and she neither went away, as a person of her nervous temperament ought in prudence to have done, nor even notified the defendant of the serious consequences to her which his acts might produce. That she accepted her husband's supposition that defendant would not blast again, or blast only the small rocks, was her misfortune, certainly not the defendant's fault.

In remaining after warning in a place which her exceptional temperament made dangerous to her, she accepted the risk.

The defendant's request for a peremptory instruction to find in his favor should have been granted.

Judgment reversed.

Opinion by MITCHELL, J.

STERRETT, J., dissented. S. H. T.

Jan. '89, 72. April 17, 1889.

Williamson v. McCormick.

Attachment—Motion to quash—Return of writs—Act of March 17, 1869—Practice.

A writ of attachment under the Act of March 17, 1869 (P. L. 1150), must be made returnable on the first return day after the issuing thereof; if made returnable to the next term, and there is a return day prior to that date by special Act of Assembly, the writ will be quashed.

Though a general appearance will cure a defective service, or even non-service of a regular writ, it will not cure a writ which is essentially illegal, such as a writ issued or made returnable at a time not authorized by law.

Error to the Common Pleas of Luzerne County.

Attachment, by John Williamson and George Wallace, doing business as Williamson & Wallace, against Thomas J. McCormick.

This was an attachment against an alleged fraudulent debtor under the Act of March 17, 1869 (P. L. 1150). The writ was issued August 25, 1888, and was made returnable to the first Monday in October next ensuing. The attachment was served personally upon the defendant, who entered an appearance by his attorney on September 3, 1888. On the same day the defendant filed an affidavit denying the allegation of fraud, and obtained a rule to show cause why the attachment should not be dissolved, returnable September 17, 1888. A commissioner was appointed, and depositions were taken on both sides. On September 17, 1888, the rule to dissolve was heard, and the defendant then moved to quash the writ for the reason that it was made returnable to the next term, which would begin on October 2, 1888, when it should have been made returnable to the first return day next after the writ issued, which was the second Monday in September.

The Court after hearing quashed the writ, WOODWARD, J., filing the following opinion:—

"The writ of attachment in this case was issued on the 25th August, 1888, and made returnable to the next term, which would begin 2d October, 1888.

"By the Act of 25th May, 1871 (P. L. 1150), it is provided that 'the first Monday of June, and the second Monday of September in each year shall be return days for all summons, writs, and other process that may hereafter be issued out of the Courts of Common Pleas and Orphans' Court of the county of Luzerne. And the same proceedings shall be had with respect to such process as though the said return days were the first days of regular terms of said Court of Common Pleas, etc."

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"The Act of March 17, 1869 (Pur. 69), under which this attachment was issued, contains this provision: 'That every such attachment shall be made returnable on the first return-day of said Court, next after the time of issuing thereof, and be served by the sheriff of the proper county, or by some general or special deputy, etc.'

"The writ in this case was not made returnable on the first return-day next after the issuing thereof, as commanded by the statute, and was, therefore, irregular and must be quashed. (See Parks *et al. v.* Watts, 18 WEEKLY NOTES, 99).

"We have examined the cases to which our attention was called by the learned counsel for the plaintiff, but are unable to see that they would justify us in disregarding the plain mandate of the statute, which compels the return of the writ on the first day next after the issuing thereof. The motion to quash is allowed."

Whereupon the plaintiffs took this writ, assigning for error the action of the Court in quashing the writ of attachment.

E. F. McGovern, for plaintiffs in error.

When a writ of attachment is served personally on the defendant it is equivalent to a service of a summons, and though the attachment be irregular, it is error to quash it, and thus displace entirely the case.

Sharpless *v.* Zeigler, 11 Norris, 468.
Biddle *v.* Black, 3 Out. 382.
Brewster's Practice, 31, § 57.
Lowenstein *v.* Sheetz, 7 Phila. 361.

The appearance of the defendant generally and his subsequent steps cured any irregularity or defect in the return-day of the writ.

Lindsley *v.* Malone, 11 Harris, 24.
1 Tidd's Practice, 513.
Poor *v.* Colburn, 7 Smith, 415.
Schober *v.* Mather, 13 Wright, 21.
Sherer *v.* Easton Bank, 9 Casey, 134.
Zion Church *v.* St. Peter's Church, 5 W. & S. 217.

This case differs from Parks *v.* Watts (18 WEEKLY NOTES, 99). In that case the defendant appeared by counsel, on the return-day of the writ, especially for the purpose of moving to quash the writ. Here the defendant did not wait for the return-day of the writ, but shortly after its issuing entered a general appearance and asked for a rule to dissolve. It was only at the last moment, after a fair and honest trial, on the merits, that the defendant moved to quash. It was error in the Court to quash the writ after appearance and a trial on the merits, and thus prevent the plaintiffs from even getting a judgment against the defendant.

John McGahren, for defendant in error, filed no paper-book.

May 6, 1889. THE COURT. Prior to the Act of May 25th, 1871 (P. L. 1150), the first day of each term, one of which commenced on the fourth Monday of October, was a return day for all writs of summons and other process issued out of the Courts of Common Pleas and Orphans' Court of Luzerne County.' To these were added, by the Act above mentioned, the first Monday of June and second Monday of September, thus making six return days, in each year, for all such writs and processes thereafter issued by said Courts.

The writ of attachment, under the Act of 1869, in this case, was issued August 25, 1888, returnable not on the next return day, but to the first Monday of October then next ensuing. On September 3d, 1888, the defendant, having filed an affidavit, obtained a rule to show cause why the attachment should not be dissolved, and afterwards moved the Court to quash the writ on the ground that it was not made returnable on the first return day next after the issuing thereof, as required by the Act. On October 8th, 1888, after hearing, the Court sustained the motion and quashed the writ for the reason above stated. This action of the Court is the only error complained of.

According to the command of the writ the defendant was not required to appear until the first Monday of October, and on the eighth of that month the Court, acting on the motion which he had an undoubted right to make, quashed the writ. It will thus be seen that defendant is not chargeable with unreasonable delay. On the contrary he moved in the matter very promptly.

This proceeding is purely statutory and the Act of 1869 should be at least substantially complied with. It declares "that every such attachment shall be made returnable on the first return day next after the time of issuing thereof, and be served by the sheriff of the proper county or by some general or special deputy," etc. As to the return day of the writ, the Act was manifestly disregarded. The next return day was the second Monday of September, but, as we have seen, that was ignored, and the writ made returnable three weeks later. This was in no sense a compliance with the express mandate of the Act, and when the matter was brought to the attention of the Court it was bound to pronounce the writ illegal and quash it. In Parks *et al v.* Watts (18 WEEKLY NOTES, 99), the same question was considered; and the Court below appears to have followed the judgment of this Court in that case. We there said: "The writ was not made returnable on the first return day next after the issuing thereof as commanded by the statute. The opinion of the learned Judge fully sustains the conclusion at which he arrived, and there was no error in quashing the writ of attachment." In principle the cases are identical.

There is no merit in the suggestion that the irregularity, as it is called, was cured by the appearance of defendant. Defective service or even non-service of a regular writ may be cured

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by a general appearance, because the object of service is to notify the defendant and thus secure his appearance to answer, etc.; but a writ issued, or what is in effect the same thing, made returnable at a time not authorized by law is essentially illegal, and if the fact is brought to the attention of the Court, in proper time, should be so treated. Under the circumstances of this case the learned Judge of the Common Pleas was clearly right in quashing the writ.

Judgment affirmed.

Opinion by STERRETT, J. S. H. T.

Jan. '89, 14. March 6, 1889.

Brooke v. Bordner.

Mortgages—Deeds—Notice—Constructive notice—Equity of redemption.

The holder of a legal title to real estate which is in effect a mortgage, may in turn mortgage that title, and by virtue thereof the mortgagee takes as security all his mortgagor's title, subject only to the equity of redemption existing against such mortgagor.

A. purchased land at public sale partly with cash furnished by B. In order to secure B. the title was taken in his name and an agreement entered into that B. should convey to A. whenever A. repaid him the cash advanced. A. took exclusive possession of the land. B. afterwards executed a mortgage to C. who had constructive notice from A.'s occupancy of the land as to his title. In a proceeding by scire facias by C. against B. upon the mortgage:

Held, that C. was entitled to judgment for the full amount of his mortgage but subject to be released and discharged upon payment by A. of the amount due by him to B.

Error to the Common Pleas of Berks County.

Scire facias sur mortgage by George Brooke, guardian, against John Bordner with notice to George Noll as terre-tenant.

George Noll appeared to defend, and by agreement of the parties the case was referred to Daniel H. Wingerd, Esq., as referee, under the Act of May 14, 1874.

The referee found the following facts:—

In the year 1874 George Noll bought at public sale two tracts of land, situate in Bethel Township, Berks County, from Jacob Dubbs, executor of Michael Houtz, deceased, the one tract containing 38 acres and 98 perches, and the other tract 7 acres and 134 perches. At some time prior to the sale of said tracts George Noll entered into an agreement with John Bordner to the effect that said Noll was to buy the property, for himself, at the rate of $105 per acre for the one tract and at the rate of $20 and some cents for the other, and that John Bordner, the defendant, was to assist him in raising the money to pay for the property. This agreement between Noll and Bordner was afterward reduced to writing and left in the possession of 'Squire Kerr, who has since died, and an extended search among his papers had been made and no agreement found.

At the time of the sale of the property bought by Noll he was living upon the premises and has remained in possession of them up to this time. Noll did the bidding upon the property which was knocked off to him; John Bordner was present but did not bid. Notes were given for the down money by Noll, upon which Bordner was security, and the subsequent payments made as follows: The entire sum to be paid by Noll amounted to $4281.89, and as Noll's wife was a daughter of Michael Houtz, deceased, she had her portion of the purchase-money to get as one of the heirs of the estate, so that her share was allowed as a payment for so much on the property, and Noll paid in cash in addition such an amount as with his wife's share aggregated $1218.89.

Bordner about that time gave Noll five or six hundred dollars in cash, and became security upon a number of notes for him to raise additional money, and when the deed was executed and delivered it was made to Bordner with the understanding that, as soon as the notes upon which Bordner was security were paid and he was free from liability, he was to convey the property over to Noll, the actual owner. In pursuance of this arrangement Noll paid from time to time, on account, and finally owed, and still owes to Bordner, the sum of $1600; and as security for the payment of this sum Bordner still held the deed.

Noll remained in possession, received the entire product of the land, paid the taxes, and insured the property and paid the premiums thereon, and asserted all the rights of ownership. Bordner never asked for nor received any rent for the premises, and paid no taxes until after a certain date, when he had the property assessed in his own name.

About the time Bordner had the two tracts assessed in his own name, which Noll had purchased under the above-stated understanding, and for which Bordner held the deed, he negotiated a loan on the two tracts which Noll had purchased and another tract which he himself owned, the latter containing 25 acres and 83 perches; the amount of this loan was $4000, payable in three years, at five and a half per cent. interest, and was secured by a mortgage upon the three tracts, dated March 27, 1886, and given to George Brooke, guardian of E. Brooke's children. This loan was negotiated by Bordner without the knowledge of Noll, and without notice to him, and he did not know of the matter until informed of it by an outside party after the mortgage had been given and duly recorded.

Some time after the date of this mortgage Bordner made an assignment for the benefit of creditors

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to John Obold. Default having been made in the payment of the interest upon the mortgage by Bordner this scire facias was issued thereon. The referee found that at the time the agent of the mortgagee examined the property with reference to making the loan no inquiry was made by him as to the title of Noll, who was in possession of the two tracts, it being taken for granted that he was in possession simply as the tenant of Bordner, and therefore the actual title of Noll to the land was unknown to the mortgagee and his agent.

Upon these facts the referee held that it was the duty of Brooke to make inquiry as to Noll's title, he being in possession, and that his failure to do so affected him with notice thereof in the same manner as if he had made the inquiry and learned the actual facts by the exercise of proper diligence and then had taken a mortgage upon the land.

The referee accordingly rendered judgment upon the mortgage in favor of the plaintiff against John Bordner, the defendant, for the full amount, but limited the lien of said judgment and the executions to be issued thereon to the tract of land therein described which wholly belonged to John Bordner, and in which George Noll had no equities. Whereupon the plaintiff took this writ, assigning for error the action of the referee in entering judgment as above.

Jeff. Snyder (*George F. Baer* with him), for plaintiff in error.

Noll was not a mortgagor, and therefore never had an equitable title. All he had was an interest in the land, arising from the trust held by Bordner for him.

Hewitt *v.* Huling, 1 Jones, 27.

Bordner having held himself out as the owner of the land is estopped from denying it both for himself and his privies.

Shultze *v.* Diehl, 2 P. & W. 277.
Miller's Appeal, 84 Pa. St. 391.
Chapman *v.* Chapman, 59 Id. 218.
Woodward *v.* Tudor, *81 Id. 394.
Putnam *v.* Tyler, 117 Id. 570.

The referee should have entered judgment against Bordner, as to such interest as he had in the two tracts claimed by Noll at the time of the recording of the mortgage—namely, the right to receive $1600, with interest, upon tendering a deed for the two tracts of land.

Henry C. G. Reber (*Daniel Ermentrout* and *C. H. Ruhl* with him), for defendants in error.

A mortgagee who omits to make inquiry is affected with constructive notice of an existing resulting trust in favor of the person in possession.

Rowe *v.* Ream, 9 Out. 543.
Hottenstein *v.* Lerch, 8 Id. 454.
Pearson *v.* Sharp, 19 Weekly Notes, 317.
Lance's Appeal, 17 Id. 513.

Bordner's deed was in fact a mortgage, and only a security for the payment of money. He had no estate or interest in the land.

Craft *v.* Webster, 4 Rawle, 255.
Ackla *v.* Ackla, 6 Barr, 228.
Moore *v.* Cornell, 18 Smith, 322.
Michener *v.* Cavender, 2 Wright, 338.
Myers *v.* White, 1 Rawle, 355.
Rickert *v.* Madeira, Id. 325.
Wilson *v.* Schoenberger, 7 Casey, 295.
Asay *v.* Hoover, 5 Barr, 35.
Witmer's Appeal, 9 Wright, 463.
Talbot's Appeal, 2 Chest. Co. Rep. 413.

April 15, 1889. The Court. The learned referee accurately perceived and stated the general effect of the transaction, but failing to give due weight to the distinctions between legal and merely equitable rights, he denied plaintiff the remedy to which he was entitled.

Bordner bought land, received a deed, and thus became the legal owner. While thus the legal owner, he made a mortgage to Brooke, duly executed and recorded. Brooke thus acquired a lien on the land, perfectly good against Bordner and every one claiming under him, and having brought suit on his mortgage, what is there to stand in the way of his recovery? So far as Bordner and his assignee are concerned, nothing. Bordner mortgaged all the title he had to Brooke, and when he subsequently made an assignment the assignee took nothing but an equity of redemption, because his assignor had nothing else to give. As between Brooke and the assignee the former had an equity at least equal in force and prior in time, and had his legal right in addition. So far, therefore, as this is a *scire facias* against Bordner and his assignee, it is the ordinary case of mortgagor and mortgagee, and there is nothing to prevent judgment and execution in the ordinary course of law.

But the *scire facias* being with notice to the terre-tenant Noll, the latter is entitled to come in and make defence *pro interesse suo.* It is found by the referee, and uncontested, that Noll made an agreement with Bordner, at the time of the latter's purchase, verbal then, but subsequently reduced to writing, by which Bordner was to take the title, subject to the right of Noll to have it conveyed to him upon the payment of a certain sum of money. A portion of this sum has been paid, and it is agreed that $1600 remain due. Bordner's title, therefore, was subject to a trust in favor of Noll, which made it, in effect, a mortgage, and it would be so treated in equity. The referee therefore held that it was only a mortgage, and could not be again mortgaged by Bordner to Brooke. But this is a purely technical objection, and can apply only to a technical mortgage, and Bordner's title was not technically a mortgage. In law it was the full title to the land, and a mortgage of it was none the less a mortgage, because the title, in equity, and upon certain terms, was defeasible by Noll. If Noll had not happened to live on the land Brooke would have taken a good mortgage against

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him as well as against the rest of the world, but as his possession was enough to put Brooke upon inquiry, the latter took subject to Noll's equity, whatever that was. If the suit had gone on in the ordinary way to judgment and execution, which, as we have seen, could not have been prevented by Bordner or his assignee, and Brooke had purchased the land at the sale, Noll could then have come in by bill to establish his equity and compel conveyance of the legal title on payment of the amount due. Having been brought in on the *scire facias*, his rights against the plaintiff are neither greater nor less. His land is subject to the mortgage, with a right to be released on the payment, not of the amount of the mortgage, but of the balance due on the original agreement with Bordner. That balance having been due to Bordner as holder of the legal title, is now due to Brooke as mortgagee of that title; and as Noll had no equity to compel Bordner to convey the legal title without payment of the balance due, so now he has no equity to compel a release of his land from the mortgage without payment of the said balance to Brooke. Upon such payment, however, Noll will be entitled not only to a release of the mortgage by Brooke, but also to a conveyance of the title by Bordner, or whoever may then stand in his place.

Judgment reversed, and record remitted, with directions to enter judgment for plaintiff Brooke against defendant Bordner, and terre-tenant Noll for the amount of the mortgage, with interest and costs, said judgment to be released and discharged as to Noll, terre-tenant, on payment of the sum of $1600, with arrears of interest, and costs.

Opinion by MITCHELL, J. S. H. T.

Common Pleas.

C. P. No. 1. March 30, 1889.

Gill v. Baizley & Roeske, trading, etc.

Partnership—Extent of a partner's power to bind firm—Where there is express notice of any partner's incapacity to contract for the firm, the latter will not be liable.

Rule for judgment for want of a sufficient affidavit of defence.

This was an action of assumpsit for goods sold and delivered.

Baizley, one of the partners, filed an affidavit, setting forth that the goods, for which this suit was brought, had not been ordered by him but by his partner, Roeske, and that prior to the sale of the goods by plaintiff, he (Baizley) had expressly notified the plaintiff not to sell any goods to Roeske, unless upon his (Baizley's) written order, and that if he did he (Baizley) would not be responsible therefor. In spite of this notice the plaintiff had furnished the goods, for which this suit was brought, to Roeske, without Baizley's order.

Allen H. Gangewer, for the rule.

John R. Read and *Silas W. Pettit*, contra.

The partnership relation is founded entirely on agency, and if any partner limits the authority of his copartner as his agent, he will not be liable to third parties on contracts made by such copartner in excess of his authority, if such third parties have notice of the limitation of the copartner's authority.

Lindley on Partnership, § 170.

THE COURT. Rule discharged.

Orphans' Court.

January 22, 1889.

McGlathery's Estate.

Will—Construction of—Legacy to children of a brother—Act of May 6, 1844—Rule in Gross's Estate (10 Barr, 360) and rule in Minter's Appeal (4 Wright, 111).

When a legatee to whom the legacy is given absolutely, with an executory limitation over, dies in the lifetime of the testator, but after the event has happened on the non-occurrence of which the limitation over depends, the bequest over cannot take place.

Sur exceptions to the adjudication of the account of the executors of Jane McGlathery, deceased.

Before the Auditing Judge (HANNA, P. J.), the following facts appeared: Testatrix gave the residue of her estate to her brother Eli for life; after his death to her brother Isaac, if then alive, and if Isaac should then be dead, "his children shall have the same to be equally divided among them, the same as if it came from their father."

Eli died before Isaac, and both died before the testatrix. Isaac left him surviving three children and one grandchild, the son of a deceased son, and two grandchildren, sons of a deceased daughter. The Auditing Judge awarded the balance for distribution to the three living children of Isaac, to the exclusion of the grandchildren.

Exceptions were filed on behalf of the grandchildren.

William Hopple, Jr., for the exceptants.

Henry T. Dechert, contra.

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February 2, 1889. THE COURT. If the gift over in case of the death of the brother before the termination of the prior life estate had been to his children, simply, and if it took effect in consequence of his death in the lifetime of the testatrix, it would have to be conceded that children of his deceased children would, *ex vi termini*, be excluded; for though the Act of May 6, 1844, provides that a devise or legacy to a brother or sister, or children of a deceased brother or sister, shall in the event of their death leaving issue "be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator," it was held in Gross's Estate (10 Barr, 360), that notwithstanding the Act, a legacy to children of a brother or sister is still to be regarded as a legacy to a class, whose members are not determined until the gift becomes operative. It is true that in other States similar statutes have been differently understood (Moore *v.* Dimond, 5 R. I. 121; Yeates *v.* Gill, 9 B. Mon. 206; Jamison *v.* Hay, 46 Mo. 552); but as was said in Guenther's Appeal (4 WEEKLY NOTES, 41), where the decision was followed—perhaps on the ground of *stare decisis*, it is now too late to question the propriety of Gross's Appeal.

Here, however, after a life estate to another brother, there is an absolute gift to Isaac of the residuary estate, with the provision that if he be dead at the death of the tenant for life "his children shall have the same, to be equally divided among them, *the same as if it came from their father*," and these words, indicating the manner in which they are to take, cannot be rejected. "Children" do not take the estate of an intestate father to the exclusion of issue of deceased children; and to give effect, therefore, to the bequest as an entirety, we are compelled to understand the word children in a more extended sense than it primarily imports, and as the equivalent of issue. In Haldeman *v.* Haldeman (4 Wright, 29), the direction that at the death of the tenant for life the estate should "descend" to her children, was sufficient to show that by "children" the testator intended the whole line of descent. (See also Hayes on Estates Tail, 35; Smith on Executory Interests, 537.) The Courts will more readily adopt this meaning, where, as here, the effect of not doing so would be to exclude persons standing in the relation of heirs or next of kin. "It is well settled that even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the Courts anxiously lay hold of slight expressions as a ground for avoiding a construction which in all probability defeats the actual intention, by excluding the issue of a deceased child from participating in a general family provision." (2 Jarman on Wills, *685, citing Giles *v.* Giles, Jarvis *v.* Pond, etc., etc. See also Smith *v.* Smith, 8 Sim. 353; Loring *v.* Thomas, 1 Dr. & Sm. 497.)

The same result would be reached by treating the direction that the children shall take "the same as if . . . from their father," as conferring, by necessary implication, a share upon the issue of deceased children—since otherwise the children will not so take. Or perhaps the members of the class are thus so individuated that the case is not within the principle of Gross's Estate at all, but is ruled by Minter's Appeal (4 Wright, 111).

But it is unnecessary to consider this question, since it is quite clear, under the authorities, that the gift to the children never took effect at all. Both brothers died in the lifetime of the testatrix, but as Isaac was the survivor, his right was indefeasibly fixed, subject only to the possibility of lapse, and the limitation to his children, which was conditioned upon his death during the continuance of the life estate, was defeated. When a legatee, to whom the legacy is given absolutely, with an executory limitation over, dies in the lifetime of the testator, but after the event has happened on the non-occurrence of which the limitation over depends, the bequest over cannot take place; or, as the rule is stated more generally by Mr. Theobald, "If all the conditions are fulfilled which would entitle those taking under the prior gift to indefeasible interests, supposing they had survived the testator, if, in other words, the failure of the prior gift is due to lapse and lapse only, the gift over does not take effect. (Williams *v.* Chitty, 3 Ves. 545; Cathorpe *v.* Gough, 3 Bro. C. C. 395; Doo *v.* Brabant, Id. 393; Tarbuck *v.* Tarbuck, 4 L. J. Ch. 129; Brookman *v.* Smith, L. R. 6 Ex. 291; Theobald on Wills, 336.)

The legatee having died in the lifetime of the testatrix, the legacy would have lapsed but for the provisions of the Act of 1844, by which it is preserved to his issue, *per stirpes*, viz: his children and the issue of deceased children. The effect would have been the same, irrespective of the Act, in view of the fact that the children and issue of the deceased children of the brother appear to be the next of kin of the testatrix, and as such, the gift being of a residue, entitled under the intestacy caused by the death of the legatee.

The exceptions are sustained, and the adjudication amended accordingly: the share which has been attached being awarded subject to the attachment.

Opinion by PENROSE, J. J. D. B., JR.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, MAY 17, 1889.* [No. 3.

Supreme Court.

Jan. '88, 328. March 25, 1889.

Usher v. West Jersey Railroad Co.

Negligence—Death—Damages—Administrators—New Jersey Act of March 3, 1848.

When an action is brought in the Courts of this State to recover damages for the death of a person occurring in another State, the right of action depends solely upon the statutes of such other State, and the action must be prosecuted by the person designated in such statutes.

The Act of New Jersey of March 3, 1848 (P. L. 151), gives a right of action "whenever the death of a person shall be caused by wrongful act, neglect, or default." Section 2 of said Act provides: "That every such action shall be brought by and in the name of the personal representatives of such deceased person: the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin." A suit having been brought in Pennsylvania by the widow of a decedent alleged to have been killed in New Jersey by the negligence of a railroad company:

Held, that the right of action depended solely upon the New Jersey statute, and that the provision of that statute requiring suit to be brought by the personal representatives was not merely a question of remedy, and was not therefore subject to change according to the *lex fori*.

Held, therefore, that the action by the widow could not be maintained.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by Josephine Usher against the West Jersey Railroad Co., to recover damages for the death of John F. Usher, husband of the plaintiff, alleged to have been caused by the negligence of defendant.

On the trial, before WILLSON, J., the plaintiff proved the death of decedent while travelling as a passenger on the road of defendant in the State of New Jersey, and also put in evidence the Act of New Jersey of March 3, 1848 (P. L. 151), authorizing the recovery of damages for occasioning the death of a person.

Defendant moved for a nonsuit on the ground that the action was not commenced by the personal representatives as required by Act of Assembly of the State of New Jersey, the death having been caused in that State.

The Court entered a judgment of nonsuit, which the Court in banc subsequently refused to take off. Plaintiff thereupon took this writ, assigning for error the refusal of the Court to take off the nonsuit.

George S. Graham (*John Roberts* with him), for the plaintiff in error.

A suit by an administrator will not lie in this State.

Book's Adm'r *v.* Borough of Danville, 14 Norris, 158.

The second section of the New Jersey Act relates to the remedy merely. But the remedy is governed by the *lex fori*.

Thornton *v.* Ins. Co., 4 Casey, 531.
Denrick *v.* R. R. Co., 103 U. S. 11.
Knight *v.* W. J. R. R. Co., 12 Out. 250.

Questions as to who are the proper parties to suits relate rather to the form of the remedy than to the right and merit of the claim, and are therefore to be determined by the law of the forum.

Kirkland & Co. *v.* Lowe, Pattison & Co., 33 Miss. 423.
Orr *v.* Amory, 11 Mass. 25.
Leonard *v.* Steam Navigation Co., 84 N. Y. 48.
Chicago, etc., R. R. Co. *v.* Doyle, 8 A. & E. Ry. Cas. 171.
Selma, etc., R. R. Co. *v.* Lacy, 49 Ga. 406.

David W. Sellers, for defendant in error.

There was no action for damages for death at common law, and the Act of this State had no extra-territorial effect to an act of negligence causing death in New Jersey.

Whitford *v.* Panama R. R., 23 N. Y. 465.

This action must fail because not brought "by and in the names of the personal representatives," as required by the Act of New Jersey.

Patton *v.* R. R. Co., 96 Pa. St. 169.

May 6, 1889. THE COURT. John F. Usher was killed by an accident upon the defendant's road in New Jersey, under circumstances of negligence, as we must assume, for which he would have had an action had he been only injured. But having been killed, his right of action, under the universal rule of the common law, terminated with his life. If any right of action remained, it must have been wholly based upon statute, and as the occurrence out of which, if at all, the right must arise, took place in New Jersey, it is to the statutes of that State alone that we must resort to ascertain the nature of the right, and the party in whom it is vested.

It is not questioned that the action is transitory, and that it may be sustained in the Courts of this Sate, if jurisdiction be acquired over the defendant. Adverse decisions have been made on this point in several States, but for Pennsylvania it has been settled by this Court in Knight *v.* W. J. R. R. (108 Pa. 250). Comity will enforce rights, not in their natures local, and not contrary to the policy of the government of the tribunal, no matter where arising, and without

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regard to whether they are of common law or statutory origin. There is no difference in this respect between such rights, except in the presumption that common law rights in other States are similar to our own, and the absence of such presumption, and consequent necessity of proof, in regard to rights merely statutory.

The statute of New Jersey (March 3, 1848, P. L. 151) provides in section 1 "that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Section 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person; the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate," etc.

The present action was brought by the widow of Usher, and we thus have the question presented whether she can maintain the action in her own name and to her own use.

The question has never been expressly decided in this State, nor, so far as we can learn, elsewhere. It arose directly in Patton *v.* Railway Co. (96 Pa. 169), and was ruled by the Judge at the trial against the plaintiff, who, as in the present case, was the widow. In this Court the judgment was reversed, but upon other grounds. The opinion of the Court was, however, indicated very clearly by what was said in regard to the allowance of an amendment making the administratrix plaintiff: "it very clearly appeared there was a mistake in omitting the name of the administratrix of William Patton, for the statute under which the action was brought directed it should be by and in the name of the personal representative. . . . This case was tried just as if the legal plaintiff had brought suit and was upon the record, and the amendment ought to have been allowed. When it was moved a year had not elapsed from the date of the decedent's death, . . . and, if the trial was free from error, it would *have saved the verdict.*" This Court, however, did not mean to pass upon the form of the action, for the obvious reason that the larger question, whether the action could be maintained in this State at all, was the main question attempted to be raised, but which the Court held was not in fact raised, because of an imperfect reservation of the point at the trial below, and therefore refused to pass upon. That main question was subsequently decided in the affirmative in Knight *v.* R. R. (108 Pa. 250), but the present question has remained open until now. The passage quoted, however, from the opinion of our late brother TRUNKEY, is valuable as showing the inclination of the Court at that time.

The case of Books *v.* Borough of Danville (95 Pa. 158), also has some weight as raising the converse of the present question. That was an action by an administrator for the injuries to the decedent, and it was sought to be maintained on the provision of the Constitution that the action for such injuries "shall survive." A very eminent Judge of the Common Pleas, ELWELL, P. J., held, however, that as the Constitution permitted the Legislature to prescribe for whose benefit the action should be prosecuted, and as there was no other legislation than the Act of 1855, the administrator had no right. The plaintiff was accordingly non-suited, and this Court sustained the judgment, holding that as the action was purely statutory it could only be maintained by the party to whom the statute gave it.

Nor, as already said, have we found any direct case upon the point in other States. The general course of decisions bearing collaterally upon it, is however, adverse to sustaining such an action except by the very one whom the statute names as entitled to bring it. Thus in Woodard *v.* R. R. Co. (10 Ohio St. 121) it was held that an administrator appointed in Ohio, could not maintain an action in Ohio, for a death caused by negligence in Illinois, although it was proved that the statutes of both States were alike, and gave such an action to the administrator. The Court held that the Illinois statute gave the action only to the Illinois administrator, and that while the Ohio administrator had a right of action by the Ohio statute, for causes arising in that State, yet that statute could not support an action for causes arising in Illinois.

Woodard *v.* R. R. Co. was approved and followed by the Supreme Court of Massachusetts in Richardson *v.* R. R. Co. (98 Mass. 85), upon the same grounds, the only difference being that in the latter case, it did not appear that there was any law of Massachusetts giving an action under similar circumstances.

A broader view of the statute was however taken in Leonard *v.* Navigation Co. (84 N. Y. 48), and Denrick *v.* R. R. Co. (103 U. S. 21), where it was held that the statutes, though not having any extra-territorial force, would be recognized by comity, and that as they give an action to the personal representative generally, without

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limitation as to the authority under which he is appointed, an administrator of the home jurisdiction can maintain the action, even for causes arising in another State, upon proof of the laws of such State authorizing the action.

With these latter decisions accords our own case of Knight *v.* R. R. Co., already cited. But none of the cases raise or discuss the question involved here, whether the widow can maintain an action in her own name, under a foreign statute, which expressly directs the action to be brought by the administrator, though for the ultimate benefit of the widow and next of kin.

We are thus left to discuss the question upon general principles.

At the outset we may say that the action can get no support from the fact that a closely similar statute in this State, gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children. It is not seriously claimed that our statute has any extra-territorial force which can produce rights from occurrences in New Jersey. On this point all the authorities agree. (Whitford *v.* R. R. Co., 23 N. Y. 484; Woodard *v.* R. R. Co., 10 Ohio St. 121; Richardson *v.* R. R. Co., 98 Mass. 85; Com. to use of Allen *v.* R. R. Co., 45 Md. 41; R. R. Co. *v.* Lacy, 43 Ga. 461; Anderson *v.* R. R. Co., 37 Wis. 321; McCarthy *v.* R. R. Co., 18 Kans. 46.)

The language of the New Jersey statute is that "every such action shall be brought by and in the name of the personal representatives of such deceased person." As this language is entirely clear, unqualified and peremptory, it would seem to settle the question without more. But it is sought to escape this conclusion by insisting, first, that as the amount recovered in such action is to be for the exclusive benefit of the widow and next of kin, the widow may be allowed to sue for it in her own name; and secondly, that the second section concerns only the remedy, and therefore may be disregarded by the Courts of Pennsylvania, who may administer the rights of the *lex loci*, under the procedure of the *lex fori*. I believe, however, that a brief consideration will show that neither of these grounds is tenable.

As to the first, there is no room for latitude of construction. The meaning of the language used is plain and unambiguous, and its directions mandatory. It is an established rule that statutory remedies are to be strictly pursued, and we have no right when the Legislature have commanded one form, to say that another will serve the purpose equally well. The law-making power has settled the remedy as well as the right, and Courts are not authorized to vary or depart from either. Moreover the distinction made in this statute between the parties having the right of action, and the ultimate beneficiary, is familiar to all common law States, and is of settled importance, especially in those where, as in New Jersey, the administration of law and equity is not only in separate forms, but by separate tribunals. In the face of this settled distinction, clearly recognized and commanded by the statute, it would be an act of judicial usurpation to say that the mandate of the statute may be disregarded. In this connection the language of our brother GREEN, in Books *v.* Borough of Danville (95 Pa. 166), is very strong and pertinent: "No other persons have been clothed with the right, and hence no other persons can sustain such actions. The present action is brought by an administrator to recover damages for injuries resulting in the death of the intestate. But the Legislature has not declared that such a person may maintain such an action, and hence the right to do so does not exist."

But secondly, is the question of the party who may sue, merely a question of the remedy, and therefore determinable by the law of the forum? Undoubtedly there are cases where it is so. Whether an infant shall sue by guardian or by next friend, and whether an assignee shall sue in his own name or that of his assignor, and the like, are clearly questions of procedure only. But where the matter is not of form merely, but of right, the remedy must follow the law of the right. The second section of the statute in question cannot be disregarded, or separated from the first; they are as closely interwoven, and as necessary to each other, as if they were parts of the same section. This is plain from the most cursory examination. The first section confers no right of any kind, or on any body. It merely imposes a liability. The second section confers the right, and without it the first would be utterly nugatory and ineffective. Apart, the first gives no right, the second imposes no liability; together they give the liability, the right, the party to enforce the right, and the party entitled to the benefit, and they give all these together, by plain words which constitute one grant, to wit, an action, to be enforced as given, and not capable of being split up into different rights, with varying remedies, according to the tribunals in which they may chance to be asserted.

If this result were at all doubtful on principle, there is another consideration of controlling weight. It is unquestionable that in New Jersey the personal representative alone can sue, and it is equally clear that he can maintain his action there, notwithstanding this action, or any other, brought by another party in another jurisdiction. It would be a strange perversion not only of comity, but of justice, to entertain an action here, which would either oust the right of the legal party in the place where the cause of action arose, or subject the defendant to as many separate recoveries as parties could be found who might

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be entitled under the laws of different forums to bring actions under similar circumstances.

Nor is the argument helped by the suggestion that as the action by the personal representative is only a means to an end—*i. e.*, the benefit of the parties ultimately entitled to the damages, the Court can control the disposition of the verdict, so as to administer the rights of all parties according to the law of New Jersey. Why should our Courts undertake such an unnecessary task, in the face of a direct prohibition by the law of New Jersey? The administration of the law of another jurisdiction is never desirable, and at best is full of difficulties and uncertainties. It is assumed *ex necessitate* when assumed at all, and it would surely be pushing comity beyond its legitimate bounds, to assume to do for the tribunals of New Jersey what they certainly would not do for themselves—administer the right of one party through a suit brought by another.

Before closing I may say that the statute of New Jersey, as of most of the other States, is an almost literal transcript, as far as it goes, of the 9 and 10 Victoria, c. 93, commonly known as Lord Campbell's Act. I have examined the English digests without finding any case bearing upon this question, but it may be noted, as some indication of the view taken of that Act, that a possible inconvenience, such as is alleged in this case, has been provided for by the 27 and 28 Vict. c. 95, s. 1, which enacts, that if there shall be no executor or administrator, or there being such, he shall fail to bring suit for the space of six months after the death, then such action may be brought by and in the name of all the persons for whose benefit the action by the executor would have been. This is certainly a strong indication of the understanding that nothing but a statute could authorize an action in the name of any one but the personal representative to whom the right was given in the first instance.

The learned Judge was right in entering a nonsuit, and the judgment is affirmed.

Opinion by MITCHELL, J. L. L., JR.

Jan. '89, 411. May 3, 1889.

Nason v. The Directors of the Poor of the County of Erie.

Treasurer of Directors of the Poor—Accounts of—County auditors authorized to audit—Proceedings of Poor Boards, etc.—When irregular—Failure of bank in which public money is deposited—Receiver of such money not thereby released from liability—Acts of April 22, 1879, *and June* 2, 1881.

The directors of the poor of a county can perform no official act, can bind the county by no contract, except when acting as a board, and they can only act as a board when lawfully convened as such.

A receiver of public money who has given bond for its safe keeping, is not discharged from liability therefor by the failure of his banker.

Baily *v.* The Commonwealth, 20 WEEKLY NOTES, 221, followed.

A treasurer of a board of school directors deposited the funds of the board with the Humboldt Safe Deposit and Trust Company, which subsequently failed. At an informal meeting of two of the three directors of the poor, a notice of which had been mailed to the third director, but not received by him, it was agreed that if the treasurer should assign to the directors his bank book with the said bank, and all rights thereunder, his bond should be surrendered, and he released from all liability. At this meeting no minutes were kept. At the next regular meeting of the board, the absent director was informed of the proceedings of this meeting. The county auditors subsequently settled a balance against the treasurer, whereupon he appealed, and an issue was framed:

Held, that the proceedings of the board were irregular, and neither they nor the failure of the bank constituted any defence to the action.

The Acts of April 22, 1879 (P. L. 30), and June 2, 1881 (P. L. 44), making it the duty of the county auditors to audit the accounts of "directors of the poor, of the treasurer and steward of any poor-house, within any county where a poor-house has been . . . . erected," authorize the auditing by said auditors of the accounts of the treasurer of the directors of the poor. Said Acts are constitutional.

Error to the Common Pleas of Erie County.

Issue upon the appeal of D. W. Nason late treasurer of the Directors of the Poor of Erie County from the report of the auditors of said county, in which the Directors of the Poor of Erie County were plaintiffs and D. W. Nason, defendant.

The case was tried before GUNNISON, P. J., without a jury, whose decision was as follows:—

"This is an issue framed upon the appeal of the defendant from the report of the county auditors, reporting a balance in his hands as treasurer of the Directors of the Poor of $1582.69.

"The facts, as they appeared from the admissions of counsel, and evidence produced at the trial, are substantially as follows:—

"(1) The plaintiffs are a corporation, invested with the care and maintenance of the poor of Erie County, and for that purpose have power to call upon the commissioners of Erie County for such amount of money, from year to year, as they may deem necessary.

"(2) The defendant was, by said directors, duly appointed treasurer of said corporation, January 12, 1885, for the term of one year, qualified, gave a bond in the regular form, and continued to act under this appointment until January 6, 1886, when he was appointed to hold the office temporarily, or until April 1, 1886, but gave no new bond upon such reappointment. In his capacity of treasurer, he paid all warrants drawn by order of the board, including those for the

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expenses at the poor-house, but no warrants were paid by him upon the order of the steward of the poor-house, who had no authority to draw warrants upon the funds in his hands. His successor entered upon his duties of the office April 1, 1886.

"(3) The defendant, as treasurer aforesaid, received from the treasurer of the county of Erie, on the 12th day of January, 1885, a check on the Humboldt Safe Deposit and Trust Co., of Erie, Pa., for the sum of seven thousand dollars, payable out of the funds of the county then on deposit in said bank. He deposited the check in the same bank, and it was credited to him in the deposit book issued to him as treasurer by the said bank, and was drawn upon by the defendant as treasurer aforesaid, to pay the warrants made and issued by said Directors of the Poor.

"(4) The Humboldt Safe Deposit and Trust Co. became insolvent and suspended payment February 1, 1885, and on the 4th day of April, 1885, made an assignment of all its assets to J. C. Hilton, Esq., for the benefit of creditors. Upon the day upon which the bank suspended payment there was a balance to the credit of the account of D. W. Nason, treasurer, of $1758.54, which was reduced by a dividend made by the officers of the bank, before the assignment of Hilton, to $1582.69.

"(5) The county auditors who audited the defendant's account for the year 1885, reported February 9, 1886, a balance in the treasury of $19,806.63, 'which includes $1582.69 deposited in Humboldt Bank.' This report was not appealed from.

"(6) In March, 1886, Joseph Henderson, president of the Board of Directors of the Poor, etc., directed the defendant, as secretary of the board, to call a special meeting of the directors, for the purpose of settling with the defendant, to be held the 31st day of March, 1886, at the office of the board, in the city of Erie, the regular place for meeting being the poor-house in Millcreek Township. Notices of the meeting were accordingly written by the defendant, and placed in a letter box in the city of Erie, post-paid, directed to the two directors, Franklin Willis and O. C. McAllister, the third member of the board being Mr Henderson, the president, by whose direction the meeting was called. Franklin Willis received the notice addressed to him. Mr. McAllister never received the notice sent him.

"(7) On the 31st day of March, two of the directors, to wit, Joseph Henderson and Franklin Willis, met at the office in the city of Erie, Mr. McAllister not being present, and agreed to a settlement with the defendant as follows: Upon the defendant assigning to the Directors of the Poor the deposit book issued by the Humboldt Safe Deposit and Trust Co., with his rights thereunder, transfer and deliver to his successor all books and papers pertaining to the office, and pay to his successor all money in his hands as treasurer, he should be released from all liability for the amount in the bank, and his bond should be surrendered and cancelled. No minutes of this meeting were kept by the secretary. The proceedings were passed by the testimony of those present. The proceedings were informal. No motions were put or declared adopted. The defendant performed the part of the agreement so made to be performed by him, and received his bond from the president of the board.

"(8) There was no subsequent formal or official ratification by the board of the action had at the special meeting of March 31, 1886. Mr. McAllister, the member who was not present at that meeting was informed on the day of the next regular meeting of what had been done by his colleagues at the special meeting. The plaintiffs have, however, received $237.40, upon the claim from the assignee of the bank upon a partial distribution of the assets collected by him.

"(9) The county auditors, who audited the defendant's account from January 1, 1886, to April 1, 1886, reported a balance due from him of $1354.79. It was admitted, however, that the amount reported by them was erroneous, the real balance of the deposit in the bank, after deducting the amount received upon the partial distribution, being $1345.29.

"From this report the defendant appealed, upon which this issue was formed.

"On the part of the plaintiffs, it is contended that the defendant was bound to account for and pay over all moneys received by him in his official capacity; that the failure of the bank was no defence to the payment of the balance standing to the credit of his account as treasurer; that there never was a settlement between him and the Board of Directors, whatever was done having been done by the two individual members present at the time, not at a legal meeting of the board; and that even if such a settlement had been made by the board at a regular meeting, it would have been *ultra vires*, and that it could not be subsequently ratified.

"The defendant claims that the settlement made between him and the two directors was upon good considerations, and within the scope of the authority of the Board of Directors; that the knowledge of that settlement acquired by the third director soon after it was made, he not objecting thereto, amounted to a ratification by the board; and that having accepted the distribution made by the assignee of the bank upon the claim assigned to them by the defendant, they are now estopped from denying the validity of the settlement. He further contends that there is no authority for the auditing and settlement of his accounts by the county auditors. That the Acts

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of 22d April, 1879 (P. L. 30), and 2d June, 1881 (P. L. 44), making it the duty of the county auditors to audit the accounts of 'Directors of the Poor and of the treasurer and steward of any poor-house within any county wherever a poor-house has been, or may hereafter be erected,' do not authorize them to audit the accounts of the treasurer of the Directors of the Poor; also, that each Act is unconstitutional so far as the accounts of the treasurer are concerned, because it does not clearly express in its title the subject-matter, and the Act of 1881 is unconstitutional because it is special legislation.

"The first question arising in the determination of the case is one of jurisdiction, and involves the constitutionality of the Acts of 1879 and 1881. If the county auditors had no authority to audit the defendant's account, their audit was not binding on him, and his appeal should be sustained.

"Whether or not the Act of 1881 is special legislation need not be considered. Its purpose was to limit the operation of the Act of 1879, as to the cases specified. The Act of 1879 is not objectionable as special legislation certainly.

"I can see no force in the distinctions made by the counsel for the defendant that he is not 'treasurer of the poor-house,' and therefore the Act does not contemplate him as one of the officers whose accounts are to be audited by the county auditors.

"I have not been referred to, nor have I been able to find any Act of Assembly creating the office of 'treasurer of the poor-house.' The defendant was treasurer of the Directors of the Poor, and as such it was his duty to pay all warrants drawn by the directors for all expenses at the poor-house. There was no other person authorzed to pay those warrants. I am therefore of the opinion that he was 'treasurer of the poor-house,' within the meaning of the Act of Assembly.

"Does the Act offend against the Constitution so far as this office is concerned, in that it does not indicate its subject sufficiently in its title? It is entitled 'An Act extending the powers and authority of county auditors, authorizing them to settle, audit, and adjust the accounts of the Directors of the Poor of the several counties of the Commonwealth.' It enacts 'that in addition to the power and duty of county auditors, as now conferred on them by law, it shall be their duty to audit and adjust the accounts of the Directors of the Poor, *and of the treasurer and steward of each and every poor-house*,' etc. If the title were simply 'An Act extending the power and authority of county auditors,' omitting the clause which follows, there would be no doubt as to its constitutionality. It must be borne in mind that 'all the presumptions are in favor of the constitutionality of an Act of Assembly; to doubt is to decide in favor of its constitutionality.' (Craig *v.* First Presbyterian Church, 88 Pa. St. 42.)

"'It is sufficient if the title fairly gives notice of the subject-matter of the Act so as reasonably to lead to an inquiry into its body.' (Esling's App., 89 Pa. St. 205; Allegheny County Home's App., 77 Id. 80.)

"The provision authorizing the settlement and auditing of the accounts of the treasurer of the poor-house is germane to the subject-matter as expressed in the title. The accounts of the treasurer of the poor-house are the accounts between him and the Directors of the Poor. They are the accounts of the directors themselves. I am therefore of opinion that the Act is constitutional.

"Since the decision in Baily *v.* The Commonwealth (20 WEEKLY NOTES, 22), it cannot be doubted that the law is in this State, that in an action against a receiver of public moneys, it is no defence that the money was deposited in good faith, in a bank which afterwards became insolvent, by which insolvency the money was lost. The defendant is therefore liable for the balance claimed, unless he has been discharged by the settlement which he alleges was made by the Directors of the Poor with him. Does the testimony show that such a settlement was made?

"That an attempt was made to make it by two members of the Board is true. But it was not at a regular meeting, the third member was not present, nor did he have due and legal notice of the meeting. It is well settled that notice of a special meeting of a corporation must be given to each person entitled to be present; and further, that when there is no method of giving notice prescribed by law, or by the by-laws or regulations of the corporation, personal notice is required (1 Potter on Corporations, §§ 336, 337, 342; Pike Co. *v.* Rowland, 94 Pa. St. 238).

"No notice whatever was received by Mr. McAllister, and that defect not being caused by his presence without notice, the settlement made or attempted to be made by the members, can have no binding effect.

"Nor was there such subsequent ratification by the board as would be binding. No minutes of the special meeting were recorded, none were afterwards read or adopted. The fact that Mr. McAllister was afterwards told of the action of his fellow-directors, he not protesting, would not amount to ratification. Nothing but an official ratification at a legal meeting would avail to bind the board.

"The defendant, however, urges that the plaintiffs having received a dividend from the assignee of the bank, upon the account transferred to them by him, are estopped from questioning the validity of the agreement by which he was to be released, even if the agreement were not made, or ratified by the board at a legal meeting. The facts show that there was one essential element

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lacking to constitute an estoppel. In order to successfully set up an estoppel, it must appear that the party setting it up was induced by the acts or representations of the other party to act to his injury. The defendant has not shown that he sustained any injury. Moreover the claim he assigned to them was for money deposited by him as treasurer, which was the very money he was bound in law to turn over or pay to the board, or to his successor in office, and not his own money. Had he assigned to them his private and individual bank account, it is possible a different question might have been presented. But when they received the dividend, they but received their own. It amounted to no more than his paying to them so much on account of his indebtedness to them, which but reduced the amount of the indebtedness.

"If I am correct in this conclusion, it must follow not only that there was no ratification of the contract, no estoppel by the acts of the plaintiffs, and no consideration for the contract if it was within the power of the directors to make, even if made regularly and legally.

"The appeal of the defendant is therefore dismissed at the cost of the defendant appellant, and the prothonotary is directed to give notice of this decision to the parties or their attorneys, and at the expiration of thirty days after such notice, to enter judgment against the defendant, and in favor of the plaintiffs for costs, unless exceptions are filed in the meantime."

Defendant offered to prove that the bank was reputed solvent and safe at the time the money was deposited and up to the time of failure, and that it had a large number of depositors, among whom were some of the most prudent and conservative business men in the city of Erie, and was considered solvent by the defendant and community. Objected to. Objection sustained. Exception (first assignment of error).

Plaintiffs requested the court to find that under the evidence and the law the judgment should be for the plaintiffs, which point was affirmed.

Defendant presented a number of requests to find the facts and the law, all of which were refused. The substance of these points and the answers thereto are sufficiently indicated in the opinion of the Court.

The Court subsequently amended its findings in this particular: "The notes of testimony show that Mr. McAllister was informed at the next regular meeting of the Board of Directors of the Poor, after the special meeting, March 31, 1886, what was done by the other two members of the board at the special meeting. The 8th paragraph of the finding of facts is therefore not complete. It should have been found that Mr. McAllister was informed *at* the next regular meeting of what had been done by his colleagues at the special meeting, instead of 'on the day of the next regular meeting.' It is accordingly amended in that particular."

Judgment having been entered, defendant took this writ, assigning for error, *inter alia*, the rejection of testimony as above, the affirmance of plaintiffs' point, the refusal of defendant's points, the dismissal of the appeal, and the entry of judgment.

John P. Vincent (*E. A. Walling* with him), for plaintiff in error.

William A. Galbraith (*Edward P. Gould* with him), for defendants in error.

May 13, 1889. THE COURT. The defendant below was the treasurer of the Directors of the Poor for the county of Erie. The county auditors who audited his account reported a balance due from him of $1354.79. It was admitted, however, that the correct balance should have been reported at $1345.29. This balance was represented by a deposit made by the treasurer with the Humboldt Safe Deposit & Trust Company. The deficit was caused by the failure of that institution. The defendant alleged a settlement with the Directors of the Poor. In consideration of his assigning to them his bank book with the said Humboldt Bank, and all rights thereunder, two of the three directors agreed to surrender up his bond and release him from all liability. The defendant gave no consideration for this settlement; the money in the defunct bank belonged to the county and he merely gave up the evidence of the deposit. Had this alleged settlement been made by a regular or legal meeting of the directors and in an orderly manner we would have had the question before us of the power of the directors to make the settlement and give away what did not belong to them, viz., $1345.29 of the money of the county of Erie. The meeting, however, was not a formal legal meeting of the board. There were but two members present and the third had received no notice of it. The learned Judge finds: "No minutes of the meeting were kept by the secretary. The proceedings were passed by the testimony of those present. The proceedings were informal. No motions were put or declared adopted." It hardly needs an argument to show that a public body, charged with important public duties, cannot transact their business in this loose way. If two of three Directors of the Poor could get together in a corner, without the presence of, or notice to, the other member, and bind the county by their informal unofficial acts, it requires no prophetic vision to see that gross abuses would soon spring up and take root. It seems almost a waste of time to cite authority for so plain a proposition; I will refer only to School District of the City of Erie *v.* Fuess (98 Pa.

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600), where it was said by our late brother TRUNKEY, in speaking of a board of school directors: "The directors as a board must exercise their powers; the board may make contracts, may authorize a committee to make a contract, and may appoint an agent for a proper and specific purpose. One or more of the directors, without authority from the board, can make no contract binding upon the district, cannot change contracts, can do no act fixing the district for a liability. He may be personally responsible to those who suffer from his unauthorized acts, as any other citizen would be." The Directors of the Poor, no more than a board of school directors, can perform no official act, can bind the county by no contract, except when acting as a board, and they can only act as a board when lawfully convened as such. It follows that the alleged settlement between the two members and the defendant was no settlement at all.

The failure of the bank in which the defendant deposited the money is no defence. A receiver of public moneys who has given bond for its safe keeping is not discharged from liability therefor by the failure of his banker. This was expressly decided in the case of Baily *v.* The Commonwealth, not yet reported in our State reports. It may be found in 9 Central Reporter, 223, and 20 WEEKLY NOTES, 221.

There is not much else in the case. We do not think there is any force in the argument that the Acts of April 22, 1879 (P. L. 30), and June 2, 1881 (P. L. 44), making it the duty of the county auditors to audit the accounts of "Directors of the Poor, of the treasurer and steward of any poor-house, within any county where a poor-house has been or may hereafter be erected," do not authorize them to audit the accounts of the treasurer of the Directors of the Poor; also that each Act is unconstitutional so far as the accounts of treasurer are concerned, because it does not clearly express in its title the subject matter; and the Act of 1881 is unconstitutional because it is special legislation. We need not concern ourselves about the Act of 1881, for if that offends against the organic law because it is special legislation it leaves the Act of 1879 in force, and we think the purpose of that Act is sufficiently expressed in the title. The criticism that the defendant is not the treasurer of the poor-house but of the Directors of the Poor is exceedingly refined and does not require discussion.

Judgment affirmed.

Opinion by PAXSON, C. J. H. C. O.

Jan. '89, 393. April 30, 1889.

Barhite's Appeal.

Family relationship—Compensation for services to decedent—Accountant's commissions—Finding of fact by Auditor—Costs.

A young woman who, upon her grandfather's invitation, goes to live with him, and for nine years keeps his house and makes her home with him, her expenses being paid by the grandfather, is not entitled to recover compensation for her services from his estate in the absence of an express contract by which she was to be paid for her services.

The blood relationship existing between the parties, and the family relationship established between them when the granddaughter went to live with the decedent, rebut the presumption of any promise on his part to pay for her services.

Under the facts of this case, the Auditor and Court below having found that the family relationship existed between the parties, and that there was no express contract by which the granddaughter was to be paid for her services, it would require a very strong case, a clear mistake, to justify the Supreme Court in reversing their findings.

An executor is not entitled to commissions upon a sum of money in which he was indebted to his testator's estate, nor upon an advancement to a distributee when he had nothing to do with it but take a receipt. Under the circumstances of the case, a commission of five per cent. to accountant was considered sufficient.

It is not error to put the costs upon the accountant when the audit is rendered necessary by his unfounded charge.

Appeal of Alexander Barhite, executor of the will of John Barhite, deceased, from the decree of the Orphans' Court of Erie County, sustaining exceptions to the report of an Auditor upon the partial account of said executor.

The following facts appeared from the report of D. B. McCreary, Esq., Auditor: John Barhite was a man of considerable wealth and great frugality, living in Erie County. His wife died when he was about seventy-seven years of age, leaving him entirely alone in his home. He then sent word to Carrie Barhite, a young woman of eighteen or nineteen years of age, his granddaughter, who lived with her father in the State of Iowa, asking her to come and keep house for him. She complied with his request, and for nine years, until his death, kept his house, often attended to some of the work out of doors on her grandfather's ten-acre lot, kept his accounts, calculated interest, and made settlements for him. John Barhite was an ignorant man, and, although principally engaged in money-lending, was unable to make his own calculations. The granddaughter received no wages for her services, nor was there any express contract that she should be paid. There was also some evidence that the grandfather had promised to pay her for her as-

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sistance to him. Her expenses, in accord with the style in which she was living, were paid by the grandfather. She never asked for pay, nor received any; at one time she applied to her father for money. John Barhite died in 1886, leaving a will in which he made no provision for his granddaughter, giving the residue of his estate, after insignificant pecuniary legacies, to his sons, Alexander, Peter, and Wesley, and of which will he appointed Alexander Barhite, the father of Carrie, executor. The testator's personal estate was valued at $90,325.13.

Carrie Barhite presented a claim of $3675 for nine years' services, against the estate, which claim was paid by the executor. In his first partial account the executor asked credit for this payment, and further claimed commissions at the rate of 6 per cent. upon the amount included in the account, viz: $35,080.65. This amount was made up in part of a debt due by the executor to the estate of $4337.27, and of an advancement of $5000 to one of the distributees, for which the executor merely took a receipt.

Exceptions having been filed, *inter alia*, to the claim of Carrie Barhite and the commissions as aforesaid, the account was referred to an Auditor who reported that while the granddaughter was not entitled to compensation for household services, yet she was entitled to pay for the clerical work she did for her grandfather, and that she should be allowed compensation at the rate of $410 per year for her entire services, and deducting $120 a year for her household duties, fixed her compensation at $290 per year, or $2537.50 for the whole period. The Auditor also reduced the executor's commissions to the rate of 5 per cent., and disallowed any commission upon the above legacy of $5000 and the accountant's debt of $4337.27. The Auditor further reported that the executor should be surcharged accordingly, and placed the costs of the audit upon the estate.

To this report Peter Barhite and Wesley Barhite filed exceptions, *inter alia*, to the allowance of any credit for payment to Carrie Barhite, and to the charging of costs upon the estate. The accountant also filed exceptions to the Auditor's report, alleging error in not allowing credit for payment of the full amount of Carrie Barhite's claim, and in surcharging the executor as above set forth.

The above exceptions on the part of Peter and Wesley Barhite were sustained, and those of the accountant dismissed. Whereupon the accountant took this appeal, assigning for error the dismissal of his exceptions, and sustaining those of Peter and Wesley Barhite.

William Benson (*A. E. Sisson* with him), for appellant.

The family relation to rebut the presumption of compensation exists only between parent and child.

Smith *v.* Milligan, 7 Wright, 107.
Gordner *v.* Heffley, 13 Id. 163.

The declarations of decedent as to his granddaughter's services and their value to him are admissible to charge his estate.

Gordner *v.* Heffley, *supra*.
Ranninger's App., 3 Crumrine, 20.

The Statute of Limitations does not bar such a claim as this.

Ranninger's App., *supra*.
Fawcett *v.* Fawcett, 14 Norris, 376.

John P. Vincent (*E. A. Walling* with him), for appellees.

Declarations will not make a contract between relations so close as the relations between these parties.

Ulrich *v.* Arnold, 120 Pa. 170.
Gordner *v.* Heffley, 49 Id. 163.
Loomis's App., 105 Id. 258.
Walls's App., 111 Id. 461.

The family relationship may exist between grandfather and grandchild as well as between father and son.

Neel *v.* Neel, 59 Pa. 347.
Duffey *v.* Duffey, 8 Wright, 399.

There must be an express contract in order to enable parties standing in these relations to recover for services.

Neale *v.* Engle, 5 Cent. Rep. 907.

This money was paid to Carrie Barhite voluntarily; she therefore cannot be compelled to pay it back. The hardship will not fall on her.

Keener *v.* Bank of U. S., 2 Pa. 237.
Natcher *v.* Natcher, 47 Id. 496.
Ege *v.* Koontz, 3 Id. 109.
Loomis's App., 105 Id. 258.

Commissions are allowed to an accountant for a faithful execution of his trust, not to one who has mismanaged or overcharged it.

Clauser's Est., 84 Pa. 51.
Norris's App., 71 Id. 106.
Pusey *v.* Clemson, 9 S. & R. 204.
Montgomery's App., 5 Nor. 230.

The accountant's overcharges made a contest necessary; he therefore was properly charged with the costs.

Landis *v.* Scott, 8 Casey, 495.

May 13, 1889. THE COURT. The learned Auditor and Court below have both found that the family relation existed between Carrie Barhite and her grandfather, the testator, and that there was no express contract by which she was to be paid for her services. Under such circumstances it would require a very strong case—a clear mistake—to justify us in reversing their findings of fact. So far from there being a mistake in this instance, we think the findings referred to are sustained by the evidence. It is true the testator, whose wife was deceased, and who was an old man living alone, invited his granddaughter, who was living with her father, to come and live with him,

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and keep his house. She came, and remained for nine years, and until his death. During all this time, there can be no doubt, under the evidence, that she was living with him as a member of his family, and without any contract as regards compensation. It was not alleged that he ever paid her a dollar as wages; on the contrary she lived with him just as a child would do, her clothing and other expenses for most of the time being supplied by him. There was evidence of his declarations that she was useful to him and should be well paid for her sevices. These, however, were but the loose declarations, which can almost always be proved in such cases, and refer to future intentions, which may mean a provision by will, or other benefit, to be conferred in some other manner. It is incredible, if there was a contract for wages, that she should have remained with him for nine years, and never have demanded nor received a dollar, especially in view of the fact that at one time she applied to her father for money. This belongs to a class of cases which we do not feel disposed to encourage, and in its own facts, furnishes a sufficient reason why we should not do so. Here we have the case of a farmer's daughter, who at her grandfather's request, makes her home with him and keeps his house. The two were living together, in a small frugal way, on a little place of ten acres. She takes care of his house, and sometimes does the chores out of doors. She has her home with him and he pays her expenses, such as were incident to her condition in life. At the end of nine years the grandfather dies, and his granddaughter claims for her services the sum of $3675.00, which was promptly paid by her father, who was the executor. No credit was given for her support, clothing or other expenses. Yet strange to say this marvellous result would seem to be justified, as to the value of her services, by the testimony of a number of apparently respectable witnesses. Their testimony, however, is chiefly valuable as a curious illustration of the extreme liberality in which some persons indulge with the money of other people. Notwithstanding what the witnesses say, every person of average intelligence knows, that this girl could not have made and saved one-fourth of that sum in nine years in any honest employment which she would be likely to obtain.

The learned Master, while of the opinion that she was not entitled to recover for the household duties performed by her, yet was of opinion that she performed other duties as to which an implied contract might arise, and for these services he allowed her a compensation of $290 per year, amounting to $2537.50. It appears that the testator, although living in a small, miserly way, was rich. He left an estate in moneyed securities amounting to about $90,000. He was an extremely ignorant man, and his granddaughter had some education, and was ready at figures. She calculated his interest for him, and gave him what assistance he needed about his papers. It was for these services that the Auditor awarded her the sum of $2537.50. Upon exception the learned Court below reversed the Auditor, and held that the claim for these services came within the same rule as her compensation for household work, and disallowed it. In this we think the Court was right. The distinction made by the Auditor was a distinction without a difference. As was said by the learned Court: "The blood relationship existing between them, together with the family relationship established when she came to live with him, rebut the presumption of any promise on his part to pay for her services, and no express promise was proved." I have not considered it necessary to discuss the authorities upon this point. Our own cases are numerous, and are right in a line with the foregoing. Perhaps there is no branch of the law with which the profession is more familiar.

We find no error in the ruling of the Court in regard to the accountant's commissions. He claimed six per cent. upon the personal estate, including an advancement of $5000, for which there was nothing to do but take a receipt. He also claimed commissions on the sum of $4337.27, in which he was indebted to the estate. The Auditor and Court below disallowed commissions on these two items, and reduced the commissions on the residue to five per cent. Under all the circumstances this was liberal. The estate was large, there were no debts worth speaking of, and no complications. The estate could have been distributed in kind between the legatees—the accountant and his two brothers—without delay or risk. Without desiring to criticise the conduct of the accountant unduly, he appears to have been actuated by a desire to make all he could out of the estate in a legitimate way. A conspicuous instance of this may be found in his paying the extravagant claim of his daughter without consultation with the other parties interested in the estate. The Court below properly surcharged him with the amount of this payment.

Nor was it error to put the costs of the audit upon the accountant. The audit was rendered necessary by his own unfounded charges.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, C. J.

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July '88, 149. March 5, 1889.

Kutz v. Dreibelbis.

Partnership—Dissolution—Right to recover assets—Practice—When assumpsit will lie by one partner against another, or against his estate.

Upon the dissolution of a partnership by the death of one of its members, the right to recover the assets of the firm belongs to the surviving partner and not to the representative of the deceased partner.

When one member of a firm receives assets of the firm during his lifetime, his partner cannot ordinarily maintain assumpsit against him or his estate, but must resort to a bill for an account or an action of account render. But where the partnership is in a single and finished transaction, assumpsit will lie at the suit of one partner against his co-partner.

A. contracted with X., county commissioners, to build a bridge; after the completion of the same X. refused to pay. A. brought suit and pending the same died. C., his widow and executrix, was substituted on the record, and subsequently recovered from X. and filed her account as executrix of A., in which this item appeared. B., five years after A.'s death, and nearly three years after C. recovered from X., brought assumpsit against C. for the amount recovered by her, claiming that he was a partner with A. in his contract with X. The jury having found that A. and B. were partners:

Held, (1) that the partnership was in a single transaction, and hence assumpsit would lie.

(2) That as there appeared to be no outstanding debts against this partnership, there is no need that the entire fund recovered by C. should be transferred to B., and thus require C. to bring suit for a settlement of the partnership accounts. B. should only recover such portion of this fund as upon an account settled between the parties appears to belong to him.

Error to the Common Pleas of Berks County.

Assumpsit by Simon Dreibelbis, surviving partner of Charles Kutz, deceased, against Esther Kutz, executrix of Charles Kutz, to recover from defendant an amount of money received by her in settlement of a suit, which plaintiff alleged belonged to him as surviving partner of Charles Kutz, deceased.

The facts sufficiently appear in the opinion of the Supreme Court, *infra*.

The Court, HAGENMAN, P. J., left the question of the existence of the partnership to the jury, and charged that if they found that Dreibelbis was a partner, then the sum recovered by Mrs. Kutz was partnership assets, and the plaintiff was entitled to it in the settlement of the partnership affairs.

Verdict for plaintiff for $1100, and judgment thereon. Defendant took this writ assigning for error, *inter alia*, (6), the portion of the charge above noted.

H. Willis Bland (*James H. Marx* with him), for plaintiff in error.

D. E. Schroeder, for defendant in error.

May 13, 1889. THE COURT. On May 11, 1872, Charles Kutz entered into a written contract under seal, with the commissioners of Lebanon County, by which he agreed to remove the old bridge across Swatara Creek, at Jonestown, in that county, and to place it over the same creek, at Bohr's Ford, upon abutments and piers furnished by the county commissioners, and to have it finished and ready for use September 1, 1872. For this work he was to receive $3350; one-third of it when one span of the bridge was erected, and approved by the commissioners, and the balance when the bridge was approved by the viewers and Court, and accepted by the commissioners. After the bridge was completed the commissioners being dissatisfied with the work, refused to pay the balance of the contract price and he brought suit for it. He died July 30, 1876, and October 14, 1878, his death was suggested on the record of the suit, and Esther Kutz, his executrix, was substituted as plaintiff, when a jury was called in the case and a verdict was rendered for the plaintiff for $1200. This verdict was the product of a compromise. From it the attorney who conducted the suit was paid $100 for his services, and the balance Mrs. Kutz received and retained as assets of the estate of her deceased husband. On July 29, 1881, Simon Dreibelbis brought an action of assumpsit against her as executrix of Charles Kutz, deceased, in which he claimed to be the surviving partner of the firm of Charles Kutz and Simon Dreibelbis trading as Kutz & Dreibelbis, and entitled to the $1100 she had received as above stated as partnership assets. The partnership was denied, and considerable evidence was taken to show that Kutz and Dreibelbis did the work under the Lebanon bridge contract, and were partners in it. The evidence was conflicting and comprised declarations of Kutz which recognized a partnership and of Dreibelbis which denied it. The learned Judge of the Court below in his charge to the jury reviewed the evidence, and said, "from this testimony it is for the jury to say whether these two persons were partners in the building of that bridge in Lebanon County. If they were, then the plaintiff is entitled to a verdict for the amount which Mrs. Kutz received, to wit, the $1100." A verdict was rendered for the plaintiff for that sum, and judgment was duly entered upon it.

It is contended on the part of the plaintiff in error that the evidence is not sufficient to support a finding by the jury that a partnership existed between Kutz and Dreibelbis in the Lebanon bridge contract, and that if it is sufficient for that purpose, an action of assumpsit cannot be maintained against Esther Kutz, executrix of Charles Kutz, deceased, for the proceeds of it. We can-

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not say that the evidence is insufficient to support the finding of the jury that such a partnership existed between them, and we think the action of assumpsit may be maintained.

It is a familiar principle of law, that upon the dissolution of a partnership by the death of one of its members, the right to recover the assets of the firm belongs to the surviving partner and not to the administrator of the deceased partner. In McCarty, surviving partner, *v.* Nixon (2 Dallas, 65, note), it was held that where an administrator of a deceased partner collected debts belonging to the firm, he must be considered as having received the money in trust for the firm, and that the surviving partner could recover it from him. The same principle was recognized in Wallace *v.* Fitzsimmons (1 Dallas, 248). In Alexander *v.* Coulter (2 S. & R. 495), administrators of a deceased partner, who had ignorantly sued for and recovered some of the partnership debts, were adjudged liable to the surviving partner for the amount so received by them. The surviving partner is "the agent of the defunct firm for the purpose of disposing of its assets, paying its debts and settling it up, and for *this purpose* the title to such assets is vested in him." (Shipe's Appeal, 114 Pa. 205.) For firm moneys or assets received by a partner in his lifetime, the ordinary rule is that his co-partner cannot maintain assumpsit against him or his estate, but that he must resort to a bill for an account, or an action of account render. But to this rule there is an exception, and it is well settled, that where there is a partnership in a single and finished transaction, one partner may maintain an action of assumpsit against the other. (Brubaker *v.* Robinson, 3 P. & W. 295; Galbreath *v.* Moore, 2 Watts, 86; Wright v. Cumpstey, 41 Pa. 102; Finlay *v.* Stewart, 56 Id. 183; Meason *v.* Kaine, 63 Id. 335.) In such case the accounts of the partners are adjusted, and the plaintiff recovers his share of the proceeds of the transaction.

That the amount claimed in this case is the proceeds of the Lebanon bridge contract is undisputed, and that Dreibelbis was a partner with Kutz in that contract is established by the verdict of the jury. But it is a case of partnership in a single transaction, which was closed in November, 1872. After that nothing remained to be done but to collect what was unpaid upon the contract. The price to be paid for the work was by the terms of the contract payable to Charles Kutz, his executors, administrators or assigns, and it was so made with the full knowledge and approval of Dreibelbis. The right of action was in Charles Kutz, and upon his death passed to his legal representative, whose duty it was to prosecute the suit to judgment. Mrs. Kutz was not an intermeddler in this business; she did only what it was her plain duty to do, in closing up this matter with the county and receiving this money. Dreibelbis made no suggestion on the record of the suit that he had or claimed any interest in it, but he distinctly recognized the right of Mrs. Kutz as executrix to control it as an estate claim, when he assisted her in an application for a change of venue. It was more than eight years after the one purpose of the partnership was accomplished, five years after the death, and nearly three years after his executrix had received this money from the county before this suit was instituted, and these five years had passed before a declaration was filed in it. These facts conflict with the absence of evidence or claim that there are outstanding debts of the partnership to be settled, and justify the conclusion that none exist.

If Kutz had received this money his estate could be compelled to pay to Dreibelbis only so much of it as belonged to him upon a settlement of the partnership accounts. (Arnold *v.* Arnold, 90 N. Y. 580.) When the estate of a deceased partner is lawfully possessed of a fund which is the sole asset of the partnership, and nothing remains to be done except to state an account between the partners, it need not pay over that fund to the surviving partner. Why should this fund be transferred to Dreibelbis, and Mrs. Kutz be compelled to bring an action against him for a settlement of the accounts between the partners, when, as we have seen, these accounts may be adjusted in the present action? We discover no necessity for such transfer, nor propriety in it. Upon a re-trial of this case the plaintiff may recover such portion of this fund as, upon an account settled between the parties, appears to belong to him.

We have considered this as a partnership in a single transaction, because it was so treated in the Court below, and is the only partnership established by the verdict of the jury. The evidence in the case would not sustain a finding of a partnership embracing other matters. The sixth specification of error is sustained. We discover no error in the remaining specifications and they are not sustained.

The judgment is reversed, and a venire facias de novo is awarded.

Opinion by McCollum, J. W. M. S., Jr.

Jan. '88, 304. March 4, 1889.

Zell's Appeal.

Partnership — Real estate — Account — Equity jurisdiction — Compensation.

A. and B., who were in partnership, purchased an interest in certain tracts of land, the legal title to which was in a trustee. The trustee afterwards sold the land and accounted to A., the liquidating partner

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of the firm, which had in the meantime dissolved, for a share of the proceeds. Afterwards B and the heirs of A., alleging that the sale by the trustee was fraudulent, began various proceedings by ejectment and bills in equity to recover the land. The defendants in those suits finally paid B. a large sum of money, and B. thereupon executed to them a quit-claim deed for his individual interest and as surviving partner. A bill in equity having been filed by A.'s administrator against B.'s executors for an account and payment of A.'s share of above fund:

Held, that the evidence showed that the interest of A. and B. was never an estate in the lands but only in the proceeds; that this interest was purchased with partnership funds, that it therefore belonged to the firm, that B.'s quit-claim deed passed all A.'s interest therein, and that therefore A.'s heirs were entitled to a share of the money.

Held, further, that the evidence disclosed no estoppel on the part of A.'s heirs, and that a Court of Equity had jurisdiction in the premises, and that even if this was doubtful the objection came too late after answer and proceeding before the Master for nine months.

In the above case it appeared that the proceedings instituted by B. which resulted in the recovery of the fund were instituted twenty years after the dissolution of the partnership and thirteen years after A.'s death. The claim was very stale, and in the opinion of the Supreme Court unfounded and worthless. It was nevertheless pressed by B. with vigor and judgment to a successful issue as above, notwithstanding much hindrance and opposition from A.'s heirs:

Held, that under the circumstances A.'s heirs should be compelled in equity to make to B. some compensation for his services, notwithstanding the fact that they had not contracted to do so; and that of the total principal sum of $6594 due them $2000 should be allowed to B.'s executors as such compensation, and that the costs should be divided between the parties.

Appeal of T. Burd Zell and William T. Zell, executors of Thomas Zell, deceased, from a decree of the Common Pleas of Berks County.

Bill in equity, in which James B. Clark, administrator d. b. n. c. t. a. of John W. Clark, was complainant, and T. Burd Zell and William T. Zell, executors of Thomas Zell, deceased, were the defendants. The bill prayed for an account and the payment of amount due complainant. An answer was filed, and the case referred to Henry A. Muhlenberg, Esq., as Examiner and Master.

The facts as found by the Master are sufficiently set forth in the opinion of the Supreme Court, *infra*. The contention of defendants was that the interest in the real estate in question had not been purchased with partnership funds of Clark & Zell, but with the individual funds of said parties, that therefore the said interest was not partnership property, and that the quit claim deed by Zell for and on account of which he had received the fund in controversy passed only his own title, and not that of Clark. This contention the Master found was not supported by the evidence. He therefore reported a decree awarding to complainant one-half the sum realized by Zell after deducting a proportionate amount of the counsel fees and other actual expenses incurred. The Master did not in his original report pass upon and allow a claim presented by respondents for compensation to Zell for his services. In a supplementary report he considered and passed upon the claim and refused to allow it for the lack of proof of any agreement on the part of Clark's heirs to pay it.

Exceptions filed by respondents to the Master's report were dismissed by the Court in a brief opinion by ERMENTROUT, J.

Respondents thereupon took this appeal assigning for error the action of the Court in dismissing the exceptions, and entering a decree as reported by the Master.

H. Willis Bland and *Josiah Funck*, for the appellants.

Jeff. Snyder (*George F. Baer* with him), for the appellee.

May 13, 1889. THE COURT. In 1855 Clark & Zell, who were partners in the lumber business, purchased an interest in certain tracts of land in Centre and Clearfield counties. The legal title was held by a trustee, who in 1859 sold the land, filed his account, and after much delay and litigation, paid Clark & Zell's share to Clark who was the liquidating partner of the firm, then dissolved.

About 1878, Zell and the heirs of Clark, who was then dead, alleging that the sale by the trustee was fraudulent, began various proceedings by ejectment and bills in equity to recover the land. As a result Zell received from Hon. William A. Wallace, in 1882, the sum of fifty thousand dollars in full settlement, and made a quit claim deed in his own name and as surviving partner of Clark & Zell. This bill was then filed, by the heirs of Clark, for an account, and payment of Clark's share of the money.

This is a very general outline of the numerous and complicated transactions, extending over a period of thirty years, that are more or less closely involved in the bill. The real pinch of the contest, however, turns upon two cardinal facts, first, whether the interest of Clark & Zell in the lands was partnership property, and secondly, whether Zell received the money as surviving partner, for the extinguishment of the joint interest in the lands. Zell denied both of these propositions, and defended on various other grounds including that of estoppel.

The learned Master in the Court below has relieved us from a large part of the burden which such a case would ordinarily impose, by a report which is a model of methodical arrangement, clear statement, and accurate application of the law. He finds first, that the interest of Clark &

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Zell was never an estate or interest in the lands themselves, but only in the proceeds, and therefore that it was not real estate but a chose in action; secondly, that it was purchased with partnership funds, and was partnership property; thirdly, that the deed of Zell in consideration for which he received the money, was executed as surviving partner, and by virtue of such execution passed all the interest of Clark's heirs in the land whatever it was, to Wallace, and therefore they were entitled to a share of the money; fourthly, that although Zell had been impeded and interfered with in getting the money, by the conduct and conflicting claims of the Clarks, yet he had in fact not lost anything, or been induced or obliged to alter his position for the worse thereby, and therefore they were not estopped from claiming their share; fifthly, that such claim was properly asserted in equity, the bill being for discovery as well as account, and that even if this were more doubtful than it is, nevertheless the objection came too late after answer, and proceeding before the Master for over nine months; sixthly, that the denials in the answer of respondent were overborne by the other testimony, which was ample to meet all the requirements of equity for that purpose; and lastly, that on settlement of the account, with allowance for counsel fees and expenses, there was due from respondent Zell to complainants the sum of six thousand five hundred and ninety-four dollars, with interest from February 13, 1883.

All these points are treated in detail ably and accurately by the Master, and we rest the case upon his report without prolonged discussion here.

On a single point, however, we are constrained to differ with the Master's conclusion, and that is the claim of the respondent Zell to an allowance for compensation for his services in securing the money.

It is due to the Master to say that this claim was not brought to his attention till the close of the case and even then was not much urged. It was hardly natural that it should be so long as counsel were strenuously contending against any liability at all. In a supplemental report, however, the Master takes up the claim and dismisses it for want of proof of any agreement to pay for the services. Such proof, of course, could not be furnished. Whether Young and Mrs. Burton had agreed to pay was irrelevant. So far as the Clarks are concerned the whole evidence shows conclusively that no such agreement could have existed. On the contrary, so far from agreeing to pay Zell for what he was doing in their behalf as well as his own, they utterly repudiated his action and hindered and opposed it from beginning to end.

But the claim did not necessarily rest on an express agreement. The complainants came into equity to claim their share in the money Zell had succeeded in getting. In equity as the Master found they were bound to reimburse him for their fair share of the expenses he had incurred in getting it. Why should they not also in equity reimburse him for his time, labor, and judgment of which they now claim the fruits? As rightly found by the Master neither Zell nor the Clarks ever had any title to the land. When the trustee sold and Clark accepted the firm's share of the proceeds, which as liquidating partner he was then entitled to do, he extinguished all the interest of every kind that the firm had in the matter. The attack on the sale, nearly twenty years later, was apparently an afterthought born of the desire to get a part of the increase in value of the lands which was considerable. There is no evidence at all that the sale was fraudulent, and even if it had been Clark appears to have had such knowledge of the matter as to estop himself from complaining by taking part of the price. Whether this be so or not is not entirely clear from what we have before us, nor is it material. We have enough in the case to show that the claim to the lands, made in the ejectment suits, was utterly unfounded and worthless. But by being actively pushed and made troublesome it became of enough importance to be bought off by the holders of the real title. In this work of making the claim troublesome Zell was the prime mover and active agent. On this point the Master finds: "Indeed Mr. Zell is entitled to all credit for the energy and determination with which he carried on these proceedings and finally brought them to a successful conclusion. The claim, even in the opinion and in the very words of Judge Ryon, was a stale claim. The plaintiffs in these equity and ejectment proceedings may have had no title at all" (as in fact we have seen they had none), "but by the exertions of Zell and his counsel the cloud on the title to these lands became so thick and dense that Senator Wallace and those whom he represented were finally willing to remove it at a cost of fifty thousand dollars." The money that was paid was paid for peace and Zell was the gadfly from whom peace was wanted. The Clarks hindered instead of helping him, and now that they have turned around and elected to come in under him and affirm his action they ought to pay him liberally. Whatever they get is just so much more than they had any real claim to and just so much more than they would have got so long as they persisted in their own wrong-headed course. They get it at all because he had better judgment than they.

True, it is well setled that a partner in the absence of express contract, is not entitled to compensation for trouble or services, though he has

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worked beyond the others. Whether this rule extends to services rendered in winding up the business after dissolution, or in carrying it on after the death of one partner, is a much vexed question, as to which our own cases incline to the affirmative, and are rather opposed on the general current of authorities. (See Lindley on Partnership, 5th ed., with Am. notes by Wentworth, p. *381, and cases there cited.) But the facts in the present case are exceptional. The partnership had been dissolved more than twenty years; Clark, who was the liquidating partner, had apparently gathered in all the known available assets, and had died. More than thirteen years after his death Zell seems to have discovered this claim (or probably invented would be a more accurate term), and he prosecuted it for four years, with the energy and under the circumstances already related, to ultimate success. And now that the others come in and claim a share in the success they refused to help him in attaining, we think in equity they should make him a fair compensation for his services.

In arriving at a basis for the amount to be allowed, we may consider the action of the other parties as some evidence of the value of the services. The whole affair was speculative, and the compensation contingent on success. Young's share was the same as that of Clark and Zell, but both Young and Mrs. Burton seem to have justly regarded their shares as so much clear gain, through the efforts of Zell, and accepted one thousand dollars each, in full. This gave Zell over five-sixths of Young's net share, for his compensation. The counsel was paid for his professional services one-fourth of the gross amount received, and this sum was much less than the fee originally promised him. We are of opinion that as to the Clarks, Zell's compensation should be between these two figures, and on consideration of the whole case, fix it at two thousand dollars.

This point also involved the consideration of the costs. Neither party's conduct to the other was entirely commendable. Zell refused to acknowledge any claim, and the plaintiff in his bill claimed twenty thousand dollars, one-half of which the Master found to be without any basis at all, and the other half of which was subject to the deductions for expenses as found by the Master, and for compensation as determined by this opinion. The costs therefore ought not equitably to fall wholly on either party, and they are accordingly divided.

The decree will be modified in accordance with the views herein expressed, and the record is remitted for that purpose.

Opinion by MITCHELL, J. L. L., JR.

Jan. '88, 429. May 3, 1889.

Battles v. Sliney.

Errors and appeals—Assignments of error—Practice—Amendment.

It is not a sufficient compliance with Rule XXIV. of the Supreme Court, relative to assignments of error, to set forth in an assignment a question put to a witness the allowance of which was excepted to. The answer to the question should also be set forth.

The object of the above rule in requiring full assignments of error is both that sufficient may remain of record in the Supreme Court after a *remittitur* to show that error has been committed and also for the convenience of the Court.

On the trial of a feigned issue the plaintiff, who was claimant, obtained leave to insert in the declaration various articles omitted in the declaration as originally filed. The defendant disclaimed any title to the articles. Verdict and judgment having been entered for plaintiff, on writ of error:

Held, that the defendant had no ground to object to above amendment, and that the allowance of the same was proper.

Error to the Common Pleas of Erie County.

Feigned issue, wherein John Sliney and E. A., his wife, in right of said wife, were plaintiffs and R. S. Battles defendant, to try the ownership of certain goods levied upon by defendant as the property of Sliney and claimed by the wife of the latter.

On the trial, before GUNNISON, P. J., the Court permitted the declaration to be amended by inserting a list of various articles of household furniture therein. The defendant withdrew all claim to above articles of household furniture. Various offers of evidence made by plaintiffs were admitted under exception by defendant.

Verdict and judgment were entered for the plaintiffs, whereupon defendant took this writ, assigning for error the action of the Court in allowing the declaration to be amended as above and also filing assignments of error to the admission of the plaintiffs' offers of evidence in the following form:—

"The Court erred in overruling the objection to the following question and answer and admitting the evidence:—

"When if at any time were you in the oil business with Sliney and Whalen, and where?

"Objected to as immaterial and as a collateral matter.

"Court: I think that is proper evidence.

"Exception by defendant's counsel, and bill sealed."

S. M. Brainerd (*William Benson* with him), for the plaintiff in error.

A claimant of property levied upon by an execution must state correctly the property claimed.

The claimant must also state the character of

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the title under which the property is claimed, and will not be allowed to vary it upon the trial.

Meyers v. Prentzell, 9 Casey, 482.
Stewart & Co. v. Wilson, 6 Wright, 450.

S. A. Davenport (*Griffith*, *Baker*, and *Bole* with him), for the defendants in error.

May 13, 1889. THE COURT. The first assignment alleges that the Court erred in allowing an amendment to the declaration. The cause below was a feigned issue under the Sheriff's Interpleader Act. The amendment consisted in specifying certain articles levied upon by the sheriff, consisting of household goods, claimed by the plaintiff below. These articles appear to have been omitted in the declaration originally filed, and were included in the amended declaration. We see no objection to this amendment, especially in view of the fact, as appears in the charge of the Court, that, upon the trial below, the defendant withdrew all claim to the household furniture which, as before observed, were the articles specified in the amended narr. The remaining assignments, nineteen in number, are all to the admission of evidence. They are not assigned according to the rule of Court. Said rule (XXIV.) is as follows:—

"When the error assigned is to the admission or rejection of evidence, the specification must quote the full substance of the bill of exceptions, or copy the bill in immediate connection with the specification. When the error is to the admission or rejection of a writing, a full copy of the writing must be printed in the paper-book. Any assignment of error not according to this, and the last rule, will be held the same as none."

The "last rule" referred to is Rule XXIII., and is as follows:—

"When the error assigned is to the charge of the Court, or to answers to points, the part of the charge, or the points and answers referred to, must be quoted, *totidem verbis*, in the specification."

The object of Rule XXIV. is apparent. The assignments of error are all that remain in this Court after the record goes down, to show upon what ground the Court has decided the case. They really constitute the pleadings here. If the evidence objected to and admitted is not set forth in the assignment, or the substance of it given, there is nothing in this Court to show that error has been committed. The answer to the question may have been perfectly harmless, or the witness may not have answered it all, or he may have had no knowledge upon the subject. This is a sufficient reason for the rule, but it is not the only one. When the evidence is given as required, this Court can see at a glance whether the objection is well founded. Whereas, if not given, we are obliged to turn to the evidence in the examination of each assignment. In this case there were nineteen of such assignments, and it requires that each Judge of this Court shall search out the evidence from a mass of about two hundred printed pages, in connection with each assignment. This is imposing an amount of useless labor upon us which we are not called upon to bear, and which we have not the leisure to perform, even had we the inclination. It consumes time that should be devoted to more important duties. The rule of Court is a wise and proper regulation, and imposes no hardship upon the Bar. It is so constantly and persistently violated that we can only correct it by declining to consider alleged errors not properly assigned. For these reasons the assignments in this case, from two to twenty inclusive, will not be considered or discussed.

Judgment affirmed.

Opinion by PAXSON, C. J. L. L., JR.

Jan. '89, 105. March 28, 1889.

Griswold v. Gebbie.

Deceit—Action for—Scienter must be alleged and proved—Charge of Court need only state rule as to, as applied to the case being tried.

In an action of deceit the general rule is that the *scienter* must not only be alleged but proved, and the jury must be satisfied that the defendant made the statement knowing it to be false, or with such conscious ignorance of its truth as to be equivalent to a falsehood; but a Court in charging a jury need only state so much of this rule as applies to the case before it. Therefore when in such action the *gravamen* of the case is that the defendant's agent had with a recklessness equivalent to fraud, made a positive statement of a material fact when he had no knowledge of the subject, and such agent is not called to testify as to his knowledge or belief, or explain his representations, it is not error for the Court to leave to the jury to find whether such agent "stated what he did not know to be true, and what was in fact false, without having any reasonable ground for believing it."

When in an action of deceit, the *gravamen* of the case is that the defendant's agent had with a recklessness equivalent to fraud made a positive statement of a material fact when he had no knowledge of the subject, and such agent is not called upon to testify as to his knowledge or belief, or explain his representations, if the plaintiff proves the statement, its falsity and the circumstances under which it was made tending to show a reckless assertion in entire ignorance of the fact, he has made out a *prima facie* case, sufficient to go to the jury.

A mere misstatement as to the amount of land sold is not sufficient to prove fraud, but if the deficiency is very great in proportion to the whole, it is evidence of fraud; and where the misstatement is made by advertisement, and by descriptive circular, is repeated at least twice orally by the agent for the vendor in response to the direct question of the intended pur-

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chaser, and is altogether unexplained by the person, these facts make out a *prima facie* case of deceit, even though the principal, and those connected with him in the transaction, are shown to have been absolutely ignorant on the subject.

An agent who is empowered to engage a real estate broker to make sale of a country seat is thereby authorized to give the broker a description of the place, including its acreage.

In an action of deceit for fraudulent representations as to the number of acres in a tract of land purchased by plaintiff from defendant, evidence as to the value of the land per acre is competent, though the land had been purchased as a whole, in a case where there is evidence that the quantity of the land was one of the elements of the calculation made in arriving at the price that had been paid.

A real estate broker, who had acted as such in making a sale of suburban property, is a competent witness, in a subsequent action involving the value of the property at the time of the sale, to testify as an expert as to such value, where he is shown to have a large general knowledge of suburban values, had, at the time the property in suit had been sold, made special inquiry as to values in the neighborhood, and had discovered a recent sale of similar property near at hand, although he had not, for the two years preceding and following the sale in question, bought or sold any other property in that immediate locality.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by George Gebbie and Mary J., his wife, in right of said wife, against Eliza T. Griswold, for deceit.

At the trial, before HARE, P. J., the following facts appeared: William A. Griswold died in the summer of 1881. His widow, the defendant, deemed it prudent to dispose of a country place belonging to her situate in Darby, near Philadelphia, Pa., and to that end asked her brother-in-law, John Griswold, to call upon a real estate broker, and have the place offered for sale. John Griswold thereupon, in the early spring of 1882, called upon Adam Everly, a well-known real estate broker, and placed the property in his hands for sale. Mr. Everly caused an advertisement to be published in the daily papers, and circulars to be printed, in which the country place was described as containing "seven acres" in the advertisement, and nearly "seven acres" in the circulars. The plaintiffs offered $24,000 for the place which offer was accepted. In the articles of agreement then signed, and the subsequent deed to the plaintiff, Mary J. Gebbie, the number of acres in the place was not mentioned. In March, 1887, after plaintiffs had taken possession, the place was surveyed and found to contain 4.1634 acres.

The plaintiffs then brought this action, and at the trial Mr. Gebbie testified that before purchasing the property he had gone to Mr. Everly, and that Everly directed him to visit the place where he would probably find John Griswold, and that witness and his wife had accordingly gone to see the property. Plaintiffs then offered in evidence the following conversation between Gebbie and John Griswold:—

"I went there and found Mr. John Griswold on the lawn of the place, he showed me through the house, and through the grounds, and in the garden; I said this circular says 'nearly seven acres,' the advertisement says 'seven acres.'" (Counsel for defendant objected to any conversation between witness and John Griswold. Objection overruled. Exception.)

Witness proceeded: "I said one said seven acres positively, and the other nearly seven acres. I asked which was correct; he said there is rather over than under seven acres. I asked him the value of land in the neighborhood; he said land was selling at $2000 an acre. I referred to the eloquence of the circular. I asked did he get up that circular, and he said yes."

A similar declaration by Griswold to Mrs. Gebbie was also proved.

The plaintiffs offered in evidence one of the aforesaid circulars. Objected to, because there was no sufficient evidence to show that the defendant had any knowledge of the contents of the circular. Objection overruled, and evidence admitted. Exception.

The plaintiffs also offered to examine Adam Everly as an expert as to the value of land in the location of the premises in question. On his preliminary question of competency as an expert, Everly testified that he had been in the real estate business exclusively for sixteen years, had bought and sold a large amount of property, that he had not bought or sold property in the neighborhood of the premises in question within two years prior or subsequent to the sale thereof; that he had made careful inquiry at that time as to sales of property in that neighborhood, and had learned that a sale had taken place in the immediate vicinity at the rate of $2000 per acre; that he had frequently bought and sold suburban properties, on all roads in the neighborhood of the city; that he had been frequently called as an expert to testify as to the value of such properties; that he had already been examined in the Court of an adjoining county as to the value of this property, and that he thought he was competent to testify in this case as an expert. Testimony admitted. Exception.

The witness then testified, that according to his knowledge of values $2000 was a fair market value for this property per acre in 1882.

The defendant testified that she never met any of the parties except upon the occasion of the settlement, and never made any statement concerning the acreage; that she did not know how many acres there were in the property, and had not authorized the statement that it contained

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seven acres; she admitted knowing that a description of the property had been prepared, but denied any knowledge of its contents. There was evidence, however, that she had admitted giving these circulars to parties who talked about buying the property.

John Griswold was not called as a witness.

The defendant requested the Court to charge as follows: "That under all the evidence in the case the verdict should be for the defendant." *Refused.* Exception.

The Court charged the jury, *inter alia*, as follows:—

"Where a man is employed to do a thing it is generally implied, or may be so, that he is to do what is requisite to render his employment effectual, and, without stating any proposition of law [it is a question for the jury to consider whether, if a man is told to select a real estate agent, and to employ him to sell a piece of property, that does or does not carry with it the duty to give a description of the property to the person so employed."]

The Court then reviewed the testimony as to the advertisements and circulars, and then continued: "I think that statements which exceed the bounds of truth, and relate to material facts, ought to be avoided; but in all such cases there are two questions: first, did the seller say what was not true? and next, did the buyer rely upon what he said?

"It may be, although I am not asked to express an opinion upon it, and do not as a matter of law, that if this were all, it would not have been enough, although I do not say so. [When, however, the purchasers, Mr. Gebbie and his wife, met Mr. John Griswold that afternoon, they showed, to some extent, that they understood that advertisements or circulars are not always to be relied upon, because they proceeded to question him explicitly, and agreeably to the lady's testimony, which seemed to me to be candid, she asked: 'Does this property contain the seven acres spoken of?' To which he replied, 'More rather than less.' While walking around the premises with Mr. Griswold the question was again asked by Mr. Gebbie, and answered in the same way. What followed was that the Gebbies agreed to give $24,000, which was subsequently reduced to $23,000 by the withdrawal of a carriage.] It was at this stage of the negotiations that Mrs. Griswold was apprised of the offer and agreed to accept it.

"When she ratified the sale by Everly she accepted him as her agent, even if he were not such previously; but as it is not denied by the defendant that he was empowered, that is not a material question, as it might otherwise have been. Mrs. Griswold and Strong met the purchasers at the office of the conveyancer, to whom the title-papers were handed over by Mr. Everly, Mrs. Griswold receiving the money and delivering the deeds.

["Now, on this state of facts, there arise three principal questions, which I leave to the jury, to be decided by them. In the first place, did Mr. Strong, as Mrs. Griswold's agent, so far empower John Griswold to act for her in the sale of the premises, as to render her responsible for what he said and did? Second. Did Mr. Griswold state what he did not know to be true, and what was, in fact, false, without having any reasonable ground for believing it? Third. Was this statement credited and believed by the purchasers? Did it influence them in buying, and induce them to give a larger sum than they otherwise would have consented to pay?

"Unless all three of these propositions are found affirmatively by the jury, they should render a verdict for the defendant. If they are so found, the jury may give a verdict for the plaintiffs, if upon the other parts of the case they are of opinion with them."]

Verdict for plaintiffs for $3640 and judgment thereon. Whereupon the defendant took this writ, assigning for error the admission in evidence of the descriptive circular, of the testimony of Adam Everly, and of the testimony as to the conversation between the plaintiffs and John Griswold, the refusal of her point, and the portions of the charge above quoted which are included in brackets.

Richard C. Dale (*John C. Bullitt* with him), for plaintiff in error.

Rufus E. Shapley (*Ellis Ames Ballard* with him), for defendants in error.

May 13, 1889. THE COURT. There can be no question at this date that in an action of deceit, the *scienter* must not only be alleged, but proved, and the jury must be satisfied that the defendant made a statement knowing it to be false, or with such conscious ignorance of its truth, as to be equivalent to a falsehood. This is the general rule, and it has been declared with notable emphasis in several recent cases in this State. (Dilworth *v.* Bradner, 85 Pa. 238; Duff *v.* Williams, Id. 490; McCandless *v.* Young, 96 Id. 289; Hexter *v.* Bast, 23 WEEKLY NOTES, 456.)

If, therefore, the learned Judge at the trial had been stating the general rule, his language to the jury, "Did Mr. Griswold state what he did not know to be true, and what was in fact false, without having any reasonable ground for believing it," would have been open to the objections so forcibly made against it by the learned counsel for the plaintiff in error. But the Judge was not defining the rule in general, but stating so much of it and in such manner as applied to the case before the jury. Thus he drops out entirely the

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first branch of the rule, did the party state what he knew to be false, because there was no evidence nor was it charged that Griswold had made a deliberate and intentional misstatement. The gravamen of the case was that he had, with a recklessness equivalent to fraud, made a positive statement of a material fact, when he had no knowledge on the subject. Plaintiff had proved that the statement was made and was in fact untrue. Defendant had given evidence as to her innocence of the misrepresentations, but John Griswold had not been called to state his knowledge or belief or explain his representations. In this state of the evidence the Judge submitted to the jury whether Griswold had any reasonable ground for believing his statement to be true, or, in other words, could the jury find from the circumstances, as shown by the evidence, any ground to suppose that Griswold did so believe. The language was a fair statement of so much of the general rule as applied to the evidence then before the jury. As it is well stated by the learned Judge in his opinion on the rule for a new trial, "Had John Griswold been put on the stand to vindicate his good faith and state the grounds of his belief, or show how he came to believe in the absence of information . . . . it might have been proper to instruct the jury that whether the causes which influenced his mind were or were not reasonable, or such as they could approve, still if he acted in good faith and expressed a sincere opinion, he should not be found guilty of fraud. But as the case actually stood such an instruction would have tended to mislead by raising an issue for which there was no foundation in the evidence."

It is argued here that the evidence was not sufficient to sustain the action, and that a verdict should have been directed for defendant, as asked by a point submitted at the trial. In support of this view, it is said that plaintiff has only proved an erroneous statement, with no direct proof of deceitful intent. But plaintiff had proved the statement, its falsity, and the circumstances under which it was made, tending to show a reckless assertion in entire ignorance of the fact. What more was necessary to make out a *prima facie* case, or could ordinarily be proved? Fraud and intent to deceive do not proclaim themselves openly, nor can they usually be proved by direct evidence. A man who is shown to have made a false statement, from the consequences of which he will be relieved if he honestly believed it to be true, even on insufficient grounds, should at least be charged with the burden of showing that he did have such belief.

A mere misstatement of the amount of land, as said by SHARSWOOD, J., in Kreiter *v.* Bomberger (82 Pa. 59), is not sufficient to prove fraud, but as said in the same case, if the deficiency is very great in proportion to the whole, it is evidence of fraud; and where, as here, the misstatement is made by advertisement, and by descriptive circular, is repeated at least twice orally in response to the direct question of the intended purchaser, and is altogether unexplained by the person making it, though his principal, and those connected with him in the transaction are shown to have been absolutely ignorant on the subject, we cannot say that there was not a *prima facie* case to go to the jury.

The point that the plaintiff in error was not liable for the statements of her agent, John Griswold, is not tenable. The general rule that a principal is responsible for the misrepresentations of his agent within his authority, is beyond question, and the better opinion is that as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world in the present day is transacted, and the rule should be enforced in a liberal spirit, with regard to the actual habits of the community. That an agent who is empowered to engage a real estate broker to make sale of a country seat, is thereby authorized to give the broker a description of the place, including its acreage, is so clear, that the learned Judge would have been justified in submitting the point to the jury in terms much stronger against the defendant below than he did. But the question does not really arise, as there was testimony not only that the defendant knew of the preparation of the circular by her agent, but also that she had herself given it to parties who inquired about the property. Under this evidence the jury could hardly fail to find that whether it was within the agent's original authority or not, she had ratified his action.

The remaining assignments of error were not pressed at the argument, but may be briefly noticed. The evidence of the value of the land by the acre is objected to, because the place is claimed to have been sold as a whole. But there was evidence that in arriving at a price, the quantity of the land was one of the elements of the calculation, and upon this view of the case, which was plaintiff's contention, the value per acre was certainly relevant.

The objection to Mr. Everly as an expert on the value of real estate, can hardly be made seriously. His testimony shows not only a very large, and widely extended experience in the general business, but also as much specific knowledge of values in the immediate neighborhood of this property, as could be reasonably looked for, in regard to any suburban district of the same character.

We have given this case a very careful examination, not only because it was due to the excep-

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tionally strong and earnest argument of the very able counsel for the plaintiff in error, but also because it is, in some sense, a hardship on the plaintiff in error, who is conceded to have been personally entirely free from any intentional wrong in the matter. Even her agent, John Griswold, who made the trouble, may not have had any actual intent to deceive, but he was shown to have made an apparently reckless statement of a fact of which he had no knowledge. An explanation from him might have turned the verdict, and it is the plaintiff in error's misfortune that he was not called at the trial, to make such explanation if he had it to make. The case, as a whole, was a very close case, in which the jury might have found for either party without being demonstrably wrong, but if they did in fact make a mistake, it was for the learned Judge who tried the cause to correct it, not for us. There was no error of law in the trial, and beyond that we are not authorized to look.

Judgment affirmed.

Opinion by MITCHELL, J. C. K. Z.

Jan. '89, 461, 462. May 1, 1889.

Read's Appeals.

Judgments—Rule to open—Usury.

Where a judgment is entered upon a judgment note, including usurious interest, and some time afterwards a new judgment note is given in settlement of the former judgment, which is thereupon marked satisfied, the defendant cannot upon the judgment upon the new note being opened set up as a defence *pro tanto* the usurious interest included in the former judgment.

As to whether, if the satisfying of the old judgment and the giving of the new judgment had been simultaneous or nearly so, the Court might consider it a mere device fraudulently to conclude the debtor, and on that ground might strike off the satisfaction, and open both judgments, not decided.

Where, however, on a rule to strike off the satisfaction, and open the first judgment to let in a defence of usury, the Court below has found from the evidence, that it was not satisfied in furtherance of a design to bar usury, and discharged the rule, the Supreme Court will not, where the evidence supports the finding, reverse.

Appeals from decrees of the Common Pleas of Crawford County.

Judgments entered in favor of E. T. Montague against W. S. Read, and W. S. Read and H. Read respectively. Satisfaction was entered on the margin of both judgments.

The Court made an order striking off the satisfaction in the above stated judgments so as to allow the defendants to show usury paid thereon, in the case of a judgment now opened, and claimed to have been given in satisfaction of the two previous judgments. Subsequently the plaintiff presented his petition to set aside the above order of the Court, and obtained a rule to show cause. The defendant then took a rule to show cause why the above order of Court should not be amended by adding thereto, "that said judgments be opened for the purpose of allowing defendant to show usury paid thereon." These various rules and motions came on for hearing, and the Court, MEHARD, P. J., of Mercer County, discharged the rules to strike off satisfaction, and open the original judgments, filing an opinion in which he said, *inter alia:* "In this case the evidence shows that the defendant has only an indefinite and imperfect understanding of the transaction resulting in the satisfaction of these judgments, while the testimony on the other side is clear and distinct that they were satisfied at the request and for the accommodation of the defendant. The conclusion is, therefore, inevitable that they were not satisfied through accident or mistake, or in furtherance of a design to bar usury."

Whereupon W. S. Read took these appeals, assigning for error the above action of the Court.

William R. Bole (*James W. Smith* and *Pearson Church* with him), for appellant.

George F. Davenport and *A. J. Harper*, for appellee, were not heard.

May 13, 1889. THE COURT. This was an appeal from the order of the Court below refusing to open two judgments, in each of which the appellant was defendant. The judgments had been satisfied of record by the plaintiff therein. The appellant alleges that the satisfaction was entered for the purpose of depriving him of the defence of usury; that he had given the plaintiff a new obligation for the money; that the transaction was usurious in its origin, and that a portion of the usury was contained in the satisfied judgments. The defendant moved the Court below to strike off the entry of satisfaction and open the judgments, in order that he might set up the defence of usury. The rule granted for this purpose was discharged by the Court below. In Montague *v.* McDowell (99 Pa. 265), it was held that where judgment is entered upon a judgment note, including usurious interest, and some time afterwards a new judgment note is given in settlement of the former judgment, which is thereupon marked satisfied, the defendant cannot, upon the judgment upon the new note being opened, set up as a defence *pro tanto*, the usurious interest included in the former judgment. In delivering the opinion of the Court in that case, an intimation was given by our late brother SHARSWOOD, that if the satisfying of the old and the giving of the new judgment had been simultaneous, or

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nearly so, the Court might have considered it a mere device fraudulently to conclude the debtor, and on that ground have struck off the satisfaction and opened both judgments. These applications to the Court below were probably the result of the intimation above referred to. We are not called upon now to affirm or disaffirm the dictum of Justice SHARSWOOD. The learned Judge below decided these cases upon other grounds. This appears from the following extract from his opinion: "In this case the evidence shows that the defendant has only an indefinite and imperfect understanding of the transaction resulting in the satisfaction of these judgments, while the testimony on the other side is clear and distinct that they were satisfied at the request and for the accommodation of the defendant. The conclusion is, therefore, inevitable that they were not satisfied through accident or mistake, or in furtherance of a design to bar usury." This ruling is abundantly sustained by the evidence. Hence, it is unnecessary to refer to Campbell *v.* Sloan (62 Pa. 481) and that line of cases, which treat of devices to evade the usury laws. The Court below has disposed of these cases upon their merits, and we are not prepared to say its discretion was not properly exercised.

The decree is affirmed in each case, and the appeals dismissed at the costs of the appellant.

Opinion by PAXSON, C. J. S. H. T.

Jan. '89, 86. March 13, 1889.

Brown's Appeal.

Life insurance—Assignment of policy—Interpleader between assignee and children of original beneficiary—Lex fori and lex loci with respect to contracts of insurance.

Where a party took out a policy of insurance in a New York company payable to his wife, and "in case of the death of the said Diana Sandt before the decease of the said Daniel P. Sandt, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian, if under age," and the husband and wife afterward executed an assignment of the policy to a creditor, the wife having died in the lifetime of the insured, her children will be entitled to the insurance money in preference to the assignee.

By the terms of the policy the wife was to receive the money only upon condition that she was living when the policy fell due; if she did not survive her husband, it was payable to her children.

The assignment of the policy passed whatever the wife had, and the extent of it clearly appeared upon the face of the policy. Her assignment put her assignee in no better condition, and gave him no greater interest than she had.

The children were parties to the contract, as truly as was the wife, and they had as clear a right to sue upon it on the happening of the contingency that made them payees, as she could have had if living.

Where the foreign insurance company has paid the money into Court, and an interpleader is framed between residents of the Commonwealth, the question of *lex fori* and *lex loci* does not arise, as the contest is over a fund in the possession of the Court of common domicile.

Appeal of Andrew J. Brown, from the decree of the Common Pleas of Northampton County, directing the payment of the proceeds of a policy of insurance upon the life of Daniel P. Sandt, to the children of Diana Sandt, wife of said Daniel P. Sandt.

The following facts appeared from the petition of the Germania Life Insurance Company of New York, praying that it be allowed to pay the proceeds of the policy of insurance upon the life of Daniel P. Sandt into Court, and that claimants therefor might interplead, and the answers thereto.

Petitioner was a corporation of the State of New York, and issued a policy upon the life of Daniel P. Sandt to Diana Sandt, on September 30, 1865, for $2000, the provisions of which policy were, *inter alia*, as follows:—

And the said company do hereby promise and agree to and with the said Diana Sandt, well and truly, to pay, or cause to be paid, the said sum assured to the said Diana Sandt for her sole use in conformity with the statute in such case made and provided, within sixty days after due notice and proof of the death of the said Daniel P. Sandt, during the continuance and before the termination of this policy, and of the interest of the claimant in this policy, if the same shall be at the time held by an assignee, or as security, the balance of the year's premium, if any, being first deducted therefrom, and in case of the death of the said Diana Sandt before the decease of the said Daniel P. Sandt, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian, if under age.

The policy was taken by the assured at Easton, in this State. By its terms the premiums were to be paid quarterly up to June 30, 1875, at which time the policy was to be full paid. By assignment, dated December 21, 1875, the policy was assigned by Sandt and his wife to Andrew J. Brown, a creditor. Diana Sandt, the wife, died February 19, 1884, and Daniel P. Sandt died January 6, 1888, leaving the following children: Ellen Sabina Staats, Wilson A. Sandt, Owen F. Sandt, Lizzie Sandt, Emily Miller, Fannie Sandt, and Daniel Sandt. Both Andrew J. Brown and the children of Mrs. Sandt claimed the insurance money, which amounted to $2129.12, less costs. The Court allowed the company to pay the money into Court, and directed that an interpleader be awarded between Andrew J. Brown as plaintiff, and the children of Mrs Sandt as defendants.

After argument, the Court entered the following decree: "And now, October 1, 1888, it is

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ordered that the fund in controversy be paid to the children of Diana Sandt, to wit: Ellen S. Staats, Wilson A. Sandt, Owen F. Sandt, Lizzie Sandt, Emily Miller, Fannie Sandt, and Daniel Sandt, the shares of Fannie and Daniel Sandt to be paid to their guardian, less the cost of this proceeding, which it is ordered shall be paid out of the fund."

Whereupon Andrew J. Brown took this appeal, assigning for error the action of the Court in awarding the fund paid into Court to the children of Diana Sandt, and in not awarding it to him.

Edward J. Fox (*Elisha Allis* and *Edward J. Fox, Jr.*, with him), for appellant.

This policy was accepted by the assured at Easton in this State. There was no contract relation until the policy was accepted, and the place of delivery is the place of contract. This was therefore a Pennsylvania contract.

Real Est., etc. Ins. Co. *v.* Roessle, 1 Gray, 336.
Hamilton *v.* Lycoming Ins. Co., 5 Barr, 342.
Myers *v.* Ins. Co., 3 Casey, 271.
2 Parsons on Contracts, 327.
Freese *v.* Brownell, 6 Vroom, 285.
Jewell *v.* Wright, 30 N. Y. 259.
Bell *v.* Packard, 69 Me. 105.
Hyde *v.* Goodnow, 3 Comstock, 266.
Mott *v.* Wright, Bliss C. C. 53.
Daniels *v.* Ins. Co., 12 Cushing, 416.
Heebner *v.* Ins. Co., 10 Gray, 131.
Kennebec Co. *v.* Ins. Co., 6 Gray, 208.
Todd *v.* Ins. Co., 3 Weekly Notes, 330.

Under the laws of Pennsylvania a married woman's assignment of a policy of life insurance is valid.

Bond *v.* Bunting, 28 Smith, 219.
Haffey *v.* Carey, 23 Id. 431.
Act of March 14, 1873, P. L. 46.
Lytle's App., 12 Casey, 131.
Stoops *v.* Blackford, 3 Id. 213.
Moore *v.* Cornell, 18 Smith, 320.

The policy having matured on June 30, 1875, Mrs. Sandt's interest became absolute and she was the owner of the policy and could have surrendered it or sold it to the company.

Anderson *v.* Goldsmidt, 103 N. Y. 617; 38 Hun, 360.

Fred. Green, for appellees.

A contract of insurance is subject to the law of the place where the policy is issued. The law of the place of acceptance controls.

2 Wharton on Contracts, § 875.
Wharton's Confl. of Laws, §§ 465, 466.
May on Insurance, 45, 61, 62.
Taylor *v.* Ins. Co., 9 Howard, 390.
Cooper *v.* Ins. Co., 7 Nev. 116.
Fried *v.* Ins. Co. 47 Barb. 127.
Eadie *v.* Slimmon, 26 N. Y. 9.

The case of Anderson *v.* Goldsmidt (103 N. Y. 617) does not overrule the case of Eadie *v.* Slimmon (26 N. Y. 9).

Prior to the Act of 1879, Ch. 248 of Laws of New York, policies were not assignable by the wife.

Frank *v.* Mutual Ins. Co., 102 N. Y. 266.
Eadie *v.* Slimmons, *supra*.
Brummer *v.* Cohn, 86 N. Y. 11.

By the terms of the policy, in case of Mrs. Sandt's death, the money was not payable to her representatives or assignee but "to her children." Her death during the lifetime of the assured, therefore, terminated whatever right she had and also that of her assignee.

Knickerbocker Ins. Co. *v.* Weitz, 99 Mass. 159.
Mass. Gen. Stats. c. 58, § 62.
Act of April 15, 1868, Purd. Dig. 924, pl. 106.
Bank of Washington *v.* Hume, 128 U. S. 195.
Bliss, Life Insurance, 517.
Glanz *v.* Gloeckler, 10 Ill. App. 486.
Wilburn *v.* Wilburn, 83 Ind. 55.
Ricker *v.* Ins. Co., 27 Minn. 193.
Charter Oak Ins. Co. *v.* Brant, 47 Mo. 419.
Gould *v.* Emerson, 99 Mass. 154.
May on Insurance, 473, 477.
Continental Life Ins. Co. *v.* Palmer, 42 Conn. 60.

April 8, 1889. The Court. This case presents but a single question. In 1865 the Germania Life Insurance Company, a New York corporation, issued a policy of insurance upon the life of Danial P. Sandt, a citizen of Pennsylvania for two thousand dollars. It was made payable to Diana Sandt, the wife of the insured, for her sole use, with a provision that "in case of the death of the said Diana Sandt before the decease of the said Daniel P. Sandt, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian if under age." In 1875 both husband and wife joined in an assignment of the policy to A. J. Brown, the appellant. In 1884 Diana Sandt died leaving her husband and seven children to survive her. In 1888 Daniel P. Sandt, the insured, died. The assignee of the policy and the children of Mrs. Sandt made claim to the amount of the policy, and the company properly asked the Court of Common Pleas of Northampton County, where all the claimants lived, for leave to pay the money into Court, and that the claimants interplead with each other. If the assignment of Mrs. Sandt was effectual to vest in her assignee a good title to the policy, then he was entitled to the fund.

The assignment is formal and her husband joined her in its execution. Whatever title she had therefore passed to her assignee. The extent and character of her title appeared plainly on the face of the policy. She was the payee named in the first instance, but the promise to her was not an absolute and unconditional promise to pay to her, or to her administrators, executors or assigns, but a promise to pay her upon condition that she was living when the policy should fall due.

If she survived her husband the insurance money was payable to her, but if she did not, it was payable to her children then living.

Their right to the money depends upon the terms of the contract, which was payable to

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them if she was not living at the death of the insured.

They were parties to the contract as truly as she was, and with as clear a right to sue upon it, upon the happening of the contingency that made them the payees, as she could have had if living. Her assignment put her assignee in no better position than she occupied, and conferred upon him no greater interest in the policy. Her death in the lifetime of her husband extinguished her interest in the policy, and it can no more survive in the hands of her assignee than in her administrator.

The condition on which her right to recover was to end, and that of her children was to arise has happened, and the contract of the insurance company is now with the children, and must be enforced by them for their benefit.

It seems to have been thought that an important question about whether the *lex fori* or the *lex loci* ought to prevail was involved in this case, but that is a mistake. The insurance company came into this State, and paid the money into Court for the benefit of the party entitled to it. The present contest is between residents of this Commonwealth, over a fund in the possession of the Court of common domicile, and depends upon the construction of the contract under which both parties claim.

The judgment is affirmed.

Opinion by WILLIAMS, J. H. S. P. N.

Common Pleas.

C. P. No. 2. April 27, 1889.

City v. Hemphill.

Municipal claim—Act of March 23, 1886 (Purd. Dig. 1209, pl. 42, 43)—Affidavit of service of notice—Service of notice before issue of scire facias upon the claim—Service of additional notice before issue of the scire facias to revive, not required.

Rule to strike off judgment.

A municipal claim for water-pipe was filed against defendant's property, May 6, 1874, and on January 9, 1879, affidavit of service of notice was filed. The same day a scire facias issued, to which there was a return of "Made known by posting and advertising." May 11, 1882, judgment was entered for want of an appearance. April 27, 1887, a scire facias, to revive judgment; and May 10, 1887, an alias scire facias issued, to each of which there was a return of *nihil habet*, upon which judgment for want of an appearance was entered.

January 24, 1888, the registered owner then took this rule, upon the ground that it did not appear by affidavit filed of record that the plaintiff made any attempt to serve a notice upon the owner or reputed owner of the said lot before issuing the scire facias of April 27, 1887, and that of May 10, 1887.

Horace Haverstick, for the rule.

The Act of March 23, 1866 (Purd. Dig. p. 1209, pl. 42, 43), directs that before any *scire facias* shall be issued upon any municipal claim the city solicitor shall cause search to be made for the owner of the lot, and serve him with notice to make payment within ten days. If the claims are not paid within said time the writs of scire facias shall be served "by posting and advertising."

But before any judgment shall be entered therein the Court shall be satisfied by an affidavit to be filed of record that said notice was served upon the owner in the manner directed by the Act.

City *v.* Hanbest, 15 WEEKLY NOTES, 349.

The judgment of May 11, 1882, will not excuse compliance with the Act. The subsequent proceedings are on the original claim, and not on the intervening judgment.

Haddington Church *v.* City, 12 Out. 466.

E. Spencer Miller, for the city.

Eo die. THE COURT. Rule discharged.

J. W. T.

Orphans' Court.

February 18, 1889.

Bispham's Estate.

Decedent's estate—Collateral inheritance tax on annuity—When payable by annuitant, and when by residuary legatee—Collateral inheritance tax upon "the annual net sum of $1200," not payable by annuitant, but out of corpus of the estate.

Sur exceptions to adjudication.

At the audit of the account of Edward P. Allinson, executor of William D. Bispham, the decedent, it appeared that the testator died in May, 1888, and by his will devised and bequeathed all of his estate to the accountant, in trust, to pay Ellen I. Parker the annual *net* sum of twelve hundred dollars, during her life, and the income of the residue to testator's son

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David, who, if alive at the dropping of the above annuity, was entitled to the fund producing it. There was a remainder to and among David's issue.

This annuity being subject to collateral inheritance tax, it was urged in behalf of the accountant that it should be deducted therefrom. This the Auditing Judge (FERGUSON, J.) refused to do, holding that the word *net*, according to Webster, means "clear of all charges and deductions," and consequently that the tax should be paid by the estate.

To this finding exceptions were filed on behalf of the accountant.

S. Davis Page, for exceptant.

The words "*net sum*" mean no more than it is the duty of the Court to set apart principal sufficient to yield the sum of twelve hundred dollars, incident to the maintenance of the general estate, and the fund itself. See—

Shippen *v.* Burd, 42 Pa. St. 461.
Thomson's Estate, 5 WEEKLY NOTES, 19.
Holbrook's Estate, 20 Id. 79.

John G. Gallen, for the annuitant.

March 2, 1889. THE COURT. The question raised by the exception is whether the collateral inheritance tax upon an annuity is payable by the annuitant, or by the executor out of the general estate, thus in effect by the residuary legatees.

If the gift was simply an annuity of a specified sum payable monthly or quarterly, it must be conceded the annuitant is liable for the tax ~~under the provisions of the Act~~ of April 7, 1826, and its supplements. An annuity is an "estate" within the meaning of the Act. (Thomson's Estate, 5 WEEKLY NOTES, 19.) And so with a legacy or devise, subject to the tax, it must be paid by the devisee or legatee, unless there is a direction in the will to the contrary, or such language be used by the testator as to sufficiently indicate his intention that the annuitant, devisee, or legatee shall take free from the tax. (Shippen *v.* Burd, 42 Pa. St. Rep. 461; Thomson's Estate, *supra.*)

This is also the law in England with respect to the legacy duty and income tax. (Foster *v.* Ley, 2 Sc. 438; 2 B. N. C. 269).

But the gift in this case is of "the annual net sum of twelve hundred dollars." And testator not only directs its payment in quarterly payments of three hundred dollars, but also the reservation of a principal sum out of the investments of his estate, ample to yield a net income or yearly sum of $1200 "disposed of as above."

It is, therefore, much more than a mere gift of an annuity of $1200, and is of "the annual net sum" of $1200. Testator was a member of the legal profession, himself, perhaps, the draughtsman of his will, and knew, or must be presumed to know, the annuity was subject to the tax. And when he used the phrase "the annual net sum" we must conclude it was so used with a certain definite purpose, and in its usual and ordinary meaning and acceptation. As shown by the Auditing Judge, the word "net," according to Webster, means "clear of all charges and deductions," and implies a gross sum from which allowances and credits are to be taken; so that, if testator had said the annual sum of $1200, "clear of all charges and deductions," can there be any doubt the collateral tax would be included? We think not; and it is very evident his intention was the annuitant should receive the clear annual sum of $1200, payable in equal quarterly payments. This being so, the tax must necessarily fall upon the residue.

We are not aware of any case in Pennsylvania where the precise language of this will is used; the nearest approach being in Holbrook's Estate (20 WEEKLY NOTES, 79). In that case, the gift was an annuity "not less than —— dollars in each year." Testator did not say "the clear sum of —— dollars," nor "free from all charges or deductions;" nor did it appear from the context that he intended to relieve the annuitant from the tax, and impose it upon the residue; and we were of opinion that such an intention was not expressed with sufficient clearness, and held the annuitant liable to pay the tax.

But in England it is held in numerous instances, that "legacies given free from deduction, or free from expense, or free from charge or liability, are free from duty." (Barksdale *v.* Gilliatt, 1 Sw. 652, and others, cited in Theobald on Wills, 143.) "A gift of a clear sum or annuity is a gift clear of legacy duty;" "so is a gift of a fund to produce a clear annual sum, which sum is to be paid the legatee." But "a gift of a fund to produce a clear annual sum and to pay the dividends of the stock, and not the exact sum, to the legatee, is not a gift free from legacy duty; the term clear being referred to the costs of investment." Id.

From these authorities, if this testator had directed the setting apart sufficient of his investments to produce the income of $1200 per annum, and to pay the dividends of the stock, etc., set apart to the annuitant, the latter would be liable to the tax. But, where the gift is of a "clear" or "net" annual sum to be paid the annuitant out of the fund so set apart, this direction is sufficient to relieve her from payment of the tax.

We think the distinction is obvious, and, as we agree with the conclusion of the Auditing Judge, the exception is dismissed and adjudication confirmed.

Opinion by HANNA, P. J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, MAY 24, 1889.* [No. 4.

THE EXCLUSIVE REMEDY OF RAILROAD BONDHOLDERS.

PHILADELPHIA, April 27, 1889.

R. C. MCMURTRIE, Esq.

Dear Sir: The decision of the Supreme Court of Pennsylvania, in the case of The Commonwealth *v.* The Susquehanna and Delaware River Railroad Company, published in 122 Pa. St. Rep. 306; S. C. 22 WEEKLY NOTES, 413, has given rise to discussion, both in the profession and also among the holders of railroad securities. The fear is entertained by some, that under the principles of this decision a railroad company, having once mortgaged its property and franchises, is incapable of making a second mortgage, which will be an effectual security to the holders of bonds issued thereunder. I would be much obliged if you would give me the benefit of your opinion upon the scope of the decision, as I think it unlikely that the Supreme Court intended to annunciate the doctrine which it is suggested finds support in the opinion of the Court.

Yours truly,

RICHARD C. DALE.

—

April 29, 1889.

DEAR MR. DALE:

The difficulty in the case you mention is to support the judgment without infringing upon a rule of law in this State on which really hundreds of titles depend.

While upon a first reading, there may be seeming difficulties in the case to which you refer, further and careful consideration had led me to conclusions which I hope will make it as plain to you as to myself.

The case was this: A mortgage had been made to a trustee by a railroad corporation to secure bonds in the usual form. A judgment had been recovered for the interest on one of the bonds. The property mortgaged was sold under this by the sheriff and the Court held that the purchasers took nothing—not even the equity of redemption charged with the mortgage.

The language of the Court and the decision combined I think naturally lead to the inference that the Court held that there was no estate left in the mortgagor that could be levied on and sold, and therefore the defendants were not entitled to be a corporation. If this were so, if this was the ground of the decision, it inevitably results that there could be nothing to mortgage.

On the other hand it is difficult to conceive that a Court intended to deny that a railway company could make as many successive mortgages as it pleases. The problem is how to reconcile this with the apparent denial of an estate that could be seized in execution since the statute subjecting all franchises to seizure and sale.

The allusions in the judgment to the nature of the property, the form of the mortgage, the character of the debt, all serve but to withdraw attention from the true ground.

The difficulty (incomprehensible to any one but a Pennsylvania lawyer) is really contained in the reference to Pierce *v.* Potter (7 Watts, 475); for we thus see that the doctrine which is supposed to be established or recognized in that case, is the difficulty to be got over. The citation is rather a strange one for the purpose. For the point there decided has no bearing on the present case. But there is a reference to a rule of Pennsylvania law, called by Chief Justice GIBSON a buttress to the decision of that case, which is evidently what is meant by the reference to the doctrine of Pierce *v.* Potter. This rule is, that where there are two securities for the same debt, a sale under either discharges both. That is, a sale under a judgment for a debt secured by a mortgage, however recovered, and irrespective of all forms, has the same effect in passing the mortgaged estate, and divesting the lien of the mortgage, as a sale in foreclosure, or, as we call it, under a scire facias. This rule is, I think, generally known as that of McCall *v.* Lenox (9 S. & R. 302). It was first recognized in that case.

Why this rule did not apply to the sale of this railroad, was the question; because it has been so uniformly decided as to be a rule of property that no exception by statute is of any avail to save the mortgage from divestiture. The inherent necessity for giving this artificial effect to a sheriff's sale for the mortgage debt, or any part of it, overbears the statutory declarations that such a sale shall not have that effect. To have said that the provision in the Act of 1870 (Purd. Dig. 359, pl. 118), under which the sale was made, and by which it was sanctioned, had that effect, would have been impossible, in view of the settled rule of the Court established in Berger *v.* Heister (6 Whart. 210). To have said that the ordinary rule does not extend to railroad mortgages, to trustees, would have conflicted with West Branch *v.* Chester (1 Jones, 282). To have said that franchises were not within the rule would have been inconsistent with the decision, because if the rule does not apply, then it follows that the sale passed the equity of redemption subject to the mortgage, and if so the judgment was wrong. To deny the existence of an

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equity of redemption would be (to say nothing more) inconsistent with the existence of an estate that can be mortgaged.

It was therefore the existence of this cardinal rule of property in this State that a sale of mortgaged property under a judgment on a bond secured by the mortgage, or for interest thereon, passes the mortgage estate, and divests the mortgage—that compelled the Court to admit that if it applied the defendants were entitled to judgment.

Why then were they not? Because by a contract between themselves and with the corporation, it was stipulated that this should not be permitted, that this result should not be possible, and hence in order to render that contract effectual, all remedies that led to such result, were by the Court held to have been put under an interdict. Could the Court have construed this contract in any other way? It is impossible that men shall agree that the legal consequences of acts shall not follow such acts [we may I think pass over our exceptional rules, such as what we call spendthrift trusts, and other anomalies], but as a general proposition it will be admitted to be true that the incidents attached by law to an act or estate must accompany it. It cannot be possible that a sale under a judgment shall be allowed to produce effects varying at the pleasure of the parties, differing from those imposed by the law of the land.

Under our law therefore if such a sale can be made, as was attempted here, and if it is made, this consequence must follow, viz: that the mortgage is discharged. But if the parties had agreed as part of the original contract between themselves and the company, that this should not be so, it became as much a part of the contract as any other stipulation. It certainly must be as effectual as the anomalous but analogous form adopted when a trustee borrows money under a power, and wishing to give something to be secured by mortgage, gives a bond restricted in right of satisfaction to the mortgaged premises. I suppose no one will doubt that under a sale on a judgment on such a security of other property, the alternative must be either that the sale is a nullity as not warranted by the judgment, or it is effectual for all purposes of any sale under any judgment.

To hold that the exclusive mode of enforcing that contract is to apply to restrain the sale, would be alarming. What is to become of the person who has made such an arrangement, and is sick, or absent, or dies?

This was then the position into which the Court was forced for they found in the mortgage a contract that there should be no sale of the mortgaged premises unless requested by $300,000 of the bondholders. True this at first sight looks like a power in aid of ordinary remedies. It is that; but it is more—it is a contractual prohibition of all other remedies that produce the result intended to be prevented; that is of a sale without consent, or in any but the agreed mode. There is authority for thus reading this clause cited in the judgment on page 322, though there it was applied as a preventive remedy.

If a covenant not to issue execution indorsed on the record renders a sale under one issued a nullity, so must this covenant render void any sale under any judgment on any bond. For all purchasers of necessity have notice of this contract.

This then is in my opinion the clear, distinct, and solid ground to rest this judgment on, and I think the only one. If the profession will accept it, and the Court sanction it—if they have not already done so—we have in this case a decision that will enable us hereafter to avoid the perils incident to the rule of McCall *v.* Lenox, and those resulting from the refusal by the Court to accept the legislative change in the law as stated, and now settled by Willard *v.* Norris, and Corporation *v.* Wallace, which refusal we find in the judgment in Berger *v.* Heister.

For years efforts have been made by some practitioners thus to exclude the risk of tricks being played by collusion between a mortgagor and a single bondholder; but they have felt the uncertainty of the acceptance by the Court of their schemes. The doubt was whether it would be thought best to interfere with that stroke of legal statesmanship that with evident pride, by the judgment in Corporation *v.* Wallace, put a mortgage in fee as a security, below that of a blacksmith's lien for shoeing a horse, when it was declared, as it was there declared, that *all sheriff's sales* had always been supposed to discharge the land of *all mortgages* with an entire unconsciousness that this was inconsistent with holding as they had just done in McCall *v.* Lenox, that it was essentially an exception that *any* sale should discharge *any* mortgage, and still later in Wilson *v.* Stoxe (10 Watts, 434), denying that a sale under a bond had any effect on its own mortgaged estate. Such devotion to a rule might well lead one to doubt the acceptance of any scheme of avoiding its operation.

If it shall be said, as it probably will be, that all that I have said is useless, it being plain that this is what was meant by the Court in the judgment which I have been discussing, I shall be more than compensated for my pains, for that assumes I am correct; for the value of this decision, *if thus understood*, cannot be exaggerated to the investing community.

I may venture to add that the form adopted by the late Mr. Gowen, and another conveyancer, was to covenant that as respects the mort-

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gaged premises the remedy of the bondholder should be exclusively that given by the terms of the mortgage. This is quite clear of the remark of Mr. Justice BRADLEY, that no stipulation can oust the jurisdiction of the Court, when one can really comprehend the rule of McCall *v.* Lenox, a thing I never found a layman or a foreign lawyer competent to do.

R. C. MCMURTRIE.

Supreme Court.

Jan. '89, 166. March 21, 1889.

Citizens' National Bank of Towanda v. Piollet.

Negotiable instruments—Memorandum on face of same—When it destroys the negotiability.

In an action against the indorser of a promissory note upon his contract of indorsement, the plaintiff must show the defendant's technical liability as indorser or fail in his suit.

A note which bears upon its face a memorandum in the following words: "This note is given for advancements, and it is the understanding it will be renewed at maturity," is not an absolute, unconditional contract to pay the money at maturity, and consequently is not a negotiable instrument; hence an indorser thereof is not liable to the holder on his contract of indorsement.

Error to the Common Pleas of Bradford County.

Assumpsit, by the Citizens National Bank of Towanda against Victor E. Piollet.

The plaintiff declared upon a note of which the following is a copy:—

This note is given for advancements, and it is the understanding it will be renewed at maturity.

$500 TOWANDA, Pa., Feb. 20, 1887.

Three months after date the Eureka Mower Co. promise to pay to the order of V. E. Piollet five hundred dollars at the Citizens' National Bank of Towanda without defalcation for value received with interest and without grace.

No. 2717. EUREKA MOWER CO.

Attest: E. T. FOX, Pres't.

By G. W. BUCK, Trea.

Indorsed: V. E. PIOLLET.

A protest was attached to this note.

On the trial, before WILSON, P. J., of Tioga County, plaintiff offered in evidence the above note. Objected to for the reason that said note is not negotiable paper, and that therefore defendant is not liable as indorser thereon. Objection sustained. Exception. (First assignment of error.)

This offer was renewed, to be followed by evidence that the Eureka Mower Company in order to take it up presented the note at the bank and offered to renew it with Col. Piollet, the defendant here, as indorser; that they asked him to indorse it, but that he declined and refused so to do.

Objected to by defendant. Objection sustained. Exception. (Second assignment of error.)

Plaintiff then amended its declaration by striking out the words, "This note is given for advancements, and it is understood to be renewed at maturity," written on the margin of the note, in red ink, and then offered the note in evidence without the memorandum. Objected to, because it is incompetent for plaintiff to offer in evidence a part of a paper. Objection sustained. Exception. (Third assignment of error.)

The Court then directed the jury to find for the defendant, which was accordingly done, and judgment was entered on the verdict.

Plaintiff took this writ, specifying for error the refusal of the Court to admit its offers of evidence as above.

D'A. Overton (*B. M. Peck* with him), for plaintiff in error.

Edward Overton, Jr. (*Elhanan Smith* with him), for defendant in error.

May 6, 1889. THE COURT. This is an action against the indorser of a promissory note; he is sued upon his contract of indorsement and not upon any other or independent special contract in relation to that indorsement. His liability therefore in the present action must be the technical liability of an indorser or the suit must fail. The note itself without the written memorandum which appears upon its face, is a complete and perfect obligation of a negotiable character, and if the written memorandum were not there we know of no reason why there should not be a recovery against the defendant as a mere indorser. But the memorandum is there; it is not alleged nor offered to be proved that it is there without authority, and if it has a controlling effect upon the note it must be treated as a part of it. Its meaning is entirely plain. The words, written across the end of the note, and on the face of it in immediate proximity to the words of the note, are, "This note is given for advancements and it is the understanding it will be renewed at maturity." The statement that it is given for advancements does not affect the certainty of the note and it could easily be regarded as a mere memorandum, not changing the contract and therefore not material. But the remainder of the writing is an agreement that the note will be renewed at maturity. As the bank is the holder and discounted the note when it was given it is undoubtedly affected by the terms of the memorandum and must be considered as having agreed to renew the note at its maturity. This

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being so the obligation of the note is not an absolute, unconditional contract to pay the money at maturity. It is a qualified obligation to pay, with a condition that instead of paying the holder may give another note in its place which the bank would be bound to accept instead of money. This being so the case comes within the rule that commercial paper, to be negotiable, must be certain, unconditional, and not contingent. In Overton *v.* Tyler (3 Pa. 346), GIBSON, C. J. said, "But a negotiable bill or note is a courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it and destroy it. But a memorandum which is merely directory will not affect it." In Woods *v.* North (84 Pa. 407), SHARSWOOD, J., said, "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor." It is manifest from the foregoing that the only inquiry necessary to determine the question of negotiability is, the effect of the memorandum upon the terms of the note. As we have seen it makes an important change in the note, in that instead of the note being a distinct contract to pay a fixed sum of money at a day certain, the holder has agreed to accept, instead of payment in money, another note payable at another time which is not fixed. The obligation of the note therefore is uncertain, depending on whether the maker chooses to pay it or give a new note in place of it. This uncertainty destroys its negotiability and for that reason relieves the indorser. As this is not an action against the indorser to recover damages for breach of an agreement by him to continue his indorsement, that aspect of the case cannot be considered.

Judgment affirmed.

Opinion by GREEN, J. W. M. S., JR.

Jan. '88, 191. February 12, 1889.

Harlan v. Haines et al.

Act of April 9, 1849—Debtors—$300 exemption—When the same must be claimed.

The exemption Act of April 9, 1849, is not self-executing; it is only a privilege which a debtor may demand or waive. And if he has notice of the seizure of his property on execution process he must, without unnecessary delay, claim his exemption or he will lose it.

An attachment execution issued against H. and a levy was made on his share of a fund in the hands of the trustees of the estate of his deceased father. H. was not entitled to receive the fund attached until the death of his mother and the settlement of an account by the trustees. The attachment was served on H. on March 28, 1874, and on January 21, 1887, H. filed his claim for the benefit of the exemption law. An appearance was entered for the garnishees, but there were no other proceedings in the case when the claim for the exemption was filed:

Held, that H.'s delay to claim the exemption, for thirteen years after the attachment had been served upon him, was a complete waiver of his privilege to demand the same.

Error to the Common Pleas of Chester County.

Case stated, wherein Enoch L. Harlan was plaintiff, and E. D. Haines & Co. defendants, as follows:—

"And now, June 25, 1887, it is hereby agreed by and between the parties, the plaintiff and defendants above named, that the following case be stated in the opinion of the Court in the nature of a special verdict.

"That Enoch Harlan died in the year 1872, and bequeathed twenty-five hundred dollars in trust, the income or interest thereof to be paid annually to his wife during her natural life, and if from protracted sickness or other unavoidable cause, the income be not sufficient to render her situation comfortable, the testator authorized the trustee to appropriate, from time to time, such part of the principal sum as in the discretion of the said trustee he might deem necessary for the purposes aforesaid; and at the decease or subsequent marriage of said widow the principal sum, or such part thereof as may remain unexpended, was to be divided into seven equal parts and to go to his seven children, one of whom is Enoch L. Harlan, the plaintiff above named. Said will was duly proven June 25, 1872, and the trustee having received the aforesaid bequest continued to make sundry payments to the widow up to the time of her decease, in the year 1886, and as appears by his account, which has been duly confirmed by the Court; the balance of the principal sum in the hands of said trustee is seventeen hundred and thirty-nine dollars and fifty-six cents; the share of Enoch L. Harlan being two hundred and forty-eight dollars and fifty cents.

"March 21, 1874, E. D. Haines & Co., the defendants above named, served a writ of attachment execution upon said trustee, and on March 28, 1874, the record shows that Enoch L. Harlan, the plaintiff above named and defendant in the judgment for $—— in favor of E. D. Haines & Co., was served with said writ of attachment

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by leaving at his place of residence a true and attested copy of the writ with an adult member of his family. Wm. M. Hayes, Esq., then entered an appearance for the garnishees. No appearance was ever entered for Enoch L. Harlan.

"Nothing further was done in said attachment proceeding until January 14, 1887, when said Enoch L. Harlan filed with the prothonotary a claim for the benefit of the $300 exemption under the Act of April 9, 1849.

"If the Court be of the opinion that the said Enoch L. Harlan is, under the facts of this case, entitled to the benefit of the exemption as claimed by him, then judgment to be entered for the plaintiff for two hundred and forty-eight dollars and fifty cents; but if the Court be not of that opinion then judgment to be entered for the defendants. Costs to follow judgment; either party reserving the right to sue out a writ of error therein."

The Court was of the opinion that Enoch L. Harlan was not entitled to the exemption claimed by him and entered judgment in favor of E. D. Haines & Co., the attaching creditors, with costs. Harlan then took this writ assigning for error this action of the Court.

William M. Hayes, for plaintiff in error.

Robert T. Cornwell, for defendants in error.

March 25, 1889. THE COURT. E. D. Haines & Co. obtained a judgment against Enoch L. Harlan, on which an attachment execution was issued March 21, 1874, and levied on his share of a fund in the hands of the trustees of the estate of his deceased father. He was not entitled to receive the fund attached until the death of his mother, and an account was settled by the trustees. The attachment was served on him March 28, 1874, and on the 14th day of January, 1887, he filed with the prothonotary a claim for the benefit of the exemption law. An appearance was entered for the garnishees, but no other proceedings had been taken in the case when the exemption claim was made.

The single question presented for determination is whether it was in time.

The plaintiff in error insists that, as the exact amount of his share in the fund could not be ascertained until the termination of the life estate and the settlement of an account by the trustees, he was not required to make his claim for the exemption before the occurrence of these events, and that a debtor may at any time effectually claim his exemption out of an attached fund if the plaintiff has done no more than issue and obtain service of the attachment. It is true that the attaching creditors could not take the fund from the trustees pending the life estate, but by the service of the attachment they acquired a lien upon it, and the right to compel the trustees to account at the proper time. The fund was taken in execution and as surely in the custody of the law as a chattel levied upon.

The exemption statute of April 9, 1849, is not self-executing. It extends a privilege to the debtor which he may claim or waive, and it is operative only on his demand. In connection with the privilege it confers on the debtor, is the duty which rests on him of promptly claiming it. When a debtor has notice of the seizure of his property on execution process, he must, without unnecessary delay, claim his exemption or he will lose it. It is a right which may be defeated by his laches, or may be protected by his vigilance. The omission of the creditor to bring the property to sale or to obtain judgment against the garnishee at the earliest practicable moment will not necessarily extend the time within which the debtor may claim his exemption, or relieve him from the consequences of his default. His exemption is protected by his own vigilance and not by the indulgence of his creditor. This is the lesson taught by the cases on this subject, and it is a wholesome one. A rule which requires diligence in the assertion of an exemption claim is reasonable, and it is just to debtor and creditor. Applying it to the case in hand it is clear that Harlan has no right to the exemption he now claims. His neglect to demand it for nearly thirteen years after the attachment was served upon him, constitutes a complete waiver of the right or privilege which the exemption statute affords. That unreasonable delay without proof of injury, such as the creation of additional expense or trouble to the creditor, may defeat his claim, is settled by Bittenger's Appeal (76 Pa. 105), in which it was decided that in an attachment execution proceeding when the attachment is served on the debtor he must make his claim at the term to which the writ is returnable. In that case this Court said, "it is important in a matter of practice such as this, that there should be a definite rule to guide both parties. It is certainly not a hard one to require the defendant to make his claim during the term when he should appear to answer the writ." In Bittenger's Appeal, as in this case, the attachment was served on the defendant. In Howard Association *v.* Phila. & Reading R. R. Co., Garnishees (102 Pa. 220), the attachment was not served on the defendant, and he was allowed his exemption after the first term, but because he made his claim for it as soon as he had notice of the execution of the writ. The rule established in Bittenger's Appeal (*supra*), has not been infringed by subsequent decisions. It is a reasonable and just rule, and as it fully sustains the action of the Court below in this case,

The judgment is affirmed.

Opinion by McCOLLUM, J. W. M. S., JR.

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Jan. '86, 149. March 25, 1889.

Watson's Appeal.

Decedent's estate — Will — Construction of — Trusts — Active and passive — Act of May 17, 1871, criticised.

A testatrix devised one-fourth of her residuary estate to a trustee to "hold and invest the principal sum . . . . in good real estate securities, and keep the same invested, and from time to time, as the interest . . . . shall be received, to pay the same over to my son M. during all the term of his natural life, and after the decease of my said son M.. to pay the principal sum . . . . over to the lawful child or children of said M., if more than one, share and share alike; any deceased child leaving lawful issue, such issue to take, etc. [*per stirpes*], and in the event of my said son M. dying in my lifetime, or without leaving any such lawful child, etc. . . . . then the same to be paid over as hereinafter provided in case of a legatee dying in my lifetime:"

Held, that the trust was a special, active trust.

Held further, that the corpus could not be delivered to M. as the "person entitled thereto" upon his entering security under the Act of May 17, 1871 (Purd. Dig. 554), to protect the interest of the persons entitled in remainder.

Per PAXSON, C. J. "We do not think the Act of May 17, 1871, was intended to destroy active trusts, and to require the Courts to hand over such estates to the tenants for life upon giving security or otherwise. If it was so intended, it is the most vicious piece of legislation ever conceived by the mind of man. It is sufficiently objectionable when confined within its proper limits. It was called for by no public need, and was probably nursed into life by some one who had a special end to accomplish, and could only do so by the passage of a general law. It is an Act which the Courts, and especially the Orphans' Court, cannot administer with too much care. In cases coming fairly with its provisions it may be enforced."

Appeal of Mark Watson from the decree of the Orphans' Court of Philadelphia County making distribution of the estate of Mary Watson, deceased.

Mary Watson died December 14th, 1876, leaving a will whereby she directed that all her real and personal property not otherwise disposed of to be sold and converted into money, and after disposing of three-fourths thereof, by the 6th paragraph of her will provided as follows:—

And the remaining one equal fourth part or share I give and bequeath unto my friend Thomas Bradfield, of the city of Philadelphia, attorney-at-law, his heirs, executors and administrators forever, in trust, nevertheless to have and to hold the same for the uses and purposes following, to wit: To have, hold and invest the principal sum so received as aforesaid in good real estate securities and keep the same so invested, and from time to time, as the interest, income and profits shall be got in and received, to pay the same over to my said son Mark Watson, during all the term of his natural life, and after the decease of my said son Mark, to pay the principal sum of said one-fourth part or share over to the lawful child or children of the said Mark Watson, if more than one, share and share alike; any deceased child leaving lawful issue, such issue to take and receive the part or share his or her parent would have received and taken if living: and in the event of my said son Mark dying in my lifetime, or without leaving any such lawful child or children, or lawful issue of any deceased child or children, then the same to go or be paid over as hereinafter provided in case of a legatee dying in my lifetime."

Upon the adjudication of the account of Thomas Bradfield as trustee, Mark Watson made claim to the *corpus* of said estate, held in trust for him, contending that the trust was a dry trust, and if not, the same should be paid to him under the provisions of the Act of May 17th, 1871, upon entering security for the same, which he was ready to do; the Court refused to declare said trust dry, and also refused to direct the payment of said fund to him upon the entry of security under said Act.

Exceptions were filed to the adjudication by Mark Watson, which were dismissed by the Court, ASHMAN, J. delivering the following opinion:—

"The trust in this case can be held to be executed only upon the ground that the first beneficiary takes the absolute estate. If his interest is for life only, the protection of those in remainder will require the intervention of the trustee. Its extent is, however, very clearly defined by more than one rule of interpretation. We may refer to the single principle which was quoted in Yarnall's Appeal (20 P. F. Sm. 342), that, any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker, will enlarge the estate for life of the first taker to an estate tail by implication.' The trust here is for the son for life, with remainder to his children and to their issue, and if he shall die without leaving children or their issue, then to the surviving children of the testatrix. The word 'children' is used in a sense wholly different from that of 'heirs' or 'issue,' and, as a word of purchase, can have no effect upon the life estate.

"The remaining question as to the payment of the fund, notwithstanding the trust, to the tenant for life, upon the entry of security under the Act of May 17, 1871, was decided adversely to the petitioner in McCann's Estate (40 Legal Int. 279)."

Exceptant thereupon took this appeal, assigning of error, *inter alia*, the refusal to award the fund to him, upon the entry of security under the provisions of the Act of May 17, 1871.

De Forrest Ballou, for appellant.

Where there is only a naked trust, where the control and management of the estate is given into the hands of the *cestui que trust*, or no clear intention is apparent to exclude him, although the first limitation is in trust for his life only, the use is executed by the statute, the trust is

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merely nominal, and the whole estate legal and equitable is vested in the *cestui que trust.* This is the doctrine laid down in—

Barnett's Appeal, 49 Pa. St. 392.

Affirmed and enlarged upon in—

Dodson *v.* Ball, 60 Id. 492.
Megargee *v.* Naglee, 64 Id. 216.
Yarnall's Appeal, 70 Id. 335.
Ogden's Appeal, 70 Id. 501.
Tucker's Appeal, 75 Id. 354.

If it should be held that the trust is an active trust, then the *cestui que trust*, the appellant, contends that he is entitled to take the principal of the estate upon the entry of security, under the provisions of the Act of 17th May, 1871 (Purd. Dig. 554, pl. 229). The Act is very broad, and we think meets the present case, and we are unable to see what sound argument can at all be advanced denying him that right. (See dissenting opinion, McCann's Est., 40 Leg. Int. 287.)

Charles L. Lockwood, for appellee, not heard.

April 8, 1889. THE COURT. The second assignment raises the only question in this case. It was as follows: "The learned Court erred in not awarding said fund to said claimant, upon the entry of security under the provisions of the Act of May 17, 1871." It requires but a glance at the will of Mary Watson to see that the trust created in favor of the appellant was a special, active trust. The trustee is required by the sixth paragraph of said will to "hold and invest the principal sum so received as aforesaid in good real estate securities, and keep the same so invested from time to time, as the interest, income, and profits shall be got in and received, to pay the same over to my said son Mark Watson, during all the term of his natural life, and after the decease of my said son Mark, to pay the principal sum of said one-fourth part or share over to the lawful child or children of the said Mark Watson, if more than one, share and share alike; any deceased child leaving lawful issue, such issue to take and receive the part or share his or her parent would have received and taken if living; and in the event of my said son Mark dying in my lifetime, or without leaving any such lawful child or children, or lawful issue of any deceased child or children, then the same to go to or be paid over as hereinafter provided in case of a legatee dying in my lifetime." The appellant claims that this is a dry trust, and upon entering security to protect those in remainder, he is entitled to receive the corpus of the estate, under the provision of the Act of May 17, 1871. Said Act is as follows: "Whenever any personal property, or the increase, profits or dividends thereof, has been or shall hereafter be bequeathed to any person for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor or executors, administrator, with the will annexed, or trustee or trustees under such will, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security in the Orphans' Court having jurisdiction of the accounts, in such form and amount as, in the judgment of the Court, will sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession; and any married woman availing herself of the benefits of the Act shall have power as a *feme sole*, to bind her separate estate and property, by any obligation given by her, as security under this Act." We are very clear that the case in hand does not come within the provisions of this Act. It is a perversion of terms to call this a dry trust. If there is anything clear in the will of Mary Watson it is that she never intended the appellant to touch a dollar of the corpus of the estate. The trustee is to invest the trust fund, and pay over the income to him for life, with the remainder over. We are to presume she had good reasons for this provision; she may have intended it as a spendthrift's trust. There is no gift to the appellant of the corpus for life, or for any other period. Hence, how is it possible for the Court below to award the money to him as "the person entitled thereto?" We do not think this Act was intended to destroy active trusts, and to require the Courts to hand over such estates to the tenants for life upon giving security or otherwise. If it was so intended it is the most vicious piece of legislation ever conceived by the mind of man. It is sufficiently objectionable when confined within its proper limits. It was called for by no public need, and was probably nursed into life by some one who had a special end to accomplish, and could only do so by the passage of a general law. It is an Act which the Courts, and especially the Orphans' Court, cannot administer with too much care. In cases coming fairly within its provisions it may be enforced.

In the case of life estates with remainders over, there may be instances in which the remainder over may not be entitled for fifty years or more. In such instances we do not see how anything less than a first mortgage upon property worth at least double its amount, would be adequate security. This was the rule which the writer enforced when a Judge of the Orphans' Court, and it usually resulted in a failure of the application.

The decree is affirmed and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, C. J. H. C. O.

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Jan. '89, 235. April 10, 1889.

Pennsylvania Railroad Co. v. American Oil Works, Limited.

Common carriers—Lien—Stoppage in transitu —Bill of lading—Construction of.

Where a vendor exercises his right of stoppage *in transitu*, his action does not amount merely to a rescission of the contract of sale but to a resumption of possession, enabling him to insist upon the vendor's lien which he had waived by delivery to the carrier. The carrier in such case may claim a lien upon the goods for his freight, charges, and expenses, but has no lien for an unpaid balance of freight due by the consignee upon prior shipments of similar goods by the same vendor.

A. shipped goods to B., receiving a bill of lading containing the following clause: "Said merchandise may be retained for all arrearages of freight and charges due thereon, and also on any other goods by the same consignee or owner, and such arrearages, and the freight and charges on said goods and merchandise, shall be a lien thereon until the same shall have been paid." Before the goods were delivered, B. became insolvent, and A. thereupon exercised his right of stoppage *in transitu*. The carrier claimed a lien upon the goods for the freight thereof, and also for an unpaid balance of freight due by the consignee in former shipments of similar goods by the consignor:

Held, that the clause in the bill of lading must be construed to confer a right of lien for freight on other goods only when that freight was due by the consignor, and that therefore the carrier was entitled to a lien for the freight of the goods in question only.

Semble, that a consignor may by express agreement with the carrier extend the lien of the latter so as to embrace back freights on other goods due by the consignor: and that in such case, the lien of the carrier, created by such special contract, would obtain and be valid, when the vendor exercised a right of stoppage *in transitu*.

Error to the Common Pleas No. 3, of Philadelphia County.

Case stated, wherein The American Oil Works, Limited, was plaintiff and The Pennsylvania Railroad Company defendant, both parties reserving the right to a writ of error.

The case stated was as follows: "The plaintiff is an owner and vendor of oil at Titusville, Pa., and for some time prior to January 1st, 1888, had sold and delivered to 'The Philadelphia Lubric Company,' a refiner of oil, large quantities of oil which were delivered to the defendant in cars. These were shipped by the plaintiff and carried by the defendant under bills of lading, containing, *inter alia*, the following condition and agreement:—

"'*First*. The owner or consignee shall pay freight and charges thereon at specified rates at time of delivery as the same from time to time arrives. Said merchandise may be retained for all arrearages of freight and charges due thereon, and also on any other goods by the same consignee or owner; and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid.'

"On January 4th, 1888, there was shipped and delivered by the plaintiff to the defendant ninety-two barrels of oil in car No. 1195; on January 10th, 1888, two hundred and one barrels in cars 1284 and 810; and on January 13th, 1888, ninety barrels in car 1125. The value of the said oil was $1026.79, and the amount due for freight and charges thereon was $197.35. All of said shipments were made and received under the bills of lading containing the aforesaid condition and agreement. On January 23d, 1888, before the actual delivery in fact to the consignee, the plaintiff exercised its right to stop said oil in transit on account of the insolvency of the consignee, 'The Philadelphia Lubric Company.'

"On January 1, 1888, 'The Philadelphia Lubric Company,' the consignee, was indebted to the railroad company, defendant, upon a running book account for freight and charges due upon merchandise theretofore consigned by various parties, in addition to the plaintiff, under the terms of the aforesaid bill of lading, and which merchandise had been delivered to the consignee by the railroad company without exacting the payment of the freight and charges due thereon, and without the knowledge of the plaintiff in this case.

"Prior to January 1, 1888, the plaintiff had made three shipments of oil to the same consignee, which had been delivered, and on which the freight and charges were unpaid. The indebtedness on these three shipments was $114.30, and the indebtedness on the shipments from others was greater than the value of the oil which is the subject of this suit.

"When the plaintiff demanded the oil in suit the defendant claimed that the sum of $197.35 due on the shipments of January 4th, 10th, and 13th (now in suit), as well as all the above mentioned indebtedness, to an amount greater than the value of the oil, was a lien thereon, and under this claim retained the oil.

"The plaintiff averred a willingness to pay the sum due upon the shipments in suit and made tender thereof.

"If the Court shall be of opinion that the defendant has a lien for the sum of the total indebtedness, then a judgment to be entered in its favor; if it shall be of opinion that the defendant has a lien only for the freight charges due on the three shipments of oil which are the subject of this suit, then a judgment to be entered in favor of the plaintiff for the sum of $829.44, with interest from the fourth day of February, 1888, the date of the institution of this suit; and if it shall be of opinion that the defendant has a lien for the freight and charges due upon the three shipments

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made prior to January 1, 1888, as well as upon those in suit, then a judgment to be entered in favor of the plaintiff for the sum of $715.44, with interest from the fourth day of February, 1888."

The Court, in an opinion by FINLETTER, P. J., entered judgment for the plaintiff in the sum of $829.44. (See 23 WEEKLY NOTES, 198.) Whereupon the defendant took this writ, assigning for error the action of the Court in entering judgment as above.

David W. Sellers, for plaintiff in error.

Charles A. Chase (*Thomas W. Barlow* and *Charles C. Lister* with him), for defendant in error.

May 20, 1889. THE COURT. A vendor of goods has a right to retain them in his own possession until the price has been paid. If he waives this right, and sells upon credit, it is an implied condition of such sale that the buyer shall continue in good credit until the goods come into his actual possession. When that happens the lien of the vendor is gone, and he must depend upon the ultimate solvency of his customer at the expiration of the term of credit. If, while the goods are in the hands of the carrier, in transit, or in the store at the end of the journey, with no intervening right in the way, the buyer becomes insolvent, the implied condition on which credit was given is broken, and the vendor may resume the possession of the goods. The exercise of this right of stoppage is not a rescission of the contract of sale, as the Court below seemed to think, but a resumption of possession which enables the seller to insist on his lien as a vendor which he had waived by the delivery to the carrier. (Patten's Appeal, 45 Pa. 151; Benjamin on Sales, vol. 2, par. 1295.) The parties are then in the same position as before the seller parted with the possession by delivery to the carrier. So far the law is well settled. The seller having exercised his right of stoppage as against the buyer, has then to consider his relation to the carrier. The goods having been delivered into the possession of the carrier, he may retain them by virtue of his lien for carriage until his charges and expenses are paid. As between the carrier and the consignee who is owner, we see no reason why this lien may not be extended by a contract to cover a general balance due by the consignee for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he honestly owed before allowing him to remove the goods from the possession of his creditor whether that creditor was a natural or an artificial person. But that question is not raised in this case for the goods never came to the end of the journey where the rights of the consignee and the carrier could be adjusted.

The seller intervened and exercised his right of stoppage. This restored the possession to him subject to the charges of the carrier for his services and expenses between the consignment and the stoppage. For these charges the carrier had a lien which was not divested by the stoppage, and which could be asserted against the seller notwithstanding his exercise of that right. (Hays *et al. v.* Mouille & Co., 14 Pa. 48.) But as between the carrier and the seller, there was no balance of accounts for carriage of former consignments, for the delivery of the goods to the consignee without payment of the freight was a voluntary surrender of the lien upon them, and the security which the lien afforded.

The carrier by such delivery gave credit to the consignee, and undertook to look to his solvency and integrity. The former bills were therefore paid so far as the consignor was concerned, and the carrier had no legal or moral ground for calling upon him to pay any balances due upon them.

The clause in the bill of lading which has been brought to our attention, and on which the plaintiff in error relies, is not according to its own terms applicable to a case like the present one. That clause provides that the consignee or owner shall pay the freight on the goods consigned to him at the time of their delivery, and that the goods may be retained by the carrier for the charges due thereon, and also for any charges due from him for other goods. As there was no carriage of these goods to the consignee, the special lien provided for could not attach to them. When the consignor exercised his right of stoppage the goods were deliverable to him, and the carrier's right of detention depended on the relations thus created. If the consignor was not debtor for previous carriage, and had contracted that these goods might be retained from him for such debt, then the carrier's lien did not extend beyond the charges applicable to the goods stopped, and on payment or tender of these he was entitled to a delivery of the goods. If the right of the carrier to extend its lien by contract with the owner to the general balance due from such owner be conceded, as it may be, still the lien is confined to the goods of such owner. The goods which by the exercise of the right of stoppage become those of the consignor, cannot be made subject to a lien for the debt of the consignee. We concur in the conclusion reached by the Court below, although we reach it by a somewhat different route.

The judgment is affirmed.

Opinion by WILLIAMS, J. L. L., JR.

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Jan. '89, 266. April 12, 1889.

Jensen v. Perry.

Contract—Construction of—Evidence.

A. entered into a contract with B., whereby the latter was constituted the sole and exclusive agent for the introduction of a certain article patented and manufactured by A. known as "Crystal Pepsin Tablets." The contract provided, *inter alia*, as follows: "Said A. agrees to supply said B. with sufficient samples of his said article and printed matter in the nature of advertisements relating thereto as the same may be called for by the said B." B. was furnished within four months with 431,621 sample bottles averaging nine tablets each and worth at the ordinary market price $31,794. Two months after, B. wrote to A. asking for 100,000 bottles at once, and stating that he would require several hundred thousand more shortly. A. declined to comply with this request. B. treated this as a violation of the contract and brought suit for breach of covenant:

Held, that under the contract A. was not bound to submit to any unreasonable and unconscionable demand for samples made upon him by B., and that evidence was admissible to show that the quantity of samples actually furnished by A. was more than a reasonably sufficient quantity for one year, according to the usual practice in the trade.

Error to the Common Pleas No. 3, of Philadelphia County.

Covenant, by John C. Perry against Anna M. Jensen, administratrix of Carl L. Jensen, deceased.

On the trial, before FINLETTER, P. J., the facts of the case appeared to be as follows: On November 25, 1885, Jensen entered into a contract under seal with Perry, whereby the latter was constituted the sole and exclusive agent for a period of forty-nine years for the sale of a certain article known as "Crystal Pepsin Tablets," patented and manufactured by Jensen. The contract contained, *inter alia*, the following clause:—

4. Said Jensen agrees to supply said Perry with sufficient samples of his said article, and printed matter in the nature of advertisements relating thereto, as the same may be called for by him, said Perry, but said Jensen is to be at no other expense or cost.

The contract commenced February 1, 1886. Perry was furnished during February, March, April, and May with 431,621 samples for distribution. Of these 113,040 came to Philadelphia, 131,042 to New York, 62,598 to Brooklyn, 25,000 to Baltimore, 36,000 to St. Louis, and 48,666 to Chicago. Each sample averaged nine tablets, and the amount furnished Perry, at the selling price, would have realized $31,794. On July 26, 1886, Perry wrote to Jensen asking for 100,000 sample vials of pepsin tablets with printed matter relating thereto. Jensen declined to comply with this request, and Perry thereupon on August 3, 1886, wrote him again as follows:—

"It is necessary for us to sell over 300 gross in the next six months, and to do it will require very hard energetic pushing of the goods directly among the people. Extensive sampling is the only method by which I can get such immediate results as to insure our selling the required quantity. The benefit to yourself from the large volume of business which would ensue from a well-directed sampling should be sufficiently apparent to you without any urging on my part. I want 100,000 samples immediately, and will want several hundred thousand more by October 15. The distribution will be immediate. Please send at once to office."

Jensen still refused to comply with the request. Perry thereupon treated Jensen's conduct as a violation of the agreement, and ceased the work of introducing the tablets. Jensen on November 23, 1886, contracted with other parties to sell the article, whereupon plaintiff brought this suit to recover damages for breach of covenant.

On the trial the defendant offered to prove that the quantity of the samples furnished the plaintiff was more than a reasonably sufficient quantity for one year according to the usual practice in the trade. Objected to by plaintiff. Objection sustained. Offer overruled. Exception. (Second assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows: Under the provisions of the contract the defendant was required to furnish only a reasonably sufficient quantity of samples. *Refused.* Exception. (Fifth assignment of error.)

The Court charged, *inter alia*, as follows: "The defendant agreed to furnish samples to the plaintiff whenever the plaintiff should require, and as he required them. Now the evidence of the plaintiff is that up to the end of May the defendant did comply with the requirements that he made, but from that time onward he absolutely neglected and failed to furnish samples, or any of the matter he agreed to furnish. If that be so, and I do not understand that it is at all contradicted by the defence, that he failed to furnish samples after May, then this is a breach of this contract. . . . . Then the plaintiff had a right to continue the contract or to cease entirely. Inasmuch as this would be a breach of contract, he is entitled to recover all the expenses to which he was put to in endeavoring to perform his part of the contract." (First, sixth, and seventh assignments of error.)

Verdict and judgment for the plaintiff for $6387.52. Defendant thereupon took this writ, assigning for error, *inter alia*, the rejection of the above offer of evidence, the answer to defendant's point and the portions of the charge above cited.

William F. Johnson (*F. Carroll Brewster* with him), for the plaintiff in error.

William S. Stenger, for defendant in error.

May 20, 1889. THE COURT. The contract sued on in this case made Perry the "sole and

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exclusive agent" for the introduction of Dr. Jensen's Crystal Pepsin to the people of the United States. It defined the powers and duties of the agent, fixed his compensation, and contained, *inter alia*, the following stipulation: 'Said Jensen agrees to supply said Perry with sufficient samples of his said article, and printed matter in the nature of advertisements relating thereto, as may be called for by said Perry."

This contract was made in Nov. 1885. Operations were begun under it by Perry about the first of February, 1886. By the first of June, or within about four months, Perry had called for and been provided with 431,621 sample bottles containing an average of nine tablets each of Dr. Jensen's Crystal Pepsin, worth at the ordinary selling price $31,794. In August of the same year Perry wrote to Dr. Jensen, "I want 100,000 samples immediately and will want several hundred thousand more by Oct. 15. The distribution will be immediate. Please send at once to office."

Dr. Jensen thought this demand was unreasonable. He insisted that he had already furnished more than a sufficient quanity of samples for the work done and doing by Perry and declined to furnish the samples demanded. Perry treated this as a violation of contract, suspended the enterprise of introducing the Crystal Pepsin to the people of the United States, and brought this action to recover damages. On the trial the defendant offered to prove that the quantity of samples which he had furnished prior to the demand in August, 1886, was more than reasonably sufficient for the whole year's operations. This offer was rejected by the Court upon an interpretation of the contract which is fully stated in the charge to the jury. The learned Judge said, "The defendant agreed to furnish samples to the plaintiff whenever he should require and as he required them." In other words, he held that the agreement to furnish "sufficient samples" meant that Jensen should furnish whatever Perry might choose to require of him without regard to the business actually done, to the usages of the trade, or the judgment of a jury. If this is correct Dr. Jensen certainly made a very unequal and unfortunate contract with his agent. Upon this view of it his liability has no bounds except such as the agent may set. He cannot say that his agent is unreasonable, or oppressive. He cannot ask a jury to say so. He has only to furnish whatever the agent demands of him.

We cannot agree to this exposition of the contract. The agent may demand what is fairly and reasonably sufficient for the purposes of his undertaking and no more. He is bound to exercise good faith towards his principal. If he fails to do this or if he makes unnecessary and oppressive demands upon him, he violates the contract and becomes himself a wrong-doer. The employer is not bound to submit to an unreasonable and unconscionable demand by his agent, nor is the question what is reasonable and conscionable to be determined by the interested and unfaithful agent alone. What is a reasonable quantity of samples for the purposes of the contract is, if the parties cannot agree about it, a question of fact to be settled by a jury. The offer made in the Court below by Dr. Jensen to show that the demand made upon him was unreasonable and oppressive, and that he had furnished before it was made a larger quantity of samples than was reasonably sufficient for the whole year's operations by his agent, if those operations had been conducted with business-like methods and with fairness towards him, should have been admitted.

The first, second, fifth, seventh, and eighth assignments of error are sustained. The judgment is reversed, and a *venire facias de novo* awarded.

Opinion by WILLIAMS, J. L. L., JR.

Common Pleas.

C. P. No. 1. March 9, 1889.

Tucker v. Hough.

Practice—Trespass—Capias—Affidavit to hold to bail—Sufficiency of.

Rule to discharge on common bail.

This was an action of trespass, in which a capias issued; bail in the sum of $500. The defendant obtained the present rule.

Plaintiff's affidavit set forth that defendant had been in his employ as a driver of his wagons; that during said employment he had possessed himself of the following goods and chattels belonging to affiant [the affidavit then set forth a list of the goods and chattels, and proceeded]; that plaintiff had frequently demanded the return of the aforesaid goods and chattels, but that said defendant has absolutely refused to deliver the same, and has converted them to his own use.

N. Dubois Miller, for the rule.

The affidavit is insufficient, inasmuch as it states what goods were taken, but not how defendant came into possession of them. There is not enough set forth to enable a Judge to determine whether there is a cause of action in trover and conversion at all. The fact of defendant being plaintiff's servant does not prevent a contractual relation from arising between them.

F. Carroll Brewster, Jr., contra, cited—
Emerson *v.* Dow, 11 WEEKLY NOTES, 270.
Craven *v.* Coates, 14 Id. 90.

THE COURT. The affidavit is not sufficient.

W. W. S.

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C. P. No. 1. April 28, 1889.

Simons Bros. & Co. v. Hickman.

Attachment—Affidavit, sufficiency of—The affidavit to sustain an attachment under the Act of 1836, must aver an intention on the part of the debtor to defraud, and not merely the creditor's belief of such intention.

Rule to dissolve attachment.

This was a domestic attachment under the Act of 1836. The affidavit upon which the attachment issued, set forth that defendant, who was in business on Columbia Avenue, was justly indebted to plaintiff, and that on the 6th day of March the defendant absconded or departed from his usual place of abode with intent to defraud his creditors, as the deponent verily believes.

Albert S. L. Shields, for rule.

The affiant swears to the fact of absconding, but only to his belief in debtor's intention to defraud his creditors. This is not sufficient; he must swear that the debtor intended to defraud his creditors.

Jewel *v.* Howe, 3 Watts, 144.
Sharpless *v.* Ankermiller, 19 WEEKLY NOTES, 88.

James M. West, Samuel M. Hyneman, and *Edward F. Hoffman*, contra.

The affidavit states that the affiant believes in the fraudulent intent. This is sufficient, for no one can swear to another's intent, he can only swear to certain facts and his belief in the intent, as shown by the facts.

THE COURT. Where a creditor resorts to a remedy of this sort, he must be prepared to swear to the debtor's intention in absconding; belief in the intention is not sufficient.

Rule absolute; attachment dissolved.

Opinion by BIDDLE, J. W. W. S.

Orphans' Court.

O. C. of York Co. February 4, 1889.

Small's Estate.

Guardian and ward—Use of ward's money in guardian's business—Loans by guardian of ward's money to firm of which guardian was a member—Ward entitled to elect between profits and interest on money so employed—Commission of guardian forfeited—Costs—Partnership—Corporation—Seguin's Appeal, 103 Pa. St. 139, followed.

Where a guardian loans his ward's money to a firm of which the former is a member, the ward is entitled, where there is no loss, and no fraud is alleged, to elect to take the proportional share of the profits received by the guardian which his (the ward's) capital, treated as part of the firm's capital, has earned, after deducting reasonable compensation to the guardian for actual services, or his capital with six per cent. interest. The same rule applied to the proportional share of dividend of a *corporation* which succeeded the firm, where the loan was continued to the corporation by the guardian, who was a stockholder.

In such a case, even where no fraud is alleged, and the investment has been successful, and has earned a high rate of interest (6 per cent.), the guardian loses his commissions, and is charged with the expenses of the litigation, as such investment, though innocently made, is a breach of trust.

The ward has his option to elect to take profits or interest on his capital, whether his capital was *loaned* to the firm by his guardian, or *invested* by the guardian in the firm as part of the guardian's own capital.

Mode of calculating the ward's proportion of the guardian's share of the profits in the present case discussed, there being two minors and three partners.

Sur exceptions to Auditor's report, upon exceptions filed by the ward to his guardian's account.

The facts which appeared in the testimony taken before the Auditor (S. H. Forry, Esq.) of the accounts of John H. Small, Guardian of J. Etter Small, a minor, of the estate of Jacob A. Small, were as follows: Jacob A. Small died intestate in December, 1868, leaving two minor children, Charles H. Small and J. Etter Small. Charles H. Small came of age on November 14, 1883, and J. Etter Small on December 17, 1885. The guardian filed his account as guardian of the latter, on April 19, 1886; the account was excepted to, referred to an Auditor, and testimony taken.

Jacob A. Small, at the time of his death, was a member of a firm, which consisted during his lifetime of four persons, each of whom had an equal interest, and one of whom was John H. Small, the brother of the intestate. John H. Small was appointed administrator of the estate of Jacob A. Small, and during the time of his administration one Huber, by family arrangement at the request of the minors' mother, was appointed their guardian. On January 4, 1871, John H. Small was discharged as administrator, and at the same time appointed guardian of both minors in place of Huber, then discharged, from whom he received at that time belonging to the minors the sum of $49.358.86, one-half belonging to each.

The remaining facts, as stated by the Court (GIBSON, P. J.) in the opinion, were as follows:—

"Jacob Small at the time of his death, was a member of the consolidated firms of H. Small's Sons & Co., and Billmyer & Small Co. The members of said consolidated firm were Jacob A. Small, John H. Small, David E. Small, and

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Charles Billmyer, each of whom owned a one-fourth interest therein. The business was that of constructing and selling railroad cars, and buying and selling and sawing lumber, carried on at York and Wrightsville, in York County. It was a business which required experience, skill, and diligence on the part of the partners. John H. Small's interest in the consolidated firm, after the death of Jacob A. Small, was one-third.

"In November, 1876, the consolidated firms were settled up, and a corporation under the name of 'The Billmyer and Small Company' was organized in their stead, for the purpose of carrying on the said business. The capital stock of the corporation was $60,000, consisting of 600 shares, of which 171 shares were issued to John H. Small.

"In the inventory of the estate of Jacob Small, filed December 31, 1868, among the assets is a note for $16,434.87, for money loaned by the decedent to H. Small's Sons & Co. The said amount appears in the statement of the affairs of the consolidated firms for the years 1867–1868, among the liabilities, thus:—

Note given to Jacob Small, to adjust accounts	$16,434 87

"(Testimony, p. 92.) And in the statement of 1868–1869 (p. 93)—

Notes, Jacob Small . . .	$16,434 87

"In the statement for the years 1869–1870 there appear the items—

Due J. H. Small, adm. of Jacob Small	$26,283 73
" " " " " "	16,846 66

"On page 41 of the testimony there is a statement (marked 'S') of 'notes and interest due John H. Small, administrator of Jacob Small's estate,' which the accountant said was a statement of the money he loaned H. Small's Sons & Co. while he was administrator. These loans were at four and five per cent. The second sum above named, $16,846.66, was explained to be made up of $11,165.66, the minors' share of their father's interest in the real estate of the firm, and of the widow's dower in the same—a little over $5000.

"At the hearing before the Auditor two promissory notes were produced by the exceptants (Exhibits 'C' and 'D'). The one ('D') is dated York, January 1, 1875, signed H. Small's Sons & Co., for $38,362.96, with interest from date, payable to the order of John H. Small, guardian. The other ('C') is dated York, Pa., January 1 (the year torn off), signed Billmyer & Small, and George S. Billmyer, for $39,787.13, with interest from date, payable to the order of John H. Small. Both notes were made payable one day after date.

"On February 9, 1880, the capital stock of the corporation was increased to $120,000, consisting of 1200 shares, of which John H. Small held 342.

"On May 23, 1881, the first triennial account of John H. Small, guardian of Jacob Etter Small, was filed. In this account there is charged the sum of $24,679.45, the amount of release to former guardian, with interest to June 1, 1881, $17,499.29; in all, $43,018.74, which, after deducting credits, left a balance of $32,618.69.

"On the 22d of November, 1881, a petition was presented to the Orphans' Court of York County, by John H. Small, guardian of Charles H. Small and J. Etter Small, 'that there will be paid to your petitioner to-day or to-morrow $40,000 of said minors' money, to wit, $20,000 for each minor,' and praying for directions how and in what security to invest said money. Whereupon the Court directed him to purchase $20,000 U. S. 3½ p. c. extended sixes for Charles H. Small, and $20,000 U. S. 3½ extended fives for J. Etter Small.

"The note of the corporation, $39,787.13 (Exhibit C.), is marked 'paid,' November 23d, 1881.

"Jacob Etter Small came of age on the 17th day of December, 1885. On the 20th of March, 1886, John H. Small filed his final account as guardian of Jacob Etter Small, showing a balance in his hands of $30,811.89½. Among other things credit is asked, by cash paid (November 24, 1881), for $20,000 United States loan 3½ per cent., at 101¾—$20,350. He charges himself with the balance in money and stocks, as shown on his first triennial account, and with interest on $20,000 United States loan, $758.33, and also with the principal of said $20,000 United States loan paid by the Government, $20,000, and with interest over and above the amount received on United States loan, $8341.19.

"The amount of money, $24,679.43, was received by John H. Small, guardian, on the 28th day of January, 1871. He filed his account on the 20th day of March, 1886. The interest on this sum of money at 6 per cent. for the whole time, fifteen years, one month, twenty-two days, amounts to $22,425.39. The interest charged in the account is $26,598.81, making a difference of $4173.42, over and above 6 per cent. for the whole period, and which was stated on the argument to be interest on interest, triennial rests having been made in the calculation of 'interest.'

"The account of the guardian, as filed, showed a balance of $30,811.89½.

"Between the filing of the account and the argument of the case before the Auditor, the guardian paid over at different times $28,000 of this amount."

On the foregoing facts the Auditor found that the guardian had not been guilty of any fraud,

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and had made a prudent investment of the minors' funds for the sole object of producing a high rate of interest, viz., six per cent., which he had been successful in producing, and that as no loss had been incurred, and as no profit had been received by the guardian, the ward was not entitled to elect between interest and profits. The ward's exceptions were therefore dismissed, and the account was confirmed, the guardian being allowed commission and three-fourths of the costs of the case, including the Auditor's fee, printing, etc., amounting to over $500.

The Auditor stated the law to be, that if the guardian had invested his ward's capital *as his own* in any enterprise which had earned profits, the ward was entitled to follow said profits. But the Auditor distinguished between such a case and the present one, which was a mere loan to the firm of which the guardian was a member, and not an investment by the guardian for his own benefit. As the guardian had not earned any profits on the ward's capital, he should not be charged as if he had done so.

The Auditor further distinguished Seguin's Appeal (103 Pa. 139), holding that that case was an investment by the guardian and not a loan. He relied upon Vyse *v.* Foster (L. R. 8 Ch. App. 309).

To the Auditor's findings exceptions were filed by the ward.

A. Sydney Biddle (*George W. Biddle*, *Levi Maish*, and *P. J. Rau* with him), for the exceptant.

This case is decided by Seguin's Appeal, *supra*. The material facts there are identical with those in the present case. The report shows clearly that the transaction in Seguin's Appeal was a *loan* by the guardian of his ward's money to a firm of which the guardian was a member, clearly not for the guardian's benefit, but simply because he thought it was a good investment, paying a high rate of interest. The transaction there was not an *investment* by the guardian of his ward's money as of the guardian's own capital. The guardian derived no benefit whatever from it.

There is no difference between the two cases. Vyse *v.* Foster, *supra*, was a wholly different case, depending upon the terms of the testator's will, which the Court held to authorize what was actually done.

Wayne MacVeagh, (*V. K. Keesey*, *W. F. Bay Stewart*, and *John Hampton Barnes* with him), for the guardian.

This is an exceptional case, in which the guardian ought not to be punished for an improper act done in good faith for the sole benefit of his ward. Because of the Act of 29 March, 1832 (P. L. 1832, page 193), which exempts an executor, guardian, trustee, etc., from liability where he has invested money in legal securities, it does not follow that other prudent investments are against law.

Jones's Appeal, 8 W. & S. 143.
Twaddell's Appeal, 5 Pa. St. 15.
Barton's Estate, 1 Parsons, 24.

The case is not ruled by Seguin's Appeal, *supra*, because in that case the trust fund was contributed by the guardian to the capital of his own firm for his as an investment for his own benefit, and subject to the risks of trade. Here the money was *loaned* to the firm, evidenced by a note, and carried upon its books as a liability and not as an asset. Wyse *v.* Foster (8 Ch. App. Cas. 309) supports this distinction and states the correct rule.

A reasonable degree of vigilance and the exercise of good faith is the standard of a trustee's duty.

Eyster's Appeal, 4 Harris.
Fahnestock's Appeal, 8 Out. 46, 52.
In re Whitely, L. R. 33 Ch. Div. 347.
Lemar *v.* Micon, 112 U. S. 452.

The guardian is chargeable with simple interest only.

Grave's Appeal, 14 Wright, 189.

The guardian is entitled to his commission.

Williamson's Estate, 7 WEEKLY NOTES, 82.
Norris's Appeal, 71 Pa. 106.

April 8, 1889. THE COURT (after stating the facts, as above). The main question in this case arises from the claim made by the ward in the third exception to the final account of the guardian, which is as follows: "The money of said ward, or a large part thereof, having been invested by his guardian, this accountant, for a number of years in the firm of H. Small's Sons & Co., and the corporation, The Billmyer & Small Company, of which the said accountant was a large stockholder and owner, the said ward, Jacob Etter Small, in lieu of interest, claims his proportionate share of the profits realized by the said firm and corporation in which his money was invested."

In the opinion of the Court the loan of the ward's money to the firm and corporation, although notes were taken with interest, was a use of the trust funds by the guardian in his business and exposed them to the hazards of trade, unsecured, and comes under the rule applicable to such cases.

"Where a guardian instead of investing his ward's money in legal investments employs them in his own business the ward is entitled to elect either interest on his capital or the profits actually earned thereby." (Seguin's Appeal, 7 Out. 139; Docker *v.* Somes, 2 Mylne & Keen, 664; 1 Story's Equity, 465, n.; Robinson *v.* Robinson, 9 Eng. Law & Eq. 75.)

In Robinett's Appeal (12 Casey, 174) WOODWARD, J., says: "Where profits are made and

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the *cestui que trust* claims them they are to be ascertained, notwithstanding the difficulties of the investigation. And if hardship occasionally happen from an application of the rule the wrongdoer will have no right to complain. If he dread the application of the rule the better for the trust, for he will be more likely to administer it according to law."

"Shall this rule be adopted in Pennsylvania? We are referred to a great number of our own cases that are supposed to be inconsistent with it; but they have reference to the rate of interest with which trustees should be charged for non-employment of trust funds or for use of them where there has been no malversation. These cases show that we have rejected the triennial rests in computations of interest and come down to the legal standard of six per cent. in settling with trustees, but they were cases in which profits were not made or if made were not claimed. (Dietterich *v.* Heft, 5 Barr, 87, and the cases therein cited; Light's Appeal, 12 Harris, 180; Biles's Appeal, Id. 335.)

"They are not inconsistent with the English rule nor applicable to a case like this, where the profits are claimed and have been carefully and, we have no doubt, correctly ascertained.. We think that every reason that has been urged in behalf of the rule elsewhere is applicable in Pennsylvania, and that the machinery of our Courts is as well calculated for its prudent application as is that of the English chancery."

The *per curiam* opinion of the Court in Seguin's Appeal, *supra*, says: "The guardian was charged with that part of the profits received by him produced by the capital invested. The *cestui que trust* is entitled to what the capital alone produced, but not to the super-added product of skill, industry, and labor in the business in which the capital was invested."

In Robinett's Appeal and Seguin's Appeal the rule for compensation of the trustee was one-third of the profits. Judge PENROSE said: "We are not prepared to admit that it was intended by the decision in Robinett's Appeal to establish a fixed rule for the compensation of trustees who have employed the moneys of the *cestui que trust* in their own business;" yet the Court sees no reason why, in this case, from the nature of the business and the labor of the active partners, the compensation of one-third of the profits should not be allowed.

In Seguin's Appeal the guardian charged himself with interest at six per cent. with semi-annual rests. The appellant before an election between interest on the fund and profits earned by the fund claimed the right to a full account of the profits of the partnership during the time covered by the trust. The Court made a decree of election which election the *cestui que trust* refused to make on account of the manner in which the profits were ascertained, whereupon the Court made an election for the ward for the interest as calculated by the accountant, because the profits arising from the use of the moneys in the business were less than the interest.

In the present case the guardian has charged himself with interest at six per cent. with triennial rests and the ward has claimed the profits arising from the use of his moneys in lieu of interest. The Court is of opinion that there is nothing in Seguin's Appeal that authorizes a decree of election between six per cent. interest with semi-annual rests and the profits.

Another question is as to the allowance of commissions. In the triennial account the guardian asked an allowance of $874.70, and in his final account of $500.00.

In Norris's Appeal (21 P. F. S. 106) the present Chief Justice discussed the principles upon which commissions are disallowed to a trustee, and it seems that the cases depend upon their circumstances.

In Seguin's Appeal, *supra*, it is ruled that a guardian who employs his ward's funds in his own business, though the result be advantageous to the ward, will not be allowed commissions on the fund.

In the case before us the guardian, while administrator of his brother's estate, left some of the money belonging to it, in the firm of which he was a member (and of which his brother had been a member), and took notes in the first place and then loaned other money to the firm and took notes for it, and these moneys remained in the corporation. After 1881, and the corporation note was paid, and the United States bonds were paid off (according to the statement of the accountant), he did nothing with the ward's money. He kept no separate account of it, depositing any balance of theirs which came into his hands with his own bank account, and drawing upon this bank account for any investments made by him in his own name. In view of these facts and under the authority of Robinett's Appeal and Seguin's Appeal commissions to the accountant must be refused.

There is also an exception relating to taxes but the finding of the Auditor in the matter of taxes is confirmed.

It remains to give the principles upon which the account should be re-stated.

The money of the ward, J. Etter Small, at the beginning of the guardianship of John H. Small, consisted of two funds, one, the exact amount of which must be found by the Auditor, was retained by the guardian as a loan to himself; the other the amount invested in the firm. The former bore simple interest, the latter earned profits during the time it was in possession of the

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partnership and corporation and afterwards simple interest.

As to the calculation of the profits, the counsel for the ward have suggested the following method: That J. Etter Small's capital, including undistributed profits at the end of each year, and interest thereon, be treated as part of the capital contributed by John H. Small to the firm, and afterwards to his share of the capital stock of the corporation; making an allowance of one-fourth of his net profits to the accountant for labor and services in producing the same. But this method of calculation is not correct.

In the first place, there were two minors, and it was stated by counsel on the argument, that the final settlement of the estate of the other ward, Charles H. Small, deceased, waited the final decree in this case. To calculate the profits earned by the moneys of each ward, disregarding the presence of the moneys of the other ward in the same investment, would not be just to the accountant; and while it is true that the account of the guardian with the other ward is not before the Court, yet for the purpose of calculation it should be considered.

In the next place, the capital of the wards should be treated as a part of the total capital of the firm or corporation and not as a part of the capital of John H. Small alone; that is, the total capital should be taken as consisting of the capital of the three partners or of the stockholders, plus the capital of the two wards. And further, the wards' capital at the end of each year should include their share of the undistributed profits, but without interest on the same; and the undistributed profits of each partner or stockholder should also be added to *his* capital.

The portion of the profits earned by the wards' capital was actually divided between the partners and afterwards the stockholders in certain proportions. In the firm John H. Small received one-third; in the corporation he received one-hundred and seventy-one six-hundredths, this proportion remaining the same after the increase of the capital stock in 1880. That part of the wards' profits received by the other partners or stockholders cannot be followed, nor can the guardian be made to account for them (Seguin's Appeal, *supra*); of that portion of the wards' profits received by the guardian, one-third should be allowed to him for his labor and services, and one of the remaining two-thirds is due to this ward.

The investment by the guardian in the business begins on the 28th day of January, 1871, the date of the release of the former guardian, and ends on the 23d of November, 1881, the date of the payment of the note (Exhibit C). From that last mentioned date on, the amount of the original investment in the firm bears simple interest. From the nature of the surcharge made by the Court, no interest is allowed since the date of the filing of the final account, except that charged by the Auditor in his report. This interest, which was not excepted to, was allowed on moneys of the ward acknowledged by the accountant to be in his hands, and on a surcharge of $1019.42, which surcharge was not excepted to.

And now to wit, April 8, 1889, this case having been argued on exceptions to the Auditor's report and the testimony having been considered, it is ordered, adjudged, and decreed, that J. Etter Small is entitled to a portion of John H. Small's profits in the consolidated firms of H. Small's Sons & Co., and Billmyer & Small, and in the Billmyer & Small corporation; that in ascertaining the amount of said portion of said profits, the moneys of both wards be taken into the calculation; that the total capital of the firm and of the corporation be considered as consisting of the moneys of the two wards, including their undistributed profits at the end of each year, and of the capital of the partners or stockholders, including their undistributed profits at the end of each year; and that of the share of the profits earned by the wards' moneys which came to John H. Small, he be allowed one-third for his labor and services in producing the same.

And that the ward, J. Etter Small, is entitled to simple interest on the sum of money held by John H. Small as a loan to himself, which sum is to be found by the Auditor, and to simple interest on the amount of the original investment in the firm, from the close of said investment, which amount is to be found by the Auditor. And that said investment in the firm shall be held to begin on the 28th day of January, 1871, and to end on the 23d day of November, 1881.

And that the Auditor reconsider his statement of the profits of the firm and corporation, and it appearing that no account has been furnished of the profits or dividends for the years 1875 and 1876, they shall be taken to be the average of the profits for the years 1873, 1874, 1877, and 1878.

And that all the commissions of the accountant are disallowed, and he is required to pay all the costs of this proceeding except the costs of filing his account and one hundred dollars counsel fee for services rendered in preparing the account and in the auditing of the same.

And that the matter is referred back to the Auditor for the purpose of re-stating, according to this decree, the account of the guardian, John H. Small, with the ward, J. Etter Small, as of the day of the filing of the final account.

And that the Auditor state the balance of the moneys of J. Etter Small, now in the hands of John H. Small, which shall include $2476.51 interest since the filing of the final account as allowed by the Auditor.

Opinion by GIBSON, P. J.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, MAY 31, 1889.* [No. 5.

AN ACT

Relating to writs of error and appeals to the Supreme Court regulating the form thereof and subjecting all persons to the Acts limiting the time within which they shall be taken.

[Approved May 9, 1889.]

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal, or certiorari, shall hereafter be taken in a proceeding to be called an appeal.

Section 2. The names of the parties, estate, or matter shall be set forth in the praecipe for the appeal in the order and sequence in which they were recorded at the trial or hearing in the Court from which the appeal shall be taken, with a substitution of proper parties in case of death or amendment, and the appeal shall be entitled as the appeal of who was (plaintiff or defendant as the case may be) from the (judgment or decree) of the Court of and the record shall be brought to the Supreme Court by a writ of certiorari.

The record on any appeal perfected in the Court from which the appeal may be taken may be filed in the Supreme Court without requiring a writ of certiorari.

Section 3. Hereafter there shall not be any exemptions in favor of any person from the Acts of Assembly limiting the time within which writs of error, appeals, or certiorari must be sued out.

NEW RULES OF THE SUPREME COURT.

All appeals taken under the Act of May 9, 1889, must be taken in this Court as writs of error have been heretofore taken, and in all such cases a writ of certiorari must be issued to bring up the record.

The present rules in regard to the preparation of paper-books in the case of writs of error shall be held to apply to all appeals taken under the Act of May 9, 1889.

Supreme Court.

Jan. '89, 401, 402, 403. April 24, 1889.

County of Huntingdon v. Kauffman.
Same v. Beck.
Same v. Ross.

Road law—Act of May 14, 1874—*Assessment of damages—Reviewers may not be appointed to assess the damages, in the absence of a special law providing therefor—Costs of views in road cases—Act of May* 19, 1887.

By the Act of May 14, 1874 (P. L. 164), it is expressly provided, that if the viewers appointed should report in favor of laying out a public road, they should assess the damages therefor, "and the damages so assessed shall be conclusive, or may be subject to appeal, review, or modification, as may be provided by existing laws in the different counties of this Commonwealth."

Held, that the words "existing laws in the different counties of this Commonwealth," apply both to the general road law in force in the county and to any special or local law which may have superseded it.

Under the General Road Law of 1836, a party dissatisfied with the damages awarded to him, was entitled to petition for a review, but such review extended to the entire action of the viewers, in laying out the road and estimating the damages. When, therefore, in a proceeding to lay out and open a public road, the viewers have, in accordance with the provisions of the Act of May 14, 1874 (P. L. 164), found in favor of opening the road, and have also assessed the damages that will be thereby occasioned, a party dissatisfied with the damages awarded to him may not, in the absence of a special or local law, authorizing such proceedure, petition the Court to set aside the report of the jury so far as the assessment of damages is concerned, and appoint a jury solely to make a new assessment of the damages.

The General Road Law makes no provision for the payment of viewers upon the question of damages, and when such viewers have been appointed, it is not competent for the Court of Quarter Sessions under the General Road Law, or under the special provisions of the Act of May 19, 1887 (P. L. 139), to impose the costs of such review upon the county.

Writs of certiorari to the Quarter Sessions of Huntingdon County.

These were three petitions filed respectively by Mary Kauffman, Martin Beck, and Ella B. Ross, for viewers to assess the damages sustained by each of them, by reason of opening a public road in Warriorsmark Township.

The facts of each case were the same, and are set out in the opinion of the Supreme Court, *infra*.

To the report of the viewers to assess the damages exceptions were filed in each case, *inter alia*, as follows :—

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(1) The viewers were appointed without the authority of law, and they had no legal right to assess the damages sustained by the petitioners. The power to assess damages sustained by a land-owner in such case being exclusively vested in the road viewers, under the Act of June 14, 1874.

(3) The county is not liable for the costs of said view, and the said costs should be paid by the petitioners.

The Court below, KREBS, P. J., of Clearfield County, overruled the exceptions, in the following opinion :—

"The most important question raised by the exceptions was heard and passed upon by the Court, upon the argument of the rule to show cause why viewers should not be appointed to assess the damages. The reasons for making the rule absolute and appointing the viewers were briefly given then. Upon this hearing upon the exceptions to the report I am informed by a certified opinion of President Judge BARNETT, of the Forty-first District, that I am at variance with his construction of the law upon this question.

"I therefore now desire to give my reasons more fully for the conclusions then reached in the consideration of these exceptions.

"Prior to the passage of the Act of 14th May, 1874 (P. L. 165), road views and proceedings were had under the provisions of the road laws of the 13th June, 1836, both as to the number of viewers appointed, their duties, and the assessment of damages. But the Act of 1874, *supra*, changed this so far as it relates to the time of the assessment of damages and the conclusiveness of the report of the viewers on the question of the amount of damages. The assessment of damages is no longer under section 7, Act 13th June, 1836, but under the Act of 1874, and the remedy therein provided to parties aggrieved by the report of the viewers. Under the Act of 1874, it is the duty of the viewers, if they decide in favor of the road, to procure releases from the land-owners for the damages likely to be done by the opening of the road; or if this cannot be done, to assess the damages; and their report upon the assessment of damages 'may be subject to appeal, review, or modification, as may be provided by existing laws in the different counties of this Commonwealth.'

"It is argued that 'the viewers were appointed without authority of law, and they had no legal right to assess the damages sustained by the petitioner.' The Act of 1874 is not in all particulars similar to the Act of 1845, Feb. 24 (P. L. 52). The Act of 28th April, 1857 (P. L. 338), under which Durnall's Road (32 Pa. 383), was decided, is almost exactly a rescript of the Act of 1845. The material and important difference between the Act of 1874 and those of 1845 and 1857, and the law relating to roads in various counties throughout the State, contained in Brightly's Purd. Dig., vol. 2, p. 1519, is, that the former Acts provided 'that it shall be the duty of the Court to examine carefully the amount of damages assessed as aforesaid; and if the Court shall be satisfied that the amount of damages assessed in any case is such that the public interest will be subserved by its payment, etc.'

"But the Act of 1874 gives the 'right of appeal, review, or modification as may be provided by existing laws.' It does not follow therefore that the decisions under the Acts of 1845 and 1857 and like statutes, control the construction that is to be placed upon the Act of 1874. But granting that they are to be considered, and that the Act of 1874 is to have like construction to the Act of 1857, under which Durnall's Road (*supra*), was decided, that case and the case of Chartiers Township (34 Pa. 413), and Road in Bensalem Township (38 Id. 368), do not decide the point raised here. In Durnall's Road the real question was, did a *private road* come under the Act of 1857 for view or review. C. J. LOWRIE does say, however, this, 'hence it arises naturally that objections to the *road itself or to the damages found* may be a ground of review or re-review.' What the Court decided in Chartiers Township Road was that the applicant was too late, and therefore not entitled to a view or review on account of the damages awarded; that they decided in Durnall's Case that a review was a proper remedy for such a complaint and not exceptions. In the case of Bensalem Township, what Judge STRONG says must be applied to the facts as they appear from an attentive study. There was a report laying out a road, and upon petition of Mrs. Bilbrough, a review of the road thus laid out. Of course it follows that under the Act of 1857 the viewers were not bound by the first view as to the location of road or damages. They did adopt the first location, but assessed a different amount of damages. The Court below confirmed the location and first damages, which was held to be error, and anything else in that case is mere '*obiter dictum*.'

"In Spring Garden Road (43 Pa. 144), LOWRIE, C. J., says, in speaking of Durnall's and Chartiers roads (*supra*), 'we notice that we have been understood as saying there that under these local road laws there might be a view for damages apart from a view or review of the road. That was not our meaning, *though possibly there might be some cases in which this would be proper*.' Why was it not their meaning? Because in neither of those cases was such a question presented, and the Act of 1857 did not, as does the Act of 1874, provide expressly for an appeal or review.

But we have been referred to the case of 'Jackson Street,' (83 Pa. 328), and 'Magnolia Ave-

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nue,' (117 Pa. 56), as ruling the question under consideration. The only question decided by those cases is, that the Act of 1874 has no application at all to streets laid out under powers conferred by statute upon the city, as was given in both instances. But what seems entirely conclusive of this case is the decision in 'Verona Borough," (118 Pa. 171). WILLIAMS, Justice, in closing his opinion there says: 'We are unable to see any good reason for such holding, and accordingly hold the rule to be *that assessments of damages* made under the general road laws are subject to review in the same manner and to the same extent in boroughs where the general road laws prevail, as in townships.'

"What are the threads that form the woof and warp of his opinion? They are that Verona Borough in 1871, when created, came under the provisions of the general road law of 1836. That under the 25th section thereof which provides that 'in all cases of views for any purpose mentioned in this Act, the respective Courts shall, on petition of any person interested, direct a second view or review for the same purpose,' *assessment of damages* was and is one of the purposes mentioned in the Act. Now we have the Act of 1874 expressly providing for an appeal or review, as may be provided by existing laws in the different counties. The general road law of 1836 applies to Huntingdon County. Judge WILLIAMS expressly declares that under the 25th section of the Act of 1836, reviews may be had by the land-owner, because of *assessment* of inadequate damages, and this ought to be conclusive of the case, unless we are under a serious misapprehension of that case.

"It is argued every review must necessarily be a review of both of the location of the road and the damages; that there can be no review of damages separate and independently of view for location. We do not believe such to be the law under the Acts of 1845 and 1857; but if true as to those it is not the law in this case, because this case must be decided under the Acts of 1874 and 1836.

"There is no reason that can be given that is at all of weight under any circumstances why where all parties are satisfied with the *location* of the road and by their not objecting show their desire to have it opened, but some one land-owner complains of inadequate assessment of damages, that the whole community must wait and wait until there is a review and re-review perhaps of the road simply to settle the naked question of damages.

"This may be the law, but I do not believe it, and will not so decide until convicted of error by a higher Court.

"To the second exception we reply that it is not sustained by any evidence; no testimony has been offered in support thereof, and it is accordingly dismissed without further notice.

"The third exception is as to the costs upon this review of damages. The 55th section of Act 13th June, 1836, provided that 'the expense of a view to assess the damages sustained by the owner of land taken as aforesaid for a public road shall be paid by the respective county.' But the Act of 19th of May, 1887, (P. L. 139), makes it the duty of the Court hearing such proceedings that is, 'of views, reviews, and re-reviews of public or private roads, and claims for damages,' to make such order about the payment of the necessary costs incurred as to the Court shall appear right and just. Under this statute and the facts surrounding this case, it is ordered that the county pay the costs of the view of Ella B. Ross, assessing damages."

Similar decrees were entered in each of the three cases. Whereupon the said county of Huntingdon took these writs assigning for error, the action of the Court in appointing the reviewers to assess the damages, and in dismissing the exceptions to their report as above set forth.

L. H. Beers, for the plaintiff in error.

No argument, printed or oral, contra.

May 6, 1889. THE COURT. These were writs of certiorari to review the proceedings in a road case. It appears that on the 15th of June, 1887, the Court below appointed viewers to view and lay out a public road in Warriorsmark Township, Huntingdon County. The viewers examined the proposed route, reported in favor of the road, and assessed the damages. Their report was approved *nisi* on December 12, 1887, a petition was presented for a review, and on the same day viewers were appointed as prayed for in the petition. About the same time, certainly at the same term, each of the defendants in error presented a petition asking the Court to set aside the report of the jury, so far as the assessment of damages was concerned, upon the ground that said damages were inadequate, and to appoint a jury to assess the damages. It was in reality an application for review upon the question of damages. The Court below appointed a jury upon each petition, who reported damages slightly in excess of those awarded by the original jury of view. The jury of review were equally divided. Three of their number were in favor of the new road; the other three were against it. Under these circumstances the Court below held that the original report must stand. The costs of the three reviews upon the question of damages were ordered to be paid by the county. This order is assigned for error. The important question presented by the record is the power of the Court below to appoint a separate jury to re-assess the damages.

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The first section of the Act of May 14, 1874 (P. L. 164), provides, "That hereafter it shall be the duty of all persons appointed in the several counties of this Commonwealth to view and review any public or private road or bridge, if they shall decide in favor of locating said road or bridge, to endeavor to procure from the persons over whose land such locations may be made, releases from all claims for damages that might arise from the opening of such road or the building of such bridge; and in every case where such viewers shall fail to procure such releases, and it shall appear to them that any damages will be sustained, it shall be their duty to assess the damages and make report thereof, signed by a majority of their number, and return the same, together with all releases obtained, to the Court of Quarter Sessions, and the damages so assessed shall be conclusive, or may be subject to appeal, review, or modification, as may be provided by existing laws in the different counties of this Commonwealth."

Section second of said Act repeals all Acts and parts of Acts inconsistent with the above provisions.

The prominent feature in this Act is the change in the mode of assessing damages. It provides, as clearly as language can do, that the jury appointed to view and lay out a road, and also a jury of review, shall assess the damages caused thereby. To this extent the general road law of 1836 is repealed. The reasons which induced the Legislature to make this change are not expressed in the Act, yet it is not difficult to see why it was done. It simplifies the proceedings and makes them less expensive. This alone would justify the change. But there is another and more important reason. Under the old system the assessment of damages was a separate proceeding, by another jury, subsequent to the location of the road by the viewers and the approval of their report. It sometimes happens that the viewers located a road where it was subsequently ascertained that the damages for opening it were so large as to be greatly disproportioned to the public necessity for the road, and the ability of the township to pay. In such cases had the jury of view also ascertained the damages they might well have hesitated to report in favor of the road. The expenses of opening a road, and the amount of damages to be paid to the land owners, are legitimate matters of consideration by a jury of view when they are called upon to decide upon the propriety of locating a road. We can readily understand, therefore, why the Act of 1874 required the jury of view to pass upon both the location of the road and the assessment of the damages.

The question which confronts us here is whether there can be a review upon the matter of damages merely. Here again we must turn to the Act of 1874, which provides, as already stated, that, "the damages so assessed shall be conclusive, or may be subject to appeal, review, or modification as may be provided by existing laws in the different counties of this Commonwealth." What is the meaning of this language? The plaintiff in error contends that the words "existing laws in the different counties of this Commonwealth" apply only to special or local laws and not to the general road laws, for the reason that the latter are expressly repealed by the Act of 1874. We do not agree to this view. The Act of 1836 is repealed only to the extent of requiring the jury of view and review to assess the damages. We hold that the true intent and meaning of the language above quoted is this, that the damages ascertained and assessed by the jury of review are conclusive unless an appeal, review, or modification thereof is provided for by the laws existing in the particular county at the time. Those laws consist of either the general road laws, if in force in the particular county, or if not in force the local or special law which has superseded it. It was conceded that there is no local or special law upon this subject for the county of Huntingdon. The Act of 1836 contains no provision for a review upon the question of damages. The Newville Road Case (8 Watts, 172) rules this point. The syllabus of that case, owing to a typographical blunder, is incorrect, and is in direct conflict with the decision. It was said by SERGEANT, J., referring to the question of damages: "An adequate remedy is given to all parties interested by the power possessed by the Court to disapprove and set aside the assessment for any impropriety in the jury or defect in the proceedings and to award another view in lieu of the former; on carefully examining, however, the whole of the provisions of this Act (1836) I am satisfied that the right to a review does not extend to the case of assessment of damages. In the first place the action of the jury in these cases is not so much that of viewers (though they are directed to view the premises and are frequently termed viewers) as that of assessors of damages, which is the great object of their appointment and their main business. And in the 80th section of the Act this distinction is apparent where it speaks of all cases of view, review, or assessment of damages. But what is still stronger the 54th section provides for the expense both of viewers and reviewers of roads, whether public or private; and the 55th section provides for the expense of a view to assess damages occasioned by a public or private road, but says nothing of the expense of a review for that purpose, which it is not supposed would have occurred had such a thing been intended. There is, therefore, as the law stands, no provision for paying the expenses

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of such review." This case was cited approvingly in Road in Bensalem Township (38 Pa. 368). That case was decided under a special law for Bucks County by which the jury of view were required to assess the damages. It was said by Justice STRONG: "In Durnall's Road (8 Casey, 383) it was ruled that under a statute quite similar, enacted for Chester County, objections to the amount of damages assessed by the jury may be a ground for a review. The meaning of this is that any land owner, dissatisfied with the assessment of damages, may petition for a review. Of course the review extends to the entire action of the viewers in laying out the road and estimating the damages." Durnall's Road (*supra*) and Road in Chartiers Township (34 Pa. 413), both of which were decided under local laws bearing some resemblance to the Act of 1874, have been relied upon to some extent to show that there might be a view for damages apart from a view or review of the road. The opinion in each of those cases was delivered by Justice LOWRIE, who said, referring to this subject, in the subsequent case of Spring Garden Road (43 Pa. 144), that such was not the meaning of the Court. The key to what the Court did mean is probably to be found in the remark of Justice STRONG, above cited, that a land owner who is dissatisfied with the award of damages may have a review, but the review "extends to the whole action of the viewers in laying out the road and estimating the damages." We do not think, however, either of the foregoing cases or any of the others cited rules this case, for the reason that the Act of 1874 makes the award of damages conclusive, unless an appeal or review thereof be provided by the existing laws in force in the particular county. There is no such law in the county of Huntingdon. It follows that it was error to grant a review upon the question of damages alone.

It was also error to put the costs of these reviews upon the county. The law makes no provision for the payment of reviewers upon the question of damages. (Newville Road, *supra*.) The Act of May 19, 1887, P. L. 139, was not intended for any such purpose. The object of that Act was not to interfere with such matters as were already regulated by law, such as the compensation of viewers, but to provide for such costs as were not fixed by statute, such as taking depositions, making surveys, etc., when necessary, after the report of viewers and exceptions had been filed. It would be a strained construction of that Act to hold that it authorized the Court to set aside all the prior Acts of Assembly upon this subject and introduce an arbitrary fee bill in regard to the compensation of viewers.

The order of the Court below appointing viewers upon the petition of the respective defendants in error to assess damages, and all subsequent proceedings thereon, is reversed and set aside in each case, at the costs of the respective petitioners.

Opinion by PAXSON, C. J. C. K. Z.

Jan. '89, 329. March 22, 1889.

Commonwealth v. Bradney et al.

Indictment—Motion to quash—Criminal procedure—When Commonwealth may except to decision of Court—Grand jury—Proceedings before—District attorney—When to appear before grand jury.

Upon the trial of an indictment charging a nuisance, it is competent for the Commonwealth to take an exception to any decision or ruling of the Court, and have a bill thereof sealed according to the practice in civil cases. A proceeding to quash is properly considered a part of the trial.

An indictment may be quashed for matters not apparent upon the face of the record.

A motion to quash a bill is a proceeding addressed to the discretion of the Court, regulated by judicial rule, but in this State the decision is open to revision in the Supreme Court.

The district attorney is the attendant of the grand jury. It is his duty to lay before them matters upon which they are to pass; to aid them in the examination of witnesses, and to give them such general instruction as they require.

It is the duty of the district attorney, during the discussion of the particular case, and whilst the jurors are deliberating upon it, to remain silent and not to attempt to influence their action, or to give effect to the evidence adduced. The better practice is, and the jurors have an undoubted right to require that he should retire from the room during their deliberations, and when their vote is taken.

The mere presence of the Commonwealth's officer in the grand jury room, in the absence of any participation in the deliberations of the jury, or effort on his part to influence their finding, is not good ground for quashing an indictment.

A bill for an indictment against supervisors for neglect to repair a road being before a grand jury, one of the jurors, a resident of the township in which the road was located, was told by the district attorney, in good faith, although mistakenly, that the Court directed him to withdraw and take no part in the deliberations in that case. The juror withdrew, the bill was discussed and found to be a true bill in his absence, the district attorney remaining in the room during the discussion and vote upon the bill. When it was returned the attention of the Court was called to the matter, the bill at once referred back to the grand jury, the witnesses were re-examined in the absence of the district attorney, and in the presence of the entire jury, the vote was retaken and a true bill found:

Held, that a motion to quash the indictment was improperly granted.

Error to the Quarter Sessions of Clinton County.

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Washington Bradney and W. P. Sweeley, supervisors of Chapman Township, were indicted for neglecting to repair a road in said township. The facts are set forth in the opinion of the Supreme Court and in the opinion of the Court below, MAYER, P. J., quashing the indictment on motion of the defendants:—

"At September Sessions, 1887, the grand jury returned a true bill of indictment against the supervisors of Chapman Township for neglecting to repair a road in said township. A. Farwell was the prosecutor of the indictment. Among the grand jurors empanelled and sworn was Warren Summerson, a citizen and tax-payer of Chapman Township, but on that account not disqualified from acting as a grand juror upon this bill of indictment. (Act of Assembly of April 16th, 1846, section 6.)

"The defendants have moved to quash the indictment for the following reasons:—

"(1) Warren Summerson, one of the grand jurors in attendance at said Court, was unlawfully, and in violation of the express order of the Court, removed from the grand jury room by George A. Brown, district attorney of said county, and was hindered and prevented from entering the same for a long time; and, while he was absent, said district attorney called witnesses before said grand jury, and they, the said grand jury, heard testimony, deliberated and voted upon said bill of indictment in the absence of said Warren Summerson and during the time that he was not permitted to enter said room.

"(2) The district attorney aforesaid remained in the grand jury room during the time that the grand jury were deliberating and voting on said bill, thus destroying all secrecy of action on the part of the grand jury.

"(3) The district attorney suppressed proper testimony which was in the possession of some of the grand jurors, and deprived the jurors of the benefit of the same, so that they could not act intelligently on the bill.

"(4) The district attorney took an undue and improper interest in the action of the grand jury upon this bill, far exceeding his duties and authority, and dictated to the grand jury in matters which should have been left entirely to their discretion and within their control.

"When the indictment came to be considered by the grand jury, the district attorney, at the instance of Farwell, the prosecutor, and without any direction from the Court, caused Warren Summerson, the grand juror from Chapman Township, to withdraw from the grand jury. During his absence the evidence of the witnesses on the part of the prosecution was heard, the bill considered, a vote taken, and a bill returned to the Court 'a true bill.' It was admitted by the district attorney in open Court, when the bill was returned by the grand jury with their indorsement 'true bill,' and his attention was called to the fact that he had ordered Summerson to withdraw from the jury, that he had done so upon the representation and statement of Farwell, the prosecutor, that the Court had directed Summerson to be withdrawn, which was incorrect, as the Court had made no such order, but had declined to do so. The defendants were entitled to have the bill considered by the whole number of grand jurors empanelled and sworn, and it was an improper and unauthorized interference on the part of the prosecutor to have one of the jurors withdrawn when his bill was being considered. Besides, it was improper for the district attorney to be present when a vote was being taken on the bill. While there can be no objection to the district attorney being present during the examination of the witnesses, for the purpose of directing the order of the testimony and eliciting the material facts, after the evidence has been presented, it is, in our opinion, his duty to withdraw and leave the jury to its unbiased deliberations. His presence for the prosecution during the vote upon the bill would necessarily hamper the jury in the exercise of a free and untrammeled judgment.

"The practice is thus stated by Judge FIELD, of the United States Court, in a charge delivered to a California grand jury: 'The district attorney has the right to be present at the taking of testimony before you, for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate his witnesses before you, but he has no right to be present pending your deliberations on the evidence. It is proper to keep in mind the fact that the only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecutor and the accused, and it is the duty of the Courts to refuse to tolerate any practice which conflicts with this independence and impartiality.' (Whart. Cr. Plead. & Prac., par. 366.)

"It was admitted by the district attorney in Court, and it also appears in the evidence taken by the depositions, that he was present when the vote was taken on the bill. After it was discovered that Summerson was improperly withdrawn from the jury, we recommitted the bill to the grand jury, who returned it without changing their finding. This, we think, will not cure the former irregularity. That we have the power to quash the finding of a grand jury for irregularities, and for matters *dehors* the record will appear from the following authorities: In Brown *v.* Commonwealth (23 P. F. Smith, 321) it was held that the array of grand jurors should have been set aside and the indictment quashed because the jury-wheel was not properly sealed. In Commonwealth *v.* Bartilson (4 Norris, 482) Jus-

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tice PAXSON says: 'We do not deny the power of the Court to quash an indictment for matters not apparent on its face. This is sometimes done for defects in the process for drawing and summoning the grand jury.' In Jillard *v.* Commonwealth (2 Casey, 169) Justice WOODWARD says: 'The irregularity of the grand jury was not pleadable in bar of the indictment; at most, it was ground only for a motion to quash,' recognizing the power of the Court to quash. The same doctrine is laid down in 1 Whart. Crim. Law, par. 480, and authorities might be multiplied. But it is contended on the part of the Commonwealth that the testimony of a grand juror and the district attorney should not be received and considered for the purpose of invalidating and impeaching the finding of the grand jury. While we might concede (although as stated by TILGHMAN, C. J., in Ritchie *v.* Holbrooke, 7 S. & R. 458, it has been a *vexata questio*) that the affidavit of jurors should not be received to impeach their finding, yet we are not prepared to go to the extent of deciding that the testimony of a district attorney cannot be received for the purpose of showing that he was present when the grand jury acted upon a bill. He is not a member of the grand jury, and the rule does not apply. But whether his evidence was admissible or not, the district attorney was frank enough to admit to the Court that he was present when the vote was taken on the bill. We think the reasons are sufficient to require us to quash the bill of indictment.

"Indictment is quashed.

"At the request of counsel for Commonwealth, an exception is taken to the order of the Court quashing the indictment, and a bill is sealed."

The Commonwealth then took this writ, alleging that the Court erred:—

(1) In saying: "Besides, it was improper for the district attorney to be present when a vote was being taken on the bill. His presence for the prosecution would necessarily hamper the jury in the exercise of a free and untrammeled judgment."

(2) In giving weight to and using the alleged admissions of the district attorney in deciding the motion to quash, after his deposition had been taken, and read in the argument of the motion. The deposition was the only testimony before the Court.

(3) In saying: "The defendants were entitled to have the bill considered by the whole number of grand jurors empannelled and sworn. After it was discovered that Sammerson was improperly withdrawn from the grand jury, we recommitted the bill to the grand jury, who returned it without changing their finding. This, we think, will not cure the former irregularity."

(4) In quashing the indictment.

The Supreme Court took the paper-books stating that if it was thought necessary to hear counsel, counsel would be notified.

A. W. Brungard, district attorney, and *George A. Brown*, late district attorney, for the Commonwealth.

(1) It is the uniform practice in this State for the officer in charge of the preparation of the indictments to attend the grand jury, open each case, examine the witnesses, and advise upon any question of law which may arise. But during the discussion of the questions it is his duty to remain silent.

Wharton Crim. Plead. § 366.

Neither the district attorney, nor any of the grand jury are competent to testify to anything done during their deliberations, or action upon the bill.

Commonwealth *v.* Twitchell, 1 Brewst. 555.
Zeigler *v.* Com., 22 WEEKLY NOTES, 111.
Whart. Crim. Pl. & Pr. § 380.
Low's Case, 16 Amer. Dec. 271.

(2) The Court was in error in acting upon admissions of the district attorney, not included in the depositions.

(3) As to this assignment see—

Whart. Crim. Pl. §§ 376, 388.
Com. *v.* Eastman, 55 Mass. 212.
State *v.* Beard, 1 Dutcher, 384.
State *v.* Dayton, 3 Zabriskie, 52-3.

W. C. Kress, for defendants in error.

The district attorney should not be present at the deliberations of the grand jury.

Com. *v.* Salter, 2 Pearson, 463.
Com. *v.* Leisenring, Id. 466.

An indictment may be quashed for matters not apparent upon its face.

Com. *v.* Bartilson, 85 Pa. St. 482.
Jillard *v.* Com., 26 Id. 169.

The testimony of grand jurors was admissible.

Com. *v.* Green, 5 Pa. Co. Ct. Rep. 205.
Gordon *v.* Com., 92 Pa. St. 219.
Sykes *v.* Dunbar, 2 Wheat. Selv. N. P. 1072.
Ex parte Schmidt, 12 Pac. Rep. 55.
Territory *v.* Hart, 14 Id. 771.
1 Greenl. Ev. 275, § 252.

May 6, 1889. THE COURT. As this indictment charges a nuisance it was competent for the Commonwealth on the trial to take an exception to any decision or ruling of the Court and have a bill thereof sealed according to the practice in civil cases. (Act 19 May, 1874, sec. 1, P. L. 219.). The proceeding to quash is properly considered as a part of the trial. (Commonwealth *v.* Jackson, 1 Gr. Cases, 262.) But as there was no exception taken or bill sealed upon the competency of the witnesses examined on the hearing of the motion to quash, no question of that character can arise. The testimony so taken is before us for what it is worth, upon the exception to the order quashing the indictment, and

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the only matter for our consideration is the sufficiency of the evidence to justify that order.

It cannot now be doubted that an indictment may be quashed for matters not apparent upon the face of the record. (Bish. Cr. Law, 763.) There is an apparent conflict in the cases but the power of the Court in this State has been recognized in frequent instances and to such an extent as to establish the rule beyond question. In support of this we may cite Jillard *v.* Commonwealth (26 Pa. 169); Brown *v.* Commonwealth (73 Id. 321); Commonwealth *v.* Bartilson (85 Id. 482); and Commonwealth *v.* Clark, a case in the Eastern District, not yet reported (23 WEEKLY NOTES, 317). It is also true that a motion to quash a bill has been treated as a proceeding addressed to the discretion of the Court, a discretion regulated by judicial rule; and according to the more common practice perhaps the decision is not open to revision in the higher Courts, but in Pennsylvania and in some others of the States the practice is otherwise. (Commonwealth *v.* Church, 1 Pa. 105; McCullough *v.* Commonwealth, 67 Id. 30; Commonwealth *v.* Keenan, Id. 203; Hutchison *v.* Commonwealth, 82 Id. 472.)

It appears that whilst the bill was under consideration of the grand jury, Mr. Brown, the district attorney, told Mr. Summerson, one of the grand jurors, residing in the township in which the road was located, that the Court had directed him to withdraw and to take no part in the deliberations of the grand jury in this case; that Mr. Summerson therefore withdrew and the bill of indictment was afterwards considered in his absence and was returned a true bill. Whilst the district attorney appears to have acted in good faith he admits that he was mistaken in supposing that the Court had given any such instructions. It appears also that the district attorney remained in the room with the grand jury not only whilst the witnesses were examined on this bill but during their deliberations upon it and whilst the votes were being taken upon the question whether or not the bill should be returned a true bill. The defendants' contention is that this action of the district attorney was good ground for quashing the indictment, and the learned Judge of the Court below being of this opinion sustained the motion to quash and entered a decree to that effect.

The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of the particular case, and whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand; any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced, is in the highest degree improper and impertinent. Indeed it is the better practice and the jurors have an undoubted right to require that he should retire from the room during their deliberations upon the evidence and when the vote is taken whether or not an indictment shall be found or presentment made. In the absence, however, of any participation in the deliberations of the jury or effort on his part to influence their finding, we do not think that the mere presence of the Commonwealth's officer in the jury room would be good ground for quashing a bill; no case has been called to our attention which carries the rule to this extent.

It is certainly true that the exclusion of Summerson from the jury was an unwarranted act of the district attorney. Summerson was a competent juror, and having been sworn was entitled to sit. The district attorney seems to have been misled by a suggestion of Farwell, the prosecutor, who coming out of the Court room said to Brown that Summerson should withdraw from the grand jury before the consideration of, or a vote upon this bill. The district attorney supposing that the Court had so ordered told Mr. Summerson to retire, which he did. Although this appears to have been done in good faith, as far as the district attorney was concerned, it was done rashly, without proper consideration and wholly without authority. But we are relieved from deciding what was the legal effect of the withdrawal of this juror, for when the bill was returned the matter was called to the attention of the Court, and it was at once referred back to the grand jury, and then, in the absence of the district attorney, upon a re-examination of the witnesses, and in the presence and hearing of Mr. Summerson and of the entire jury the vote was re-taken and the bill was again returned a true bill. In the absence of all evidence of any corrupt or improper influence exerted upon the jury either upon the examination or the re-examination of the case, certainly this was sufficient.

It seems that Summerson resided in the township in which the road was situate, and that he had a draft which belonged to the other side. The district attorney says that Summerson was "concussing in the corner" with it, and that he told the jury, they had no right to use that draft, or to try the cause, that they had a right to find a true bill or to ignore it, but the proper place to hear the defence was at the trial in Court. Now this statement of the district attorney was clearly right, and it was one which it was his privilege to make. We find nothing in the testimony to indicate that the district attorney exercised any undue or improper influence upon the jury which

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could have affected them on their deliberations during the re-examination of the case, and their findings were therefore in all respects regular and valid.

The order and judgment of the Quarter Sessions, quashing the bill of indictment, is reversed, and the record remitted for further proceedings according to law.

Opinion by CLARK, J. H. C. O.

Jan. '89, 262; July '89, 42, 45. May 14, 1889.

Appeal of Breckenridge et al.
Appeal of Ewing et al.
Appeal of Ford, Administrator.

Decedents' estates—Executors and administrators—Subrogation—Partnership—Evidence.

A., being cashier of B., who was State treasurer, died insolvent, leaving a shortage in his accounts of $42,500. Prior to his death he had been dealing in oil on margins, and had opened an account with certain brokers, which if closed at once would have resulted in a loss. B. made good the deficit to the State, and urged A.'s administrators not to close the account, but to carry the same until oil should advance, promising to put up margins if necessary. The administrators did so, B. was not called on for margins, and the account was subsequently closed out at a profit of $9314.90. The administrators, after collecting this sum, paid the same over to B. Upon the filing of the administrators' accounts:

Held, that B. was not entitled to this sum, but that the same evidently belonged to the estate of decedent only, and that therefore the administrators should be surcharged therewith.

In the above case the administrators having been surcharged as above, claimed that they were entitled to a credit for the sum of $5928.75, being the dividend of A.'s insolvent estate upon the sum of $42,500 due B. as a general creditor:

Held, that it was not error under the circumstances to allow this credit, and that the administrators were entitled to be subrogated to B.'s rights in that respect.

A claim to the above amount of $9314.90, made by the administrator of an alleged surviving partner of decedent was disallowed, the evidence of partnership being insufficient, and consisting principally of the use of the word "*we*" by decedent in business letters written by him during his lifetime.

Appeals of F. C. Breckenridge *et al.*, administrators of A. C. Nutt, deceased; of J. K. Ewing *et al.*, executors, and of Charles P. Ford, surviving administrator of William Coldren, deceased, from a decree of the Orphans' Court of Fayette County, in the matter of the account of the administrators of said Nutt.

Before the Auditor (A. H. Wycoff, Esq.), to whom the account was referred, the facts appeared as set forth in the opinion of the Supreme Court, *infra*. The estate was insolvent. The total amount with which the accountants charged themselves was $27,041.70, and the amount for which credits were asked was $6212.08. The balance for distribution, amounted to $20,828.88. The claims of creditors largely exceeded this balance. The Auditor having reported that the accountants should be surcharged with the sum of $9314.90, being the amount paid by them to Bailey, said accountants claimed that they were entitled to a credit for the sum of $5928.75, being a dividend to which the State or Bailey would have been entitled on account of the debt of $42,500, due by the decedent. The claim was allowed by the Auditor.

Exceptions filed to the Auditor's report were dismissed by the Court, and a decree entered accordingly; whereupon the present appeals were taken. F. C. Breckenridge *et al.*, the accountants, assigned for error, *inter alia*, the surcharge of $9314.90. Ewing *et al.*, who were general creditors, assigned for error the decree of the Court allowing to the accountants the credit of $5928.75. Charles P. Ford, administrator of William H. Coldren, deceased, assigned for error the rejection of his claim as administrator of an alleged surviving partner of decedent.

W. H. Playford, for F. C. Breckenridge *et al.*, administrators.

S. L. Mestrezat (*John Boyle*, *A. D. Boyd*, and *R. H. Lindsey* with him), for the general creditors.

Edward Campbell, for Ford, administrator.

May 27, 1889. THE COURT. These appeals are all from the same decree, were argued together, and may be disposed of in one opinion. They will be considered in the order in which they are stated. 1. *Breckenridge's Appeal.* There is but a single assignment of error in this appeal. It is as follows: "The Auditor erred in surcharging the account with $9314.90, the amount received from J. C. Fisher & Co." In order to understand this assignment, it is necessary to state the facts briefly. Adam C. Nutt, the decedent, over whose estate the present controversy arises, died suddenly December 24, 1882. At the time of his death he was cashier of General Samuel M. Bailey, the State treasurer. Immediately after his death it was discovered that his accounts were short in the office of State treasurer, to the extent of $42,500. For some time prior to his death he had been speculating in oil, that is to say, he was buying oil on margins. At the time of his death he had an oil account with J. C. Fisher & Co. of Pittsburgh. Owing to a decline in oil, his margins were exhausted, and there was a small balance against him on the books of Fisher & Co. Had the administrators closed the account then, there would have been a loss. The State treasurer, believing that the money of the State had gone

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into this transaction, and being himself personally responsible for the deficit of his cashier, advised and urged the administrators of Captain Nutt not to close the account, but to carry it until oil should advance, and promised to margin the account if necessary. The adminstrators did so; Mr. Bailey was not called upon, and did not put up any additional margin; the price of oil advanced, and as the result, it was afterwards sold at a profit of $9314.90. This sum was received by the administrators upon the settlement of the account with Fisher & Co., and they receipted for it in their official capacity. Instead of holding it for distribution as an asset of Captain Nutt's estate, they paid it over to Mr. Bailey. Upon the audit of their account in the Orphans' Court they were surcharged with this sum, and it was to this surcharge that the assignment of error refers.

This statement of the facts renders an extended discussion of this branch of the case unnecessary. It is clear that Mr. Bailey was not entitled to the money in question. While it may be true that the amount realized was saved by his advice and suggestion, the fact remains that the oil belonged to Captain Nutt's estate, and had there been a loss it would have fallen upon the estate. Mr. Bailey might have secured the benefit of the advance in the oil, had he taken the contract with the Fishers upon himself by a transfer of the account. In such case he would have become the owner of the oil, and the estate of Mr. Nutt would have had no further responsibility in the matter. This he did not do. He merely offered to put up any additional margins required, if the administrators would continue to carry the oil. He had a strong notion to do this. He was a creditor of Mr. Nutt's estate to a large amount, and had every inducement to make the assets realize as much as possible. Had he taken an assignment of this oil from the administrators, and placed himself in Capt. Nutt's shoes, he would have been in a position to realize as owner all the benefits of a rise in the price of oil. As it was he was only entitled to share in such benefits as a general creditor of the estate. There is no merit in this assignment.

2. *Ewing's Appeal.* The seventh assignment raises the only question which requires notice in this appeal. It is as follows: "The Court erred in overruling and dismissing the third exception to the Auditor's fourth report, which exception is as follows: 'The Auditor erred in allowing the administrators of A. C. Nutt, deceased, the sum of $5928.75.'" This sum was a dividend upon the $42,500 which Capt. Nutt owed the State, or rather State treasurer Bailey, who had made the account good in the State treasury. The latter was therefore clearly a creditor of the estate in that sum. The administrators of Nutt having been surcharged with the $9314.90 which they had paid to Mr. Bailey, were in equity entitled to retain the dividend on the $42,500. In other words they were entitled to be subrogated to Mr. Bailey's rights in this respect. Mr. Bailey does not object to this, and could not well do so, and no one else has any right to object.

3. *Ford's Appeal.*—The first assignment alleges that the Court below erred in not awarding the $9,314.90 paid to accountants by Fisher Brothers to W. H. Coldren's administrator. This assignment is based upon the allegation that in the matter of the oil account with Fisher Brothers, Captain Nutt and the said W. H. Coldren were co-partners. Had such partnership existed it is clear the amount of profit realized from the sales of oil would have been payable to Coldren as surviving partner, and after his death, to his administrators. Unfortunately for this claim, it was a claim merely, and was not sustained by evidence. There was no testimony in the case from which an auditor or a jury would have been justified in finding a partnership. The most that can be made of it is that in one or two of his letters to Mr. Coldren, Mr. Nutt used the conventional "we" in referring to these oil transactions. The strongest illustration I can give is his letter of July 27, 1882, where he says: "I think it is a good scheme to buy ten or twenty thousand at 58, and as it always goes against us at the start be prepared to average down until we get a full load. We must have the benefit of the oil boom when it comes. Now I want to go down to 50c. again and we must follow it down if it starts for that figure," etc. These were merely instructions of a principal to his agent. His use of the pronoun "we" was probably in the editorial sense and does not mean anything. It is a common thing to write in this manner. Members of the Bar often use it in writing to their clients, or about their clients' business, and would doubtless be surprised if such expressions could be used as evidence of a partnership. In the absence of any evidence that Coldren was personally interested in these transactions, or that he had contributed a dollar of money in the purchase of the oil, we must regard the case as entirely barren of any proof of a partnership.

The decree is affirmed in each case, and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, C. J. L. L., JR.

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Jan. '89, 197. May 14, 1889.

Campbell v. County of Fayette.

References to attorneys-at-law—Act of May 14, 1874—Who may act as referee—Who may agree to such reference—County commissioners act in a fiduciary capacity, and cannot agree to such a reference.

Only a person who has been admitted to practise in the Supreme Court is a "person learned in the law, who is *authorized* to act as an attorney in the Supreme Court in this State" within the meaning of the Reference Act of May 14, 1874 (P. L. 166), and therefore a reference made to an attorney who has not been so admitted, is improvidently made and invalid, however well *qualified* he may be to act as an attorney of such Court.

Since the Act of April 22, 1874 (P. L. 109), providing for the submission of cases to the decision of the Court, expressly excepts "parties acting in a fiduciary capacity," and since the Act of May 14, 1874 (P. L. 166), expressly confers the authority to refer cases to attorneys-at-law, only on such parties who "may legally by agreement in writing submit a case to the decision of the Court," it follows that parties acting in a fiduciary capacity cannot agree to a submission of a case to an attorney-at-law.

The phrase "parties acting in a fiduciary capacity," as used in the Act of April 22, 1874 (P. L. 109), is not to be confined to persons who are technical trustees under appointment by will or deed, or by the Court, but includes county commissioners, and all other public officials who have charge of the public money, as well as all private trustees clothed with authority over the property of others.

When a reference under the Act of May 14, 1874 (P. L. 166), has been made to a person who has not been authorized to act as an attorney in the Supreme Court, and by persons not authorized to make such a reference, to wit, county commissioners, the whole proceeding is void from the beginning, and may be set aside, even after an award has been made, on motion of the Court having original jurisdiction in the cause, although an award of such a referee, when duly appointed, is only reviewable by the Supreme Court.

Error to the Common Pleas of Fayette County.

Assumpsit, by Edward Campbell against the county of Fayette, to recover compensation for professional services rendered by him to the county.

After this action had been brought the following agreement was filed:—

And now, December 3, 1887, the parties above named, by their respective attorneys, do hereby agree to submit the above cause to the decision of Wm. G. Guiler, Esq., under the Act of Assembly of May 14, 1874.

R. P. Kennedy,
Plaintiff's attorney.
A. D. Boyd,
Defendant's attorney.

Subsequently Mr. Hopwood was substituted for Mr. Guiler by the following agreement:—

January 16, 1888, on motion to the Court, by agreement of counsel for both parties, Robert F. Hopwood, Esq., is appointed referee in this case, instead of William G. Guiler, Esq., who was appointed referee, and since his appointment has become counsel in the case.

W. G. Guiler,
Defendant's attorney.
R. P. Kennedy,
Plaintiff's attorney.

Mr. Hopwood acted as referee and filed his report; the defendant then took a rule to show cause why the above-mentioned agreement of reference should not be set aside, the appointment of the referee vacated, and all proceedings before said referee and his report be set aside.

After hearing argument on this rule, the Court made the same absolute in the following opinion by Ewing, J.:—

"On December 3, 1887, a written agreement, signed, not by the parties, but by their attorneys, to submit this case to the decision of Wm. G. Guiler, Esq., under the provisions of the Act of May 14, 1874 (P. L. 166), was filed in the proper office; but before any further action was taken it became impossible, by reason of a change in the board of county commissioners, and the employment of Mr. Guiler as legal adviser of the county, for Mr. Guiler to act under said agreement, and on January 16, 1888, by agreement of the attorneys, Robert F. Hopwood, Esq., was substituted as referee. Nothing more was done in the case until July 3d, when written notice of his selection as referee was served upon Mr. Hopwood, who at once accepted and took the prescribed oath before the prothonotary, both the acceptance and oath being written on the back of the notice aforesaid, but not filed in the prothonotary's office within twenty days, nor, indeed, at all, except as a part of the report filed August 23, being attached thereto. The referee, by writing on said notice also, and not filed within the twenty days, appointed July 14 as the time, and his office as the place of hearing, without any agreement between the parties and himself, so far as appears, to have the hearing elsewhere than the place designated in the Act of Assembly, viz: the court-house. This notice was served upon the defendant's attorney.

"On the day appointed for hearing, defendant's counsel appeared and objected to the referee proceeding in the case, alleging the agreement of submission to be void because the county commissioners act in only a fiduciary capacity and have no authority therefore to make such an agreement. This objection the referee did not consider valid, and the hearing proceeded. At the conclusion of the plaintiff's evidence, apparently on the same day, July 14, defendant's counsel requested a continuance until he could have an opportunity to apply to Court to have the submission vacated, which application could not be made until September Term, beginning the first Monday of September, the June Term

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being closed about the middle of June. This request the referee declined to grant, on the ground that the Court had no right or authority to set aside the agreement. Again, on August 16, defendant's counsel objected to the referee proceeding in the case, protested against his action in overruling the objections already made, and refusing the continuance requested, refused to offer any testimony, and presented as a further objection that the said referee could not act in the case, beause he is not 'authorized to act as an attorney in the Supreme Court of this State." Mr. Hopwood, it is admitted, has never been admitted to practise as an attorney in the Supreme Court, but he overruled this objection on the ground, not denied, that he is 'qualified for admission to the Supreme Court,' and '*authorized*' in the Act means 'qualified,' and not 'admitted.' Therefore the referee proceeded to make out his report, and the same was filed August 23, 1888.

"On September 5th the petition of the county commissioners was presented to the Court, setting forth the main facts, and praying for a rule on the plaintiff to show cause why the agreement of reference and the proceedings before the referee should not be set aside, because, first, the county commissioners could not make such an agreement, as they act but in a fiduciary capacity; and secondly, because Mr. Hopwood is not authorized to act as an attorney in the Supreme Court of the State, and therefore could not act as referee under the said Act of May 14, 1874. In answer to the rule granted upon this petition the plaintiff alleges that this Court has no jurisdiction, and that the matters complained of are all embodied in exceptions to the report of the referee, and can only be legally passed upon and disposed of by the Supreme Court. The disposition of this rule is the matter now on hand.

"The failure of the referee to file his acceptance and oath, and appointment of time and place of hearing, in the prothonotary's office within twenty days, and his appointment of other than the court-house as the place of hearing, without any agreement of the parties to that effect appearing, are matters concerning which no question is here raised. Nor is any exception taken because of the failure of the parties to sign the agreement of submission; and, consequently, it may be taken for granted that the attorneys were authorized and directed by the parties to make such agreement for them. Were the question raised, however, I am inclined to think it would invalidate the submission, for the statute provides only that 'the parties may, by written agreement,' etc., and I don't see how the agreement can well appear to be that of the parties unless it is signed by them. When drawn like the one in this case, thus, 'the parties above named, by their respective attorneys, do hereby agree,' etc., and signed by the attorneys alone, it appears rather as the agreement of the attorneys, and the record shows no assent of the parties at all. At all events it is bad practice, fruitful of controversy, and may occasion unpleasant and troublesome questions between attorney and client, and should be eschewed.

"The first reason assigned why the agreement of reference should be set aside is that the county commissioners, representing the defendant, act in a fiduciary capacity, and therefore are not authorized by the Act of May 14, 1874, to make such an agreement, since said Act only confers that authority upon the parties who 'may legally, by agreement in writing, submit a case to the decision of the Court;' and the Act of April 22, 1874, providing for the submission of cases to the decision of the Court, expressly excepts parties 'acting in a fiduciary capacity.' Chester County *v.* Barber (1 Out. 464) is cited in support of the proposition that county commissioners act in a fiduciary character, and sustains the position for that case at least, and it is not necessary to question it here. But may not parties 'acting in a fiduciary capacity,' 'legally, by agreement in writing, submit a civil suit or case to the decision of the Court?' Is that exception in the Act of April 22, 1874, constitutional? Is it not an attempt by the Legislature to limit the provisions of section 27, of Article V. of the Constitution of 1874? That section declares that 'the parties,' without exception be it noted, 'by agreement filed, may in any civil case dispense with trial by jury,' etc. A right or privilege thus conferred cannot be limited by legislative enactment. The Legislature cannot say such and such persons shall enjoy it, and such and such shall not. If that provision in the Constitution means what it plainly says, that the parties in any civil case may submit it to the decision of the Court, etc., that embraces any and all parties, and the exception in the Act of April 22, 1874, is unconstitutional and void, and the right thus to submit a case to the decision of the Court is without exception as to the character of the parties in any civil suit. That such is the case seems to be clear. It therefore follows that the right, in like manner, to submit the decision of a civil case to a referee, under the Act of May 14, 1874, is without limitation as to the character of the parties also, and that such a submission is valid in this case.

"But, it may be said, that section of the Constitution does not execute itself (see Commonwealth *v.* Mitchell, 30 Smith, 58), and the Legislature only having provided for carrying into execution so far as concerns parties *not* acting in a fiduciary capacity, the right is not complete in such trustees. Yet, would that construction and effect be given to the Act of April 22, 1874, because of

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the ineffectual attempt therein to limit the right, when the evident purpose of the Act was to declare the manner in which the constitutional privilege should be exercised? Would it not rather be held that annulment of the limitation left the Act as if such exception had never been expressed, and, consequently, as broad and comprehensive in its bearing as the provision of the Constitution which occasioned it? And beyond this, the Constitution vests the right; the legislative enactment only regulates the practice under it. (Commonwealth *v.* Mitchell, *supra.*) Had the conclusion been that the defendant had no right or authority to make such agreement of submission, the power of the Court to set aside the agreement could hardly be doubted; for then the agreement would have been invalid, no authority would have been vested thereby in the referee and the jurisdiction of the Court would not have been ousted.

"The second reason why the agreement should be set aside is that the referee does not possess the statutory qualification to act, not being 'authorized to act as an attorney in the Supreme Court of this State.' As stated, the direct answer made to this by the plaintiff is that '*authorized*,' in the Act means *qualified*, and that the referee is so qualified. But authorized and qualified are by no means synonymous, and have entirely different meanings. One may be qualified to fill any position and to discharge any duties, and yet have no authority whatever to do so. And one may be qualified by having complied fully with the requirements of Rule VI. of the Supreme Court, as the referee states in his case, and yet be refused admission as an attorney of that Court. And no one is 'authorized to act as an attorney in the Supreme Court of this State' unless that Court has conferred the authority. The admission of an attorney is a judicial act, and the Judges of the Supreme Court have exclusive jurisdiction in respect thereto in that Court. This authority is conferred by section 68 of the Act of April 14, 1834. Until the Judges of the Supreme Court have passed upon the application of an attorney for admission to that Court and pronounced a favorable decision, and the applicant has taken the prescribed oath, he is not 'authorized to act as an attorney' therein. It, therefore, follows that, no matter how well qualified or competent the referee in this case may be to act as an attorney in the Supreme Court, yet never having been admitted as an attorney of that Court, he is not *authorized* to act as an attorney therein. And, if not so authorized, it is not questioned that he could not act as referee in a case submitted under the Act of May 14, 1874. It is remarked, however, that there is no reason for embodying such a provision or requirement as the qualification of the referee in the Act, but this observation overlooks the fact that the decision of such referee is reviewable directly and only by the Supreme Court, and that the Legislature must have had in view, if no other reason, the fitness of things, in determining that the Supreme Court should not thus be called upon to review the decision of any one not an officer of that Court. This provision establishes a direct connection, at least, between the two tribunals.

"But, it is strenuously insisted that this Court cannot interfere to set aside the submission even if the referee be disqualified to act; that the Court in which the suit is pending can only thus act for the three causes specified in the sixth section of the Act. Admitting that, so far as a submission valid in the first place is concerned, yet cannot the lower Court certainly declare null and void an invalid submission? If an effort to submit a cause under this Act be made and the provision of the Act not complied with in the agreement, surely the Court where the cause is pending can annul the agreement, for the authority conferred by the statute would not then have legally vested in the referee, and the jurisdiction of the Court would not be ousted.

"Here it may be said that the original agreement was valid, since Mr. Guiler was qualified to act as referee, and that thus the jurisdiction of the Court was lost. So be it, but when Mr. Guiler, before notice of his appointment was served upon him or any action at all taken under the agreement, became defendant's counsel, then it 'became impossible for him to act' as referee, and the jurisdiction of the Court vested again by the very terms of the Act itself. And the jurisdiction of the Court having thus vested, so that the agreement could be set aside upon the application of a party in interest, after notice, it was not again ousted by the substitution by the parties as referee of a person not qualified to act, for, as has been said, the disqualification of the referee would prevent the authority conferred by the statute from vesting. This would be the case even if the disqualification of the referee, unknown before and discovered after his appointment, does not itself come within the spirit, if not the letter, of the second ground specified in the Act for the Court's interference, viz: when 'it becomes impossible for him, the referee, to act.' True, it does not strictly here 'become' impossible for him to act, since the disqualification existed before his appointment; but the fact of that disqualification 'becomes known' subsequently, so as to possibly bring the case within the spirit, at least, of that provision.

"Again it is said that this rule should be discharged, even if the Court had the power to decree otherwise, because the very points here treated are embodied in exceptions filed to the report of the referee and can be passed upon by

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the Supreme Court. This view of the case would be adopted very willingly if it were not that, believing this Court to have the power, under the circumstances of this case, to set aside this agreement, it then becomes the duty of the Court, since application for that purpose has been made by one of the parties, to do so; and were it not also that, possibly the Supreme Court might think, since the submission of the case to the referee is defective and illegal, that their jurisdiction under the Act does not extend so far as to correct that feature; but only to a review of the rulings and judgment of the referee, and that this Court is the proper place to have any such remedy as demanded administered. Moreover, if the view of the case here taken is erroneous, by making this rule absolute, an opportunity is thereby afforded to have the Supreme Court to correct the error on review and declare clearly the law upon the point here raised.

"For the reasons here given the rule is made absolute."

The Court then entered the following order. "And now, December 17, 1888, this matter having been argued by counsel and fully considered, it is hereby ordered and directed that the rule to show cause, etc., be made absolute, the agreement of submission and all proceedings thereunder vacated and set aside, and the case restored to its place on the issue docket, the costs incurred by the reference to be taxed as part of the costs in the case and abide the event of the suit."

Thereupon the plaintiff took this writ, assigning for error the above order of the Court.

R. P. Kennedy, for plaintiff in error.

W. G. Guiler, for defendant in error.

May 27, 1889. THE COURT. The plaintiff brought this action in the Court below to recover compensation for professional services to the county of Fayette. By agreement of counsel, in writing, the case was referred to a member of the Bar, under the provisions of the Act of May 14, 1874 (P. L. 166). The referee made an award in favor of the plaintiff in the sum of $2202.66. Upon the petition of the county commissioners, the Court below granted a rule on the plaintiff to show cause why the "agreement of reference should not be set aside, the appointment of the referee vacated, and all proceedings before said referee, and his report be set aside."

This rule was made absolute by the Court, and this action is the matter complained of here. The ruling of the learned Judge can be sustained upon two grounds. The first section of the Act of 1874, under which this reference was made, provides, "That in all civil suits or cases which the parties may legally, by agreement in writing, submit to the decision of the Court in any county or city of this Commonwealth, the parties may, in like manner, by written agreement, submit the case to the decision of any person learned in the law, who is authorized to act as an attorney in the Supreme Court in this State." It was admitted that the learned referee in this case had never been authorized to act as an attorney in this Court, however well fitted he may be to do so. The Act does not say that the referee must be qualified to act as an attorney in the Supreme Court, but that he must be "authorized" to so act. There is a wide distinction between these words. However well qualified an attorney may be for admission to the bar of this Court, he can only be authorized to act as such by an order of admission, and this can only be done by the Court. We are of opinion that the learned referee was not entitled to act under the Act of Assembly. It follows that the appointment was improvidently made, and his award had no validity.

There is, however, another ground which we think equally fatal. It will be noticed that the Act of May 14, 1874, only confers the authority to refer upon such parties who "may legally, by agreement in writing, submit a case to the decision of the Court." The county commissioners, representing the people of the county, and having the control of their funds, act in a fiduciary capacity (Chester County *v.* Barber, 97 Pa. 455). The Act of 22d April, 1874 (P. L. 109), providing for the submission of cases to the decision of the Court, expressly excepts parties acting in a fiduciary capacity. We do not think this exception is to be confined to persons who are technical trustees under appointment by will or deed, or by the Court. The words are to be used in their broad, popular meaning, as best calculated to carry out the object of the Legislature. The language is comprehensive enough to include county commissioners, and all other public officials who have charge of the public money, as well as all private trustees clothed with authority over the property of others. We think the exception applies with especial force to county commissioners, and its object was evidently to prevent the money of the public being parted with in such cases as this, until the right thereto has been established by the verdict of a jury.

We do not attach much weight to the argument that the Court below had no power over the award; that it could only be reviewed here. There would have been more force in this position had there been a legal reference and a legal award. But the whole proceeding was abortive, and the Court below had ample power to set it aside.

Judgment affirmed.

Opinion by PAXSON, C. J. C. K. Z.

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Common Pleas.

C. P. No. 1. Jan. '89.

Wright et al. v. Warren L. Ewen and Wm. H. C. Kerlin, trading as Ewen, Kerlin & Co.

Attachment—Partnership—Power of one partner to confess judgment—Act of 1869—Affidavit for attachment, sufficiency of—An affidavit alleging that part of a debt was fraudulently contracted is not sufficient to sustain an attachment under the Act of 1869—The confession of judgments, by one partner, in favor of creditors of the firm, does not constitute a fraudulent assignment of the firm property, such as contemplated by the Act of 1869—Lennig v. Senior, 21 WEEKLY NOTES, *379, approved and followed.*

Rule to dissolve attachment.

This was an attachment under the Act of 1869.

The affidavit of one of plaintiffs' firm, set forth that the defendants were justly indebted to plaintiffs in the sum of $4707.50 for goods sold and delivered. That said sum was composed of the following items: No. 1, for $446.88; No. 2, $641.05; No. 3, $783.86; No. 4, $2835.71—the debts contained in items Nos. 1, 2, and 3, amounting to $3619.27, were fraudulently contracted by means of defendants' false representations as to their credit and resources.

The affidavit further set forth that defendants have assigned and disposed of the firm property by fraudulently confessing judgments for debts other than firm debts, with intent to defraud the firm creditors—the said confessions of judgment having been made in the firm's name by Ewen, one of the partners, without the consent of his co-partner Kerlin.

De Forrest Ballou, for rule.

A. Sydney Biddle, contra.

April 27, 1889. THE COURT. (After stating the facts.) If this attachment can be sustained, it must be done under the two allegations which are set forth in the affidavit on which the writ issued. First, that the debt was fraudulently contracted, and second, that the defendants have assigned and disposed of the firm property by fraudulently confessing judgments for debts other than firm debts, with the intent to defraud the firm's creditors. The said confession of judgments having been made by Ewen, without the consent of his partner, Kerlin, in the firm name.

In support of the motion to dissolve the attachment, the contention of the defendant, Ewen, is, that in so far as the allegation that the debts were fraudulently contracted is concerned, that the averments of the affidavit do not meet the requirement of the statute, because of the limitation of fraud in contracting the debts, which is contained in the statement that "the debts mentioned in paragraphs numbered 1, 2, and 3 thereof were fraudulently contracted, on false representations as to the credit, assets, and property of the firm, made by one of the members thereof."

The claim made by the plaintiff firm, as stated above, aggregates $4707.50, while the debts asserted to have been fraudulently contracted amount to the sum of but $3619.27. The Act of 1869 authorizes an attachment to issue when it is averred in the affidavit that the defendant fraudulently contracted *the debt* or incurred the obligation for which such claim is made. Not that the debt or obligation was only in part fraudulently contracted, but when the debt, to secure which the property of the defendant is sought to be attached, was tainted with a fraud practised by the defendant when the contract was entered into. We do not know of any case in which this point has been decided, but in Fernau *et al. v.* Butcher *et al.* (3 Amerman, 293), the same question was raised. The debt for the recovery of which the attachment issued amounted to $506.74, of which amount, it was charged in the affidavit, that $279.73 had been fraudulently contracted. In the opinion of the Court, MERCUR, C. J., says: "In the view taken of other questions which rule the case, it is not necessary to decide whether an attachment will lie when the affidavit charges fraud as to only a part of the debt. The writ goes out claiming the whole debt as an entirety. If it can be so used as to obtain possession of property to pay a debt, concerning a large portion of which no fraud is alleged, the whole purpose and spirit of the statute will be perverted." The opinion which the Court entertained on this point is plainly apparent in the language quoted, though the decision of the cause was not ruled upon this ground. The remedy under the Act of 1869 is special, and not according to the course of the common law; its provisions should therefore be strictly followed. There is no hardship in requiring a plaintiff to keep within the spirit of the Act, and, indeed, to conform to its letter; to do otherwise, in the language of the Supreme Court, the whole purpose and spirit of the Act would be perverted.

The testimony of Young, of the former firm of

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Young, Ewen & Co., and of Kerlin, of the defendant firm, is most positive that when they represented to the plaintiffs that the amount of capital in the firm of Young, Ewen & Co. at the risk of the business was about $19,000, and that it had been reduced when the new firm was formed to the amount of $2800 only, that they stated what they believed to be the truth. That when these representations were made they regarded the $7000 put in the firm by Ewen as his contribution to the capital of the firm. They believed it to be money which belonged to him, or had been procured on his individual credit and put into the firm as his share of the capital at the risk of the business. They say they did not then know, nor had they at that time any reason to believe, that Ewen had borrowed the money from his mother on the credit of the firm, or that he had confessed a judgment to her in the name of the firm. They deny fraudulent design in making the statements testified to by Frank L. Webb, as manager of the firm of Peter Wright & Sons, which, according to his testimony, and the testimony of William R. Wright, were the basis of the credit given to the firm of Young, Ewen & Co., and Ewen, Kerlin & Co., and without which statements the merchandise in question would not have been sold to either firm. Mr. Wright's testimony is, that Young stated to him that the capital at the risk of the business was over $10,000, and that no statements were made to him personally, by either member of the firm of Ewen, Kerlin & Co., of their standing from the time of the formation of their partnership. His allegation is, that the two firms were given credit in consequence of the statements made to Mr. Webb and those made to himself by Young, and the trade reports, a copy of which was sent to the plaintiffs. But there is in all this no contradiction of the positive testimony of Young and of Kerlin, that what they said they believed to be true. If this is a correct statement, and it has not been shown to be untrue, however divergent it may have been from the facts as they existed at the time, it follows that the debts were not fraudulently contracted. We speak, of course, of the case as it stands before us, considered under the first allegation contained in the affidavit, weighed and judged by the evidence in the cause.

As to the second reason given in the affidavit to support the attachment, that the defendants had assigned and disposed of the firm property by fraudulently confessing judgments for debts other than firm debts, with the intent to defraud the firm's creditors, we are of the opinion that the confession of judgment in favor of creditors who claim to be creditors of the firm, and who are admitted to stand in that relation to the firm by the partner who confesses the judgments in their favor, does not constitute, under the Act of 1869, an assignment and disposition of property such as is contemplated by the Act.

We at one time inclined to a different view of this question, but, on further reflection, I agree with the opinion of Common Pleas No. 3, as expressed by FINLETTER, P. J., in the case of Lennig *v.* Senior (21 WEEKLY NOTES, 379), that inasmuch as a confessed judgment cannot be presumed to be fraudulent, its validity cannot be attacked in a proceeding of this character.

Judgments may be attacked by persons having the right to question their validity, and, on sufficient cause shown, they may have an issue raised to inquire into their legality and honesty, but they cannot be attacked collaterally in a proceeding instituted under the Act of 1869.

But besides this ground of objection to the second averment of the affidavit, we think the allegation of fraudulent assignment and disposal of property of the defendant firm is not given with sufficient precision or certainty. What judgments are chargeable with the imputed fraud is not stated; the entire statement is made in the most general terms. It was not necessary that the charge should be made otherwise than in the terms of the Act, but when a plaintiff assumes to state specific acts as constituting the basis of the complaint which supports an attachment, he should not deal in vague and indefinite generalities, but should state his case with at least a reasonable degree of particularity and clearness. This has not been done in the portion of the affidavit now under consideration, and in the case of Biddle *v.* Black (3 Outerbridge, 380), this was held to be a fatal defect.

For the reasons stated above the attachment is dissolved.

Opinion by ALLISON, P. J. W. W. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JUNE 7, 1889.* [No. 6.

Supreme Court.

Jan. '88, 58. February 25, 1889

Hill, Keiser & Co. v. Stetler et al.

Limited partnership — Act of June 2, 1874— Construction of — Compliance with — When parties not entitled to benefit of.

In order to constitute a valid organization under the Limited Partnership Act of June 2, 1874 (P. L. 271), it is necessary that the association in entering upon its business life should have in its treasury the capital or so much thereof as the recorded certificate endows it with at the outset, and the balance remaining unpaid, in accordance with the terms of the certificate, should appear upon the stock subscription book, so that a creditor, or any one interested to know, can determine whether, and to what extent, the new business agency is entitled to credit.

If no capital has been put into such association, and there is no actual cash with which to begin business, the association has no right to record the certificate, and to do so is a fraud upon the law and upon the public. A portion of the capital must, under the Act, be actually paid in at the time the certificate is filed, and unless this is done, the recording of the certificate is not authorized by law, and can give no business life to the association.

Three parties executed and recorded a certificate of organization under the Limited Partnership Act of June 2, 1874 (P. L. 271), stating that the total amount of the capital was $25,000, "payable in lawful money upon the execution hereof." Said parties began business without in fact paying any part of their said subscriptions, and thereafter entirely failed to pay them. No subscription list book was kept or signed, but business was done under the name of the organization as set forth in the statement:

Held, that this was not a compliance in good faith with the requirements of the Act of 1874, and that the parties were liable as general partners.

A fourth party some time after the organization as aforesaid purchased shares in the association, and paid for them to the treasurer at their par value. The stock was not bought by him from any one of the original parties. He subsequently became one of the managers of the association:

Held, that he was chargeable with notice of the manner in which the association had been organized, and of the failure to comply in good faith with the Act of 1874, and that therefore he was liable as a general partner in like manner as the other partners for all debts contracted after he became a member of the association.

PAXSON, C. J., and MITCHELL, J., dissent.

Error to the Common Pleas of Lackawanna County.

Assumpsit, by Hill, Keiser & Co., Limited, against S. N. Stetler, E. L. Fuller, R. W. Archbald, and Theodore Strong, copartners, doing business as the Amity Coal Company, Limited.

The facts of the case, as they appeared on the trial, before HAND, P. J., are fully stated in the former report (21 WEEKLY NOTES, 255).

A nonsuit was granted, which the Court in banc refused to take off. Whereupon the plaintiffs took this writ, assigning for error the above action of the Court. The Supreme Court, on April 2, 1888, in an opinion by WILLIAMS, J. (TRUNKEY and CLARK, JJ., being absent), reversed the judgment, and awarded a venire facias de novo. Subsequently a reargument was ordered.

William H. Jessup and *John G. Johnson* (*Edward B. Sturges* and *William Strong* with them), for defendants in error.

The Act of 1874 is a wise one, and should not be defeated by the imposition of requirements and penalties not prescribed by it. The tendency of modern judicial decisions is against the holding liable as partners those who are not really such, unless they hold out to the world the appearance of being partners.

1 Lindley on Partnership, *19.
Hart *v.* Kelley, 2 Norris, 286.
Cox *v.* Hickman, 8 H. of L. Cas. 267.

Parties who comply with the conditions of the Act of 1874 as to the execution and recording of the prescribed certificate ought only to be held liable as partners in case of fraud. In the present case all the prerequisite conditions of non-liability were complied with, and the statement was true in every particular. The plaintiffs were not misled or deceived. They knew they were dealing with a limited association. They gave credit to it as such. All the goods they furnished—except, possibly, one small order—were furnished on written orders of the Amity Coal Company, *Limited*. The burden of proof is therefore on them to show that the defendants are general partners.

Whildin *v.* Bullock, 4 WEEKLY NOTES, 234.

Everett Warren and *J. Vaughan Darling* (*Edward N. Willard* and *Charles H. Welles* with them), for plaintiffs in error.

In order to obtain the advantages of limited liability provided by statute, there must be a strict compliance with statutory requirements.

Eliot *v.* Himrod, 108 Pa. 569.
Appeal of Hite Nat. Gas. Co., 118 Id. 436.
Lauder *v.* Logan, Gregg & Co., 22 WEEKLY NOTES, 529.

It is the duty of a party, on becoming a member of such a concern, to inform himself within a reasonable time of the true state of facts with respect to the organization and prospectus of the company. Failing to do so, he is held to have waived any rights which he might have had

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if he had examined, and then affirmed or repudiated the contract of membership.

Oakes *v.* Furquand, L. R. 2 Eng. & Ir. Cas. 325.
In re Kincaid's Case, L. R. 2 Ch. 412.

May 29, 1889. THE COURT. The persons comprising a partnership may agree with each other to invest a certain fixed sum in the common venture, and no more. Such an agreement may limit the interest of each in the property and profits of the firm, but it will not limit the liability of any for the firm debts. Each member will be individually liable for the entire indebtedness of the firm. The Act of 1874 was passed to relieve against the risk and inconvenience attending general partnerships, by providing a mode by which individuals might invest a fixed sum in a business enterprise without liability to loss beyond the sum so invested. The method provided is the creation of a new artificial person to be called a joint stock association, having some of the characteristics of a partnership and some of a corporation.

The process by which this new organization is brought into business existence is plainly laid down in the statute. Three or more persons may agree to form such an association. They must put their agreement in writing, in the form not of a contract with each other, but of a certificate for the information of the public.

This must be signed by every member of the association, and, as a further assurance of its truth, it must be acknowledged by them. It must set out, among other things, the names of the persons uniting in the enterprise, and the name by which the new artificial person is to be known; the total capital subscribed and the amount subscribed by each member, and a statement showing when and how it is to be paid. When the certificate has been prepared and signed and acknowledged, and when the payment of capital into the treasury has been made in accordance with its terms, the preliminary work of organization is completed, and the association is ready to be called into life by the organic act, the recording of the certificate. This gives it existence and a name in the business world. Thenceforward the promoters cease to act as individuals or as partners in the common business, but through and in the name and upon the credit of the joint stock association. When the association enters upon its business life, it should have in its treasury the capital, or so much thereof as the recorded certificate endows it with at the outset, and the balance remaining unpaid, in accordance with the terms of the certificate, should appear upon the stock subscription book provided for by the Act, so that a creditor or any one interested to know could determine whether and to what extent the new business agency was entitled to credit.

In the case of business corporations, the certificate that at least ten per cent. of the subscribed capital has been paid in goes to the governor, and he then issues letters-patent, which impart life to the corporation. In the case of joint stock associations, the members are trusted by the law to certify directly to the public without the intervening agency of the governor, and thus to give life to their own creature. Under such circumstances the Courts should require absolute good faith and an honest compliance with the law from those who claim exemption from individual liability as members of a joint stock association. If no capital has been put into the concern, no actual cash, with which to begin business, it has no right to begin business. The subscribers have no right to record the certificate, and to do so is a fraud upon the law and a fraud upon the public. We do not say that the entire capital must be paid down. The law does not say so, but seems to contemplate a payment by instalments. What we do say is, that until some part of the capital has been paid in conformity with the certificate, the recording of the certificate is not authorized by the law, and can give no business life to the limp and empty frame work of the association.

In analogy to the business corporations of the State, ten per cent. of the subscribed capital would seem to be the minimum amount to be actually provided for and paid into the treasury before the recording of the certificate, which, as we have already said, should show the times of subscription truly, and should be complied with fully and honestly before it goes upon the record.

This was substantially said when this case was before us one year ago. A fresh examination of the subject, aided by an elaborate reargument, has not persuaded us that we were in error in the views then expressed.

Turning now to the facts of this case they seem to leave us no alternative under the salutary rule laid down. This certificate when prepared put the capital stock at twenty-five thousand dollars. It gave the names of the subscribers and the amount of stock subscribed by each. In obedience to the statutory requirements to state when and how the subscribed stock was to be paid it stated "to be paid on the execution hereof." Now the first thing to be done was to execute the certificate. After that was done it was to be acknowledged as an assurance of its truth; then it was to be recorded as the certificate of those signing it, made to the public, that its provisions had been complied with. The recording of the certificate was therefore a distinct affirmance that the capital to be paid on its execution has been paid and that the association was entitled to the credit which its capital should command. The fact was, however, that neither of the stockholders paid one cent on the execution of the cer-

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tificate, nor at its acknowledgment, nor when it was recorded, nor yet when they began business in the name of the association.

It is useless to argue that such conduct is a compliance with the requirements of the Act. It is a palpable disregard of the Act of 1874, and of the requirements of business honesty.

We speak of the facts as they appear upon this record. The case goes back for a new trial. If upon such trial, with attention directed to this point, a different showing is made and the facts necessary to a legal organization are made to appear, the case may be taken out from the operation of the rule; but on the facts before us we hold that the subscribers to the stock in this association by reason of their disregard of the law under which they attempted to organize, acquired no rights under it but became liable as general partners for all the debts contracted in the name of the association. Nor do we see our way clear to relieve one who bought an interest in the concern months afterwards and honestly put his money into its business. Like one buying into an ordinary mercantile partnership he was bound to inquire into the organization and condition of the concern in which he was about to invest his money.

The order heretofore made reversing the judgment of the Court below remains in full force.

Opinion by WILLIAMS, J.

PAXSON, C. J., and MITCHELL, J., dissent.

L. L., JR.

Jan. '89, 234. April 10, 1889.

Keith et al. v. City of Philadelphia to use.

Municipal claims—Paving—Foot-front rule—Rural property—Ordinances.

When an ordinance is passed by city councils authorising the paving of a street, and subject to previous general ordinances providing for the assessment of benefits, according to the foot-front rule, the question whether the property is or is not rural, and whether therefore such rule is or is not constitutionally applicable is to be determined by the condition of the property at the time the actual paving is done and not by its condition at the time of the passage of the ordinance.

An ordinance of the city of Philadelphia, passed in 1872, authorized the paving of a certain street, subject to the provisions of the general ordinances of 1855 and 1868, directing the assessment of benefits according to the foot-front rule in such cases. A contractor executed part of the work in 1874 in front of part of a certain lot, and filed a lien against the same. On the trial of the case it was determined that the property was rural, and therefore not subject to the foot-front rule; and a verdict and judgment were entered for defendant accordingly. Subsequently, in 1878, the same contractor, under the same ordinance, paved another portion of said street, filed a municipal lien against another part of the same lot therefor, and issued a scire facias against the administrator, and heirs of the same defendant. On the trial defendants offered in evidence the record of the previous case as conclusive to the effect that the property was rural. The record was excluded by the Court:

Held, that this was not error, and that the sole question for determination was whether or not the property was rural at the time the work was executed in 1878.

In the above case the scire facias upon the first lien was issued against A., as owner, and in the second lien the scire facias was issued against certain parties as the administrator and heirs of A.:

Held, that as the plaintiff had spread upon the record the fact that said parties were the administrator and heirs, the defendants could not be called upon to prove this fact in order to establish the privity in estate of the parties defendant in the two proceedings.

Error to the Common Pleas No. 4, of Philadelphia County.

Scire facias sur municipal lien for paving by the City of Philadelphia, to the use of Jacob M. Peters, against William Keith, Ormes B. Keith, Julia B. Keith, William B. S. Boudinot, Elias L. Boudinot, and Elizabeth C. Boudinot; Ormes B. Keith, tenant by the curtesy; Mary K. Leavitt, wife of John Brooks Leavitt; Boudinot Keith and Jennie B. Keith, heirs-at-law of Julia B. Keith, deceased; and B. W. Beesley, administrator of Julia B. Keith, deceased.

On the trial, before WILLSON, J., the facts appeared to be as follows: On May 18th, 1872, an ordinance was passed by the councils of the city of Philadelphia, directing the paving of Indiana Street from Kensington Avenue to Front Street, in the city of Philadelphia. Certain premises known as the "Dower Farm" abutted on said Indiana Street. The paving on account of which this lien was filed was done in 1878, under and by virtue of the ordinance aforesaid. The property against which the lien was filed was a lot of ground at the northeast corner of Indiana and C streets, being part of said "Dower Farm." There was evidence to show that in 1878, when the paving was done, valuable improvements had been made in the neighborhood, and a large number of dwelling-houses and other buildings had been erected in the vicinity, and in short, that the lot was within the built-up portion of the city.

The defence was that the property was rural, and was not subject to the foot-front rule of assessment. Defendants offered in evidence the record of the proceedings in a municipal claim filed in 1875, by the same use plaintiff against Julia B. Keith, owner or reputed owner, for the paving of Indiana Street in front of certain other premises constituting part of the same "Dower Farm." It appeared from the record in that

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case that the work had been done by authority of the same ordinance, and had been executed in 1874. That the defence set up was the same as that relied upon in the present case. That the Court had left to the jury the question whether the property was rural or not; and that a verdict and judgment had been entered for defendant, which was affirmed on writ of error to the Supreme Court. Plaintiff objected to the admission of the record in evidence. Objection sustained. Record excluded. Exception.

Verdict and judgment for the plaintiff for $624.20. Whereupon the defendants took this writ, assigning for error the refusal of the Court to admit the above record in evidence.

Robert J. Williams and *George M. Dallas* (with whom was *George L. Crawford*), for plaintiffs in error.

Whether or not the property could be assessed by the foot-front rule was to be determined by the question whether or not the property was rural at the time of the passage of the ordinance authorizing the street improvement.

City *v.* Wetherill, 13 Weekly Notes, 10.
Seely *v.* Pittsburgh, 1 Norris, 360.
Washington Ave. Case, 19 Smith, 352.
Hammett *v.* Philadelphia, 15 Id. 146.
Craig *v.* Philadelphia, 89 Pa. St. 265.

Even if not conclusive, the former judgment was evidence for the jury.

Kilheffer *v.* Herr, 17 S. & R. 319–332.
Long *v.* Long, 5 Watts, 103.
Smith *v.* Elliott, 9 Pa. St. 345.

B. Woodward, for defendant in error.

May 27, 1889. The Court. In applying the rule of *res adjudicata* in this case the question is mainly as to the indentity of the matter *now* in issue, with what *was* in issue at the trial of the former scire facias, the record of which was offered and refused. This municipal claim having been filed, and the scire facias issued against certain parties as the administrator and heirs-at-law of Julia B. Keith, deceased, it would not be required of the defendants to show that they were the administrator and heirs, for that was part of the plaintiff's case. The defendants could certainly not be called upon to prove what the plaintiff himself has spread upon the record as the basis of his recovery. As the jurisdiction of the Court, in which the matter now at issue is alleged to have been adjudicated, is conceded and the identity of the parties, by privity of estate, is established, the question, upon which the whole case turns, is the identity of the matter in dispute.

It is undoubtedly true that the record which was offered would show that certain property, adjacent to the property in question, both together constituting a larger lot known as the "Dower Farm" and belonging to the same owner, was adjudged by a Court of competent jurisdiction to be rural property and therefore not liable to a lien for paving done in 1874, according to the foot-front rule of assessment. But the paving in that case was done in 1874, whilst in this case it was done in 1878, and it is contended on the part of the plaintiffs that the record of the defendants' recovery on a claim for paving in 1874 can have no conclusive effect on the trial of a *sci. fa.* for paving done four years later. On the part of the defendants however it is argued, that in such a case as this, the character and condition of the property is to be inquired into as of the date of the ordinance authorizing the improvement, and not of the date when the improvement was made, and that as the paving of 1874 and that of 1878 was done under the same ordinance, in front of different portions of the same property, the question now at issue is necessarily the same which was passed upon in the trial of the former action, and that the matter in issue has therefore passed *in rem adjudicatur.*

We cannot accept this view of the case. The ordinance of 1872 laid down no rule for the assessment of the benefits resulting to the abutting property; it simply authorized and directed the Department of Highways "to enter into a contract with a competent paver or pavers, who shall be selected by a majority of the owners of property fronting on Indiana Street, from Kensington Avenue to Front Street, for the paving thereof with rubble pavement," with conditions, etc., "that the contractor or contractors shall collect the cost of said paving from the property owners" fronting thereon, respectively. The assessments according to the foot-front rule were not made under this ordinance, but would seem to have been authorized by the general ordinances of the city, enacted May 3, 1855, and June 12, 1868. But these general ordinances, providing for the assessment of benefits according to the foot-front rule, cannot have any application to farm lands or rural property, although the same be situated within the city limits. (Washington Ave., 69 Pa. 353; Seely *v.* Pittsburgh, 82 Pa. 360; Craig *v.* City, 89 Pa. 265.) Whilst perhaps all property within the limits of a borough or city may be assessed according to some reasonable rules for special and peculiar benefits conferred by local improvements, it is now well settled that the foot-front rule can only be applied to the built-up portions of the city, or to property ripe for city treatment. Sewerage, sidewalks, paved and lighted streets, fire protection and other city improvements are not essential to the ordinary enjoyments of farm lands, and to impose the expense thereof on a large frontage of such property would amount in many cases to confiscation.

The streets and avenues, however, must con-

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form to the extent of the city; as the city's population increases and the demand for homes is developed they will of necessity be extended accordingly. But it is only when, from the built-up condition of the immediate neighborhood, the public health and the common convenience and necessity demands these improvements, that they may be made and the expense thereof apportioned according to the foot-front rule. It is the common benefit received or about to be received which justifies an apportionment of the expense, and the built-up or improved condition and small size of city lots which renders this rule of assessment a reasonable one.

It is in the application of the rule its legality in each case is to be determined. This provision of the general ordinances of 1855 and 1868 is a valid and proper one, but, as we have said, it must be applied only to city property. The ordinance of 1872 does not apply this or any other rule to the amount of benefits arising from the paving of Indiana Street; it simply directs the work to be done.

The provisions of the general ordinances were applied to the property when the assessments were made in pursuance thereof, and it is therefore the conditions of the property when the tax is assessed which, in cases of this kind, must control. It follows that the judgment on the former sci. fa. can have no conclusive effect on this case.

The record was inadmissible for any purpose. Assuming that the defendants' property was of a rural character in 1874, and the record, if received, could establish no more, it does not follow that this was its condition in 1878. Indeed, it is alleged, and it would appear to have been proved that in 1878 very valuable improvements had been made in this vicinity; that a large number of dwelling-houses had recently been erected and were occupied, and that places of business, manufacturing establishments, etc., had been located in the immediate vicinity and were in operation; in short, that the bounds of the built-up city then embraced this property.

The Court was right in refusing this record, and as there is no other error assigned, the judgment is affirmed.

Opinion by CLARK, J. L. L., Jr.

July '88, 54. March 19, 1889.

Bradford County v. Wells et al.

Prosecutions for misdemeanor—Costs—When county liable for under Act of May 19, 1887—*Acts of May* 1, 1861; *April* 5, 1862; *and February* 14, 1867.

Under the Act of May 19, 1887 (P. L. 138), a county is only liable for costs in cases of misdemeanor, where the case is a misdemeanor in a Court of Quarter Sessions, where the prosecution shall have terminated by the bill of indictment being ignored by the grand jury, or by the verdict of a traverse jury, and sentence of the Court thereon.

Said Act does not render a county liable for such costs in prosecutions before justices of the peace under the Act of May 1, 1861 (P. L. 682), and its supplements of April 5, 1862 (P. L. 274); and February 14, 1867 (P. L. 197), which are local Acts applicable to particular counties only.

Error to the Common Pleas of Bradford County.

Case stated, in which Johnson Wells, A. Decker, G. V. Myer, James Thornton, W. L. Carpenter, George Quigley, D. Stone, G. C. Hollon and Charles M. Hall were plaintiffs, and Bradford County defendant, as follows:—

"The plaintiffs, Johnson Wells and G. C. Hollon, are constables of the county of Bradford, duly commissioned; Charles M. Hall is a justice of the peace of said county, duly commissioned, with office in the borough of Towanda; the other plaintiffs are jurymen who acted as such in case in pursuance of Act of Assembly of May 1, 1861 (P. L. 682), and its supplements of April 5, 1862 (P. L. 274), and February 14, 1867 (P. L. 197); that on July 22, 1887, the plaintiffs presented to the commissioners of the county of Bradford, a transcript of the proceedings in a criminal proceeding had before the said justice of the peace, and said jury, which is hereto attached, and made a part of this case.

"It is also agreed that the said costs were demanded of the said commissioners on said July 22, 1887, and payment refused by them; and also agreed that the prosecutor, H. Campbell, upon whom the said jury imposed the costs, was discharged according to law on the 15th of July, 1887.

"If in the opinion of the Court the county of Bradford is liable for the costs of the justice, constables, and jurymen as shown, and itemized on transcript hereto attached, then judgment to be entered in favor of the plaintiff; if in the opinion of the Court there is no liability on the part of the defendant for the said costs, then judgment to be entered in favor of the defendant. Either party to have the right of appeal or writ of error to the Supreme Court."

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The transcript referred to was as follows:—

"Warrant issued June 11, 1887, on sworn information of H. Campbell, charging that at the county of Bradford, on or about June 11, 1887, at borough of Towanda, defendant did commit an assault and battery upon him.

"Defendant brought in, hears complaint read aloud, and demands jury trial. Panel prepared, time being agreed on June 15, 1 to 2 P. M. The following jury, citizens and electors of borough of Towanda, chosen and venire issued to Constable Wells, of Towanda Borough; A. Decker, Geo. V. Myer, J. Thornton, W. L. Carpenter, C. P. Welles and George Quigley.

"H. Campbell, held to Commonwealth of Pennsylvania in sum of $25, conditioned that he appear and prosecute June 15, 1887, 1 to 2 P. M.

"Defendant committed in default of bail. Same day discharge issued upon Mrs. E. Tidd, *feme sole*, of Towanda, becoming bound to the Commonwealth of Pennsylvania in the sum of $100, conditioned that the defendant appear June 15, 1 to 2 P. M. to answer charge.

"June 15, 1887, all above-named jurors appear excepting C. P. Welles, absent and excused. Constable Wells summons D. Stone *de circumstantibus* and jury duly sworn. After trial and argument and swearing of constable, jury find defendant not guilty, and that Henry Campbell shall pay the costs. Same day defendant discharged, and Henry Campbell sentenced to pay the costs of the case or stand committed until sentence is complied with. June 15, 1887, commitment issued and executed to county jail.

"July 15, defendant having been imprisoned thirty days, discharge issued."

An itemized bill of costs was annexed to the transcript.

The Court entered judgment for the plaintiffs, Sittser, P. J., of the Forty-fourth Judicial District, delivering the following opinion:—

"June 11, 1887, H. Campbell instituted a criminal prosecution against S. Bond for assault and battery. The defendant demanded a trial by the justice and jury of six, which was accorded to him. It resulted in a verdict of not guilty, and that H. Campbell, the prosecutor, pay the costs. The prosecutor was sentenced, committed to the county jail for thirty days, and discharged according to law, without paying the costs. The plaintiffs—the constable, jurymen, and justice—demanded their costs of the commissioners of Bradford County, and were refused payment. The case stated raises the question as to whether they are entitled to payment of their costs from the county.

"The Act of May 1, 1861, § 7 (P. L. 682, Purd. 498), in force in Bradford County, provides that the jury shall have the same control and jurisdiction over the payment of costs as in the Court of Quarter Sessions, '*Provided*, That the county shall in no case be liable for either the prosecutor's or the defendant's bill of costs.' That the county would be liable in case of conviction is shown by the case of Codding *v.* Bradford County (1 Crum. 47). It is conceded that the verdict and sentence in this case, if in the Quarter Sessions, would not make the county liable as the law stood in 1861, but the Act of 19 May, 1887, provides 'that the costs of prosecution accruing in every case of misdemeanor in any of the Courts of Quarter Sessions of the Peace of this Commonwealth shall, on the termination of the prosecution by the bill of indictment being ignored by the grand jury, or by a verdict of the traverse jury, and sentence of the Court thereon, be immediately chargeable to and paid by the proper county.' This extends the liability of the county. The verdict of the traverse jury acquitting the defendant and imposing costs on the prosecutor now makes the county liable. That Act of 1861, making the control of costs the same in the Justice's Court as in the Quarter Sessions makes the power of the jury in that Court the standard by which the power of the other is to be measured, and when the one is changed or extended the other is changed and extended with it.

"We direct judgment for the plaintiffs for the costs of the justice, constable, and jurymen, as shown and itemized on the transcript attached to the case stated."

Defendant thereupon took this writ, assigning for error the entry of judgment.

I. McPherson (*E. J. Angle* with him), for plaintiff in error.

C. M. Hall, for defendants in error.

April 8, 1889. The Court. We are unable to agree with the learned Court below in the conclusion reached in this case. In the opinion it is said: "It is conceded that the verdict and sentence in this case if in the Quarter Sessions would not make the county liable as the law stood in 1861." This is undoubtedly correct, for the simple reason that neither the Act of 1861 nor any other law, prior to the Act of 1887, imposed liability upon the county upon the particular conditions mentioned in the latter Act. The Act of 1887 (P. L. 138), provides, "that the costs of prosecution accruing in every case of misdemeanor in any of the Courts of Quarter Sessions of the Peace of this Commonwealth, shall on the termination of the prosecution by the bill of indictment being ignored by the grand jury, or by a verdict of the traverse jury and sentence of the Court thereon, be immediately chargeable to and paid by the proper county." The conditions of liability on the part of the county as established by this Act are, that the case shall be a misdemeanor in a Court of Quarter

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Sessions, that the prosecution shall have terminated by the bill of indictment being ignored by the grand jury, or that it shall have been terminated by the verdict of the traverse jury and sentence of the Court thereon. None of these conditions either did or could subsist in the present case. It was not a case in any Court of Quarter Sessions, there was no bill of indictment by a grand jury, and the prosecution was not terminated either by an ignoramus, or by the verdict of a traverse jury and sentence of the Court of Quarter Sessions. The case was a proceeding before a justice of the peace, under a local law applicable to particular counties only, whose proceedings, it is true, are to have the same force and effect as in the trial of similar offences in the Court of Quarter Sessions, and with the same power in the jury to impose costs as is conferred upon juries in the Court of Quarter Sessions, but it is a special and limited jurisdiction still. The jury did not see fit to impose any of the costs upon the county, and this would have relieved the county from any liability even in the Quarter Sessions until the passage of the Act of 1887. But that Act did not embrace cases arising before justices under the special and limited jurisdiction conferred upon them. It was limited by its express terms to cases pending in the Courts of Quarter Sessions, and we cannot extend it beyond its plain words without invading the province of the Legislature. The case of Codding *v.* Bradford County (116 Pa. 47), has no application. It involved the construction of certain sections of the Act of 1861, establishing the special jurisdiction of the justices, but had no relation to the Act of 1887, nor to any question such as we are now considering.

Judgment reversed.

Opinion by GREEN, J. H. C. O.

Jan. '89, 125. March 29, 1889.

Thomas v. Hinkle et al.

Mechanics' liens—Acts of June 16, 1836, *and August* 1, 1868—*Practice—Liens for an addition to a building must be filed under the Act of* 1868—*A claim under the Act of* 1868, *filed after the property has been conveyed to a third party, acquires no lien.*

The Act of August 1, 1868, applicable to mechanics' liens in Philadelphia, is amendatory of the Act of June 16, 1836, and is to be construed as part of it. The Act of 1836, as thus amended, creates two classes of mechanics' liens which differ materially in their extent and qualities.

A mechanic's lien for an addition to a building in Philadelphia County can now only be filed under the Act of August 1, 1868, although the addition is such as would have been held to be an "erection and construction" within the Act of June 16, 1836. To this extent the Act of 1868 alters the meaning of the Act of 1836, as previously construed by the Courts.

The claim filed in this case, being for an addition to an old building, is governed by the Act of August 1, 1868, and, as it was not filed until after the property was conveyed to a third party, under the terms of that Act no lien was acquired.

Error to the Common Pleas No. 3, of Philadelphia County.

Scire facias sur mechanics' claim to recover the sum of $836.01.

The lien, which was filed November 21, 1883, against the new building only, was as follows:—

Robert Thomas, trading as Robert Thomas & Son, of the city of Philadelphia, hereby files his claim for the payment of the sum of eight hundred and thirty-six dollars and one cent against all that certain two-story building or wing, being a new structure or building, two stories in height, rough-cast on the outside, attached to and adjoining a three-story stone dwelling and lot or piece of ground and curtilage appurtenant thereto, situate on the northwest corner of Germantown Avenue and Mount Pleasant Street, in the Twenty-second Ward of the city of Philadelphia, containing in front or breadth on the said Germantown Avenue one hundred and forty-three feet and ten inches, and extending in a northerly direction to a corner; thence southwestwardly along the line of land belonging to Charles Weiss, three hundred and forty-four feet four and a half inches in depth to Bryan Street; thence along Bryan Street southeastward one hundred and thirty-two feet eight and one-eighth inches to Mount Pleasant Avenue, and thence along Mount Pleasant Avenue northeastward three hundred and fifty-nine feet five and one-half inches to Germantown Avenue, the said sum of eight hundred and thirty-six dollars and one cent being a debt contracted for lumber and materials at the request of the said Rex Hinkle by the said Robert Thomas continuously within six months last past furnished to and supplied for and towards the erection and construction of and on the credit of the said building at the times and in the quantities in the annexed bill of particulars mentioned, to wit: From the twelfth day of February, A. D. 1883, to the twelfth day of July, 1883, which bill said claimant prays may be taken and considered as part of this lien against said building, of which the said Rex Hinkle was owner or reputed owner, and Rex Hinkle was contractor for the erection of said building, with whom the said contract was made, and the said Robert Thomas claims to have a lien on said building, and the curtilage appurtenant thereto, for the amount of his said claim from the commencement of said building, according to the Act of Assembly in such case made and provided.

The above-described premises were, on September 24, 1883, conveyed by Rex Hinkle to Rachel Shields, who appeared as terre-tenant and made defence to the sci. fa.

On the lot facing Germantown Avenue was the main building, of stone, three stories in height, which had been erected many years. On the rear of the lot stood an old frame building, two stories high, and adjoining that, still further in the rear, an old shed. These old frame

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buildings were entirely destroyed and removed, and on a new foundation, one foot longer and two to four feet wider, was erected a new two-story building, rough-cast on the outside, containing a dining-room and kitchen on the first floor and eight or nine bedrooms on the second floor. The new building was so constructed that it could be entirely shut off from the main building, and it was against the new building only that the lien was filed.

Counsel for plaintiff requested the Court to charge as follows:—

(1) The building against which the lien was filed was erected on a new foundation, two feet longer and three feet wider than the old one, two stories in height, and rough-cast and of new material, and the lien was properly filed and within the intendment of the Act of 1836. *Refused.* (First assignment of error.)

(2) The evidence shows that an old frame building and one-story shed were removed, and, on a larger and wider foundation, a new two-story rough-cast building was erected which can be entirely shut off from the main building; and as the plaintiff's lien was filed against the new building only he had a right to recover thereon. *Refused.* (Second assignment of error.)

(3) A lien can be filed against a new wing or addition to the main building as a new structure *per se*, and it is immaterial what was on the ground before it has been removed and a new building erected thereon. *Refused.* (Third assignment of error.)

(4) Under all the evidence in the case your verdict should be for the plaintiff. *Refused.* (Fourth assignment of error.)

The Court charged the jury as follows: "Under the evidence in this case I instruct you to find a verdict for the defendants."

Verdict for defendants and judgment thereon. Plaintiff then took this writ, specifying for error, 1 to 4, the answers to the points as above, and 5 the charge of the Court.

Charles C. Lister, for plaintiff in error.

The lien, as filed, was against the new building, and was within the intendment of the Act of 1836.

Nelson *v.* Campbell, 28 Pa. 156.
Parrish's Appeal, 83 Id. 111.
Lightfoot *v.* Krug, 35 Id. 348.
Pretz's Appeal, 35 Id. 349.
Harman *v.* Cummings, 43 Id. 322.
Long *v.* McLanahan, 103 Id. 545.

Our mechanics' lien laws are regarded as remedial, and should receive a liberal construction.

Haslett *v.* Gillespie, 95 Pa. 375.

The Act of 1868 relied on by defendants extends the mechanic's rights to a lien for alterations and repairs. It is not explanatory but amendatory of the Act of 1836. It gives a lien where none existed before, and does not apply to a new building.

Hancock's Appeal, 115 Pa. 1.

Mayer Sulzberger (*Albert S. L. Shields* with him), for defendants in error.

The Court below had the right to direct a verdict for the defendants, on two grounds:—

(1) Because under the Act of 1836 it is the Court's province to determine whether the amount of change is sufficient to give a lien.

Patterson *v.* Frazier, 23 Weekly Notes, 143.

(2) Because the Act of 1868 deprived the plaintiff of a lien.

May 20, 1889. The Court. The claim in this case was filed November 21, 1883, against a two-story building or wing, rough-cast on the outside, attached to and adjoining a three-story stone dwelling situate on the northwest corner of Germantown Avenue and Mount Pleasant Street, in the city of Philadelphia. It is for materials furnished by the plaintiff from February 12, 1883, to July 12, 1883, at the instance of Rex Hinkle, who was then the owner of the premises described in the claim. These premises were, September 24, 1883, sold and conveyed by Hinkle to Rachel Shields, who, when the scire facias was issued upon the claim, and was served on her as terre-tenant, appeared and made defence to it. The learned trial Judge instructed the jury to return a verdict for the defendants, but did not place on record his reasons for this instruction.

We do not find in the evidence any dispute as to the amount and value of the materials furnished by the plaintiff, nor any denial that they were used in the construction of the two-story building or wing mentioned in the claim. The plaintiff's contention in the Court below and here is defined by the following points which were refused: (1) The building against which the lien was filed was erected on a new foundation, two feet longer and three feet wider than the old one; two-stories in height, rough-cast, and of new materials, and the lien was properly filed and within the intendment of the Act of 1836. (2) The evidence shows that an old frame building and one-story shed were removed, and on a longer and wider foundation, a new two-story rough-cast building was erected, which can be entirely shut off from the main building; and as the plaintiff's lien was filed against the new building only, he has a right to recover thereon. (3) A lien can be filed against a new wing or addition to the main building as a new structure, *per se*, and it is immaterial what was on the ground before, if it has been removed and a new building erected thereon.

It is apparent from the evidence that the plaintiff's effort was to prove that the materials furnished by him were used in the erection and construction of an addition to a main building,

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while the defendants sought to show they were employed in the alteration and repair of an old building. There is considerable evidence on this subject, but we think taken as a whole it fairly sustains the claim of the plaintiff that the materials were furnished for and used in the construction of an addition to the main building. This view of the evidence he contends entitles him to a lien under the Act of 16th June, 1836, and he cites and relies on Nelson *v.* Campbell (28 Pa. 156); Lightfoot *v.* Krug (35 Id. 348); Pretz's Appeal (Id. 349); Harman *v.* Cummings (43 Id. 322); Parish's Appeal (83 Id. 111); Long *v.* McLanahan (103 Id. 537). In Lightfoot *v.* Krug, the erection of a one-story, twelve by fourteen feet kitchen as an addition to a two-story brick house, was held to authorize a lien under the Act of 1836, which might bind the main building, and the case was said to fall within the rule established by Nelson *v.* Campbell. Pretz's Appeal is to the same effect. Harman *v.* Cummings decided that a claim for alterations, repairs, and additions was valid to the extent of the work done and material furnished in and about the erection and construction of the additions. Parish's Appeal, and Long *v.* McLanahan fully recognize and approve the doctrine of these cases. They were all under the Act of 1836, and they distinctly decide that a new wing or addition is an erection within its intendment.

But the Act of August 1, 1868, applicable to mechanics' liens in Philadelphia, is amendatory of the Act of June 16, 1836, and must be read into and construed as a part of it. As amended and applicable to the city of Philadelphia, the Act of 1836 creates two kinds or classes of mechanics' liens. The first class embraces debts contracted for work done or materials furnished for or about the erection or construction of a building; the second, debts contracted for work done or materials furnished for or about the repair, alteration of, or addition to the same. The liens thus given differ materially in their extent and qualities. Those in the first class relate to the commencement of the building, and are without limitation as to amount; those in the second class date from the filing of the claim, and are not allowed for debts less than fifty dollars. The claims in both classes must be filed within six months after the work shall have been finished or materials furnished, but the liens are again distinguished by preserving those in the first class, if filed within the six months, and denying to debts in the second class any lien if the property is conveyed to a purchaser before a claim is filed.

It cannot be doubted that the amendment places all repairs, alterations, and additions upon the same footing, and we think the case presented by the plaintiff is within it. The fact that the original Act was deemed broad enough to include new additions does not interfere with this conclusion. "Where there are in an Act specific provisions relating to a particular subject they must govern in respect of that subject, as against general provisions in other parts of the statute, although the latter standing alone would be broad enough to include the subject to which the particular provisions relate. Hence if there are two Acts, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provisions it must be taken that the latter was designed as an exception to the general provision." (Endlich on the Interpretation of Statutes, § 216; Felt *v.* Felt, 19 Wis. 193; State *v.* Goetze, 22 Wis. 363; Crane *v.* Reeder, 22 Mich. 322.)

"Where a general intention is expressed, and the Act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception." (Dwarris on Statutes, 658.)

We conclude that the right to a lien for the materials furnished in this case was under and governed by the provisions of the Act of August 1, 1868, and that as the claim was not filed until after the property was conveyed to a purchaser, no lien was acquired. (Hoff's Appeal, 102 Pa. 218.)

The judgment is affirmed.

Opinion by McCollum, J. W. M. S., Jr.

Jan. '89, 236. March 6, 1889.

Nye's Appeal.

Husband and wife—Desertion by wife—When justified—When a bar to widow's exemption—Dower not barred by desertion.

Where a wife leaves her husband, and renounces all conjugal intercourse a considerable time before his death, she is not entitled to administer upon his estate after his death nor to the exemption of $300.

The exemption provided for by the Act of April 14, 1851, is a pure gratuity by force of law for the benefit of a decedent's family, and does not belong to a woman who did not, at least in contemplation of law, sustain a family relation to her husband at his death.

The reasonable cause which justifies a wife in abandoning her husband, is such as would entitle her to a divorce. Separation is not tolerated for light causes.

A single act of cruelty on a single occasion may be so severe, and attended with such corresponding cir-

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cumstances of atrocity as might, under a fair and liberal construction of the act justify a divorce; but no single act of cruelty, however severe, that comes short of endangering life, is sufficient to do so.

Dower does not depend upon the existence of the family relation at the death of the husband, and is not barred by desertion.

Under the circumstances of this case, it was held that the widow was not entitled to her exemption of $300, but was entitled to dower in her husband's estate.

Appeal of Cain Nye from the decree of the Orphans' Court of Berks County, making distribution of the estate of John C. Nye, deceased.

Upon the audit of the account of the administrator of decedent, Elizabeth Nye, his widow, made application for $300 widow's exemption under the Act of April 14, 1851, the administrator having refused to do so. This claim was resisted by the children of decedent, of whom appellant is one, upon the ground that the widow had deserted her husband some seven years prior to his death and had not lived with him at any time during that period. The separation was admitted by Elizabeth Nye, but she offered testimony for the purpose of showing that she was compelled to withdraw from her husband on account of his cruel and barbarous treatment.

The facts of the case are fully set forth in the opinion of the Supreme Court.

The Auditing Judge, SCHWARTZ, P. J., awarded to the widow the $300, under the Act of April 14, 1851, and $24.12 witness fees; and also awarded her the interest on one-third of the balance for distribution for life, it being proceeds of realty.

Exceptions filed to this adjudication were dismissed by the Court, whereupon Cain Nye appealed, assigning for error (1) the allowance of the $300 exemption; (2) the allowance of the witness fees; and (3) the award of one-third of the income to Elizabeth Nye for life.

C. H. Ruhl (*Daniel Ermentrout* with him), for appellant.

The exemption is given to the widow as the surviving head of the family to provide for its immediate necessities, and she must be either actually or constructively in the family at the time of her husband's death. If she leaves her husband with a fixed intention not to return, she is not constructively of the family.

Sipes *v.* Mann, 39 Pa. 414.
Odiorne's Appeal, 54 Id. 179.
Hettrick *v.* Hettrick, 55 Id. 292.
Terry's Appeal, Id. 344.

A widow may be entirely blameless, as where she always lived abroad, and not be entitled to the benefit of the Act.

Spier's Appeal, 26 Pa. St. 233.
Coates's Estate, 6 WEEKLY NOTES, 367.

So also, if she lives apart from her husband under articles of separation, even though she be the injured party.

Hettrick *v.* Hettrick, *supra*.
Speidel's Appeal, 107 Pa. St. 18.

There was nothing in this case to justify the wife in leaving her husband. See—

Richards *v.* Richards, 1 Gr. 389.
Richards *v.* Richards, 37 Pa. St. 228.
May *v.* May, 62 Id. 210.
Gring *v.* Lerch, 112 Id. 250.

When a wife separates from her husband without sufficient and justifiable cause, the same principle of law which denies her the benefit of the widow's exemption, denies her the right of dower in her deceased husband's lands.

Reel *v.* Elder, 62 Pa. St. 316.

Hiram Y. Kaufman, for appellee.

As to what constitutes desertion, see—

Ingersoll *v.* Ingersoll, 13 Wr. 249.
Ann Little's Estate, 7 Phila. 495.

The reasonable ground which will justify a wife or husband in abandoning the other, is such as would entitle the injured party to a divorce.

Butler *v.* Butler, 4 Clark, 284.
Gordon *v.* Gordon, 12 Wr. 228.
Jones *v.* Jones, 16 P. F. S. 494.
Detrick's Appeal, 20 WEEKLY NOTES, 421.
Bauder's Appeal, 19 Id. 255.

There can be no question whatever as to Elizabeth Nye's right of dower.

Walsh *v.* Kelly, 10 Casey, 84.
Reel *v.* Elder, 12 P. F. S. 308.
Heslop *v.* Heslop, 1 Norris, 537.
Holbrook's Estate, 20 WEEKLY NOTES, 79.

May 13, 1889. THE COURT. John C. Nye, a widower aged seventy years, and Elizabeth Reigel, a widow aged thirty years, were married in the summer of 1878, and dwelt together as husband and wife until the fall of 1879, when she left his home and moved into her own house about ten miles distant, where she resided until his death in November, 1886. A short time after the separation she commenced suit against him under the desertion statutes, which upon full hearing and investigation by the Court of Quarter Sessions, resulted in a dismissal of her complaint. After that there was no communication between them, and no effort on her part to assert the rights or to discharge the duties of a wife. That she had deliberately resolved upon a permanent separation from Nye and his family is evident from what she said to Wm. Schlappig the morning she left. Nye was unwilling that she should leave, and tried to persuade her to remain with him. No angry or unkind words passed between them on that occasion. While in his presence she made no complaint of misconduct on his part, and did not assign any reason for her determination to depart from his home. The testimony of the witnesses who were present and who describe the conversation and conduct of the husband and wife stamps the separation

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as a wilful and malicious desertion on her part, and there is nothing shown of her subsequent behavior to deprive it of that character.

After his death she claimed a widow's rights in his estate, and the Orphans' Court awarded her the exemption, the fees of the witnesses to support her claim to it, and statutory dower. From this decree Cain Nye, a son and heir of the decedent, appealed.

In Odiorne's Appeal (54 Pa. 178), this Court in an opinion by Chief Justice WOODWARD said, "Where a wife leaves her husband and renounces all conjugal intercourse, a considerable time before his death, she becomes not such a widow, after his death, as was in the contemplation of the Legislature, when the Acts of Assembly were passed which entitle her to administer his estate and to appropriate $300 of it to her own use. The Acts contemplate the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of the duties imposed by the relation."

The exemption provided by these statutes has been described as a pure gratuity by force of law for the benefit of a decedent's family. (Sipes *v.* Mann, 39 Pa. 417.) It does not belong to a woman who did not at least in contemplation of law sustain a family relation to her husband at his death. (55 Pa. 290.) It was not created for a wife who abandons her husband without reasonable cause and for seven years before his death refuses to perform her marital duties. The reasonable cause which justifies a wife in abandoning her husband, is such as would entitle her to a divorce. (Cattison *v.* Cattison, 22 Pa. 276.) In the language of Justice STRONG in Grove's Appeal (37 Pa. 443), "separation is not to be tolerated for light causes, and all causes are light, which the law does not recognize as ground for the dissolution of the marriage bond."

It remains to inquire, if Mrs. Nye had reasonable cause for abandoning her husband. As we have seen, her departure from his home was deliberate and without complaint or explanation to him. It is incumbent on her, therefore, to show conduct on his part which justified her in severing the family relation. This she has undertaken to do, and the evidence on which she relies for her justification is before us. It shows but one act of personal violence, and the single witness of that was her son, who was then but ten years old. Adam Reichard testified that he was frequently at Nye's house, and that he once, while they were quarrelling, heard Nye threaten to strike her with a salt box. This is all of threat or violence which the evidence discloses. Mrs. Nye's declarations to third persons in the absence of her husband, were not competent to affect him, and in view of the time when and the circumstances under which they were made were not admissible as a part of the *res gestæ*. It is probable, however, that these declarations were all made with reference to the one act described by her son, and the provocation of that, according to his recollection, was her refusal to sleep with her husband, and this was conceded in her statement to Kauffman, together with an admission that she struck him in the face. There is no conflict in the evidence, and no question of the credibility of witnesses involved in the case. From the facts disclosed by the legal testimony it is our duty to decide whether a justification of the abandonment is shown.

In May *v.* May (62 Pa. 210), it was said, "a single act of cruelty, on a single occasion, as suggested in Richards *v.* Richards (1 Grant, 391), may be so severe and attended with such corresponding circumstances of atrocity as might, under a fair and liberal construction of the act, justify a divorce. But no single act of cruelty, however severe, that comes short of endangering life, is sufficient to justify a divorce." A single act of indignity will not be sufficient, nor indignities provoked by the complaining party, unless where the retaliation is excessive. It is not every coarse and ungallant act, even though it amounts to a technical assault, that authorizes a severance of the marriage bond. It was well said by Chief Justice LOWRIE, in Richards *v.* Richards (37 Pa. 225), "it is not all unlawful and barbarous acts that are made grounds of divorce. We do not divorce savages and barbarians because they act as such towards each other." The question with which we have to deal is not one of sentiment or chivalry, but of law and its faithful administration, and we have no hesitation in declaring that under our decisions and the evidence in this case Mrs. Nye is not entitled to the exemption of $300 out of the estate of her deceased husband, or to the fees of her witnesses in prosecuting her claim for it. The first and second specifications of error are sustained.

Dower does not depend on the existence of the family relation at the death of the husband, and is not barred by desertion. The third specification is not sustained.

The decree of the Orphans' Court, awarding to Elizabeth Nye a widow's exemption of $300, and $24.12 for witness fees, is reversed, and it is now considered and adjudged that the remaining claims of creditors and for expenses be paid according to said decree; that the balance for distribution, to wit, $38.85, proceeds of personalty, and $1247.94, proceeds of real estate, be distributed as follows, viz: one-third of the personal fund to Mrs. Elizabeth Nye absolutely, and the interest upon one-third of the real estate fund to be paid to her annually during her natural life;

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two-thirds of the personal and real estate fund to be paid to the children and heirs of the decedent, named in the decree of the Orphans' Court, share and share alike, and the remaining one-third of the said fund to be paid to the said children and heirs in the same proportion as above, at the death of Elizabeth Nye, widow of decedent. It is ordered that the costs of this appeal be paid by the appellee.

Opinion by McCollum, J. H. C. O.

Common Pleas.

C. P. No. 2. December 8, 1888.

Wood et al. v. Rhoads.

Partnership debts—Agreements to give time to continuing partners—Effect of such agreement upon retiring partner—Consideration.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for goods sold and delivered.

Judgment was entered against two of the defendants, Jacob H. Rhoads and Frank H. Campbell, they making no defence; Pittman Bright filed an affidavit and supplemental affidavit of defence, setting forth that one day after the last sale of goods to his firm he retired from the partnership, his partners, Rhoads and Campbell, retaining the assets of the firm, and agreeing to settle all the debts, including the one in suit. That subsequently the plaintiffs entered into an agreement with the two continuing partners, Rhoads and Campbell, and one Joseph H. Rastell, assignee for the benefit of their creditors, whereby the said assignee was allowed to continue the business of Rhoads & Campbell for the purpose of winding up the business and paying the creditors:

"Provided, however, that so soon as it shall appear that the said business is not being conducted to the advantage of the estate and of the creditors, and so soon after the expiration of one year from the date hereof as the said Joseph H. Rastell, assignee, or his successor, shall be requested, in writing, . . . etc., he shall at once wind up the business." . . .

There was also an agreement to accept the notes dated September 1, 1888, and falling due at various intervals, from three months to eighteen months, for the indebtedness of the continuing partners. Both these agreements were signed by the plaintiffs.

John W. Savage, for the rule.

The agreements alleged to have been made in the affidavit were without consideration, and, therefore, a nullity, and of no binding effect upon the plaintiffs.

William Henry Peace, contra.

The agreement to give time to his two partners, Rhoads and Campbell, released Pittman Bright from all further liability, or, at any rate, until the time given has expired.

Rule absolute. T. B. S.

C. P. No. 2. December 8, 1888.

Neal v. Vollrath.

Affidavit of defence—Bad where it only tells part of the story.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, on a book-account for goods sold and delivered by the plaintiffs, W. H. Neal and George L. Morse, trading as Neal, Morse & Co., to the defendant, J. C. Vollrath, trading as J. C. Vollrath & Co.

The affidavit stated, "that the goods set forth in the plaintiffs' statement were never purchased by deponent, and he does not owe for the same. Hence, is not indebted to plaintiffs for the same. . . . Many of the goods named in plaintiffs' statement were forwarded to this deponent, and are in his store . . . . and he is ready to return the same at any time."

Samuel M. Hyneman, for the rule.

The Court. An affidavit, which on its face shows that it only tells part of the story, is always bad.

Rule absolute. T. B. S.

C. P. No. 4. April 13, 1889.

Apreda v. Romano.

Foreign attachment—Jurisdiction—Sale as perishable.

Under a writ of foreign attachment against an undivided interest in personal property, it is the duty of the sheriff to take physical possession of the property itself; and the Court having thus acquired jurisdiction of the *rem* may order it to be sold as perishable, without regard to whether the real owners, or all of them, are parties to the proceeding.

On February 8, 1889, the bark "Giulio R." was attached by the sheriff of Philadelphia County, under a writ of foreign attachment, at the suit of Gabrielo Apreda *et al.*, plaintiffs, against Francesco Romano, Teodoro Romano, Curlo Romano, and Bartholomeo Romano, de-

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fendants. Teodoro Romano, one of the defendants, was master of the bark, and the owner of one undivided fourth part of the same. He was present in Philadelphia at the time of issuing the writ of foreign attachment, and was personally served, and the vessel was therefore attached as the property of the other three defendants, who, it was alleged, were the actual owners of the remaining three undivided fourth parts of the bark. The whole vessel was taken into the custody of the sheriff, under the writ, and subsequently, while still in his possession, a libel was filed against the bark for maritime liens, in the District Court of the United States for the Eastern District of Pennsylvania, in Admiralty. The return of the marshal in this proceeding was as follows: "March 5, 1889, as commanded by the within writ I have attached the bark 'Giulio R.' and cited the master, Teodoro Romano, by giving him an attested copy of the within writ, and making known the contents of the same to him."

On February 23d the Court of Common Pleas had granted an order to sell the vessel as perishable, and it appears that a sale was had, which was afterwards, on March 30, set aside by agreement of counsel, upon a rule taken for that purpose. On April 11th a rule was entered to show cause why the order of sale should not be amended so that the sheriff should be directed to sell only the three-fourths interest in the bark.

J. Warren Coulston, for the rule.

The sheriff being commanded by his writ to attach only the undivided three-fourths of the vessel, cannot pass a good title to the whole vessel. The marshal is in possession of the remaining one-fourth.

J. Rodman Paul, contra.

The sheriff has actual custody of the whole vessel, and the marshal cannot attach or seize any part of it.

Taylor *v.* Carryl, 12 Harris, 259; 20 Howard, 584.

Eo die. THE COURT. The sheriff attached only the undivided interests of the three owners, while the marshal attached the *rem*—the ship itself. In view of the existing maritime liens we think it for the interest of all parties that the ship should be sold under an order of the Admiralty Court.

The rule is discharged, and the order to sell as perishable is rescinded.

Oral opinion by THAYER, P. J.

Subsequently a petition was presented reciting that since the revocation of the order to sell as perishable, an application for a similar order had been made to the United States District Court for the Eastern District of Pennsylvania, by the libellants in the Admiralty proceedings pending in that Court, which application had been referred to Morton P. Henry, Esq., as Commissioner, to report the facts, together with his opinion as to whether the order could be made; that the Commissioner had advised against the validity of any order of sale by the District Court, as long as the sheriff of Philadelphia County retained manual custody of the bark; and that thereupon the District Court had refused to make any order of sale. The petition further alleged that the vessel was rapidly deteriorating, and was subject to large charges for wharfage, keepers' fees, and other expenses, which would soon absorb the whole value, and the Court was therefore asked to make an order that the bark be sold by the sheriff as perishable.

Annexed to the petition was a copy of the report of Morton P. Henry, Esq., the Commissioner appointed by the United States District Court, which, after reciting the facts, continued as follows:—

"The Court of Common Pleas having refused to take any steps for the sale of the bark, which had been in the custody of the sheriff since February 8, 1889, this Court (the Admiralty) is applied to to order the sale of the said vessel, as perishable, and the question referred to the Commissioner simply is, whether it is in the power of this Court to do so, and whether an order for the sale made under these circumstances would convey a title to the purchaser.

"On the marshal's return, standing by itself, which recites that he had attached the bark 'Giulio R.' under a proceeding strictly *in rem*, such an order of sale could be granted, but the Commissioner is bound to report the fact that at the time this return was made the whole of the vessel was in the actual custody of the sheriff. Such custody could not be disturbed by the marshal under any writ issued in this Court, even if he should undertake to dispossess the sheriff (per NELSON, J., Freeman v. Howe, 24 How. at p. 457). And while such return might bind the marshal personally, it could not have the effect of giving him the lawful possession of the vessel, as against the State authorities, and any attempt to proceed *in rem* against that vessel would lead to a conflict of jurisdiction, in which there could be but one result: that the marshal had no right to attempt to seize or attach the 'Giulio R.' while in the possession of a Court of co-ordinate jurisdiction, under a writ of foreign attachment, whether the vessel was properly attached or not as the property of the defendants. If the seizure by the sheriff was improper or unlawful, it must be set aside by the Court of Common Pleas which issued that process. This Court has no authority to undertake to disturb the jurisdiction of the Court of Common Pleas under the writ of foreign attachment, whatever might be the title

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to the vessel, whether owned in part by some or without any actual ownership whatever, by any of the defendants. If the fact was, as it is not, that the writ was irregularly issued and served by the sheriff, this Court could not undertake to set it right. The Commissioner refers to the case of Gumbel *v.* Pipkin (124 U. S. 132) as an instance in which the legality of the service of process was left to be determined by the Court out of which it is sued, and to Krippendorf *v.* Hyde (110 U. S. 276), and Freeman *v.* Howe (*supra*). The sheriff would not be authorized or justified in withdrawing from the custody of the vessel, except under the orders of the Court which directed him to attach it. This case is therefore governed by the decision in the case of Taylor *v.* Carryl (20 How. 584), which decided that a writ issued out of the admiralty to enforce a maritime lien for wages could not be executed against a vessel in the custody of the sheriff, and that no sale by the admiralty in a case commenced under such circumstances was valid, but was void for want of jurisdiction, *unless a distinction can be drawn between that case, in which the whole vessel was the property of the defendant, and the present one, in which the interest attached is the interest of the owners of three-fourths of the whole vessel.*

"The first question which presents itself therefore is, whether the sheriff was rightfully in possession of the whole vessel under a writ of attachment, where the judgment could only deal with the title of the three-fourths interest owned by the absent defendants, and could not affect the title, either by mesne or final process by any judgment therein, to the one-fourth owned by the master, who was within the jurisdiction of the Court when the writ issued? This point is settled conclusively in the case of Morgan *v.* Watmough (5 Wharton, 125), in which case it was decided that under the Foreign Attachment law of Pennsylvania process to attach partnership effects in a suit brought for the debt of one partner alone is required to be executed by taking physical possession and custody of the partnership property itself. This case shows that the possession of the vessel was lawfully in the sheriff of Philadelphia, although one of the part owners was present. The Commissioner has been asked by libellant's counsel to distinguish the present case from that of an attachment of partnership property, but he is unable to do so.

"Each owner of a vessel has a part ownership in the whole as an entirety. The joint owners are not partners. But if any distinction can be drawn, a part ownership in chattel property held by joint owner or owners in common, is more distinct than that of a member of a partnership in partnership property, because a partnership interest is subject to be affected by the settlement of partnership accounts between the partners, while part ownership in a vessel is not. It is an absolute and distinct ownership, subject to liability for joint undertakings, and such as are created by the law of agency and to maritime liens.

"We have therefore the case of a vessel, a chattel lawfully attached by the sheriff under process of the Court of Common Pleas. The return by the marshal in this case must be treated as an attempt to make a typical attachment of the vessel, subject to the sheriff's custody, and not such an actual seizure of the vessel as would place it under the sole control of this Court, and sustain a proceeding *in rem*.

"This construction must be put on the marshal's return, otherwise his attempt to attach this vessel would be a violation of the rule in Taylor *v.* Carryl, which has never been departed from.

"It is thought proper to cite the opinion of Mr. Justice MATTHEWS, in Covell *v.* Heyman (111 U. S. at p. 182), which shows the necessity of observing this rule in questions of attachment and seizures, between the Federal and State Courts, as being more than an exercise of comity between co-ordinate Courts, but 'a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.'

"As no process *in rem* can be executed unless the property is within the jurisdiction of the Court, and also capable of actual seizure, and under the actual control of the Court, this Court cannot attempt to exercise its jurisdiction *in rem* over this vessel while it remains in the hands of the sheriff, and no order of sale by this Court would have any effect to pass the title to this vessel or to any part thereof. The principle of Taylor *v.* Carryl, in 20 How. 584, and of the same case in the Supreme Court of Pennsylvania, in 12 Harris, 259, is equally applicable to the present as to that presented in those cases. There can be no joint custody by the officers of State and Federal Courts. (Hagan *v.* Lucas, 10 Peters, 400.) The ground on which Taylor *v.* Carryl was decided is that any other rule would permit a conflict of jurisdiction between the officers of two Courts of co-ordinate jurisdiction over the same subject matter, and applies equally where the vessel is in the custody of the sheriff under a writ against a part owner as well as to a case in which the whole interest in the vessel is attached. In the opinion of the Commissioner the same result would follow if the vessel was attached by the sheriff, although there was no ownership whatever on the part of any of the defendants. (Covell *v.* Heyman, 111 U. S. 176.) While the possession of the sheriff continues this Court cannot proceed *in rem* against property seized by him. If the vessel is

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irregularly attached remedies exist by which the Court issuing process can relieve the defendants (Krippendorf *v.* Hyde, 110 U. S. 276), and the real owners are protected against eventual loss by the responsibility of the sheriff, and the bond given by the plaintiff. (Covell *v.* Heyman, *ante.*) Although foreign attachment is not a proceeding *in rem*, and a sale under an execution on a judgment obtained in such a proceeding would only pass to the vendee whatever title the defendants had in the property, and would not sell the thing itself, this does not affect the right of the sheriff to retain possession of the goods attached as against the actual owners. Such an action is said to be *quasi in rem* (Freeman *v.* Alderson 119 U. S. 187). This is the case under all seizures, whether by execution or process of attachment, or *in rem;* the property is in the custody of the Court, and no other Court can interfere with such custody. In accordance with this principle in the case of the 'Edith' (34 Fed. Rep. 927), the possession by the sheriff of the vessel under the execution issued from the State Court against one part owner only, prevented the execution of the process *in rem* by the admiralty, and the proceedings were stayed. In a similar manner it was decided that no process *in rem* to enforce a maritime lien could issue against a vessel while in the possession of a receiver appointed by a State Court. (The 'Red Wing,' 14 Fed.Rep. 869).

"These cases convince the Commissioner that this Court has no power to act while the sheriff retains possession of the vessel. If it is contended that this rule would prevent the enforcement of any maritime lien against the vessel, the answer is plain: (1) That if such was the case it is a result that this Court is not responsible for; and that it is better that private interests should suffer rather than a public disturbance should take place between two Courts of the same community forcibly attempting to exercise jurisdiction over the same chattel. It is not necessary to point out how lamentable might be the result, and how unseemly any controversy would be which should arise between two conflicting jurisdictions. It is reiterated in the cases cited. Although there are expressions in the opinion in the case of Taylor *v.* Carryl, in the Supreme Court of Pennsylvania, from which it would appear there might be a joint possession by the marshal and sheriff, and it is not only not borne out by the decision of the Supreme Court of the United States, but that decision seems absolutely in contradiction of it. It holds that the marshal cannot take possession of a vessel which is lawfully in the possession of the State Court at the time the writ issues. The jurisdiction *in rem* is always exclusive. It is inconsistent with any other possession than that of the Court which exercises jurisdiction *in rem*. Secondly, it is a familiar principle that when a Court of limited jurisdiction proceeds by attachment against property *in rem*, it will recognize and protect rights which it could not enforce by original proceedings, of which the following are instances: In the case of Schuchardt *v.* The 'Angelique' (19 How. 239), a mortgagee was suffered to intervene, and was paid out of a fund arising from the sale of the vessel by the Admiralty, although the Court had no original jurisdiction to enforce the mortgage itself. The same rule was applied to a claim of general average against cargo, over which subject the English Admiralty formerly had no jurisdiction, in the case of the Cargo Ex Galam (Br. & Lush. Reps. 167). This is not peculiar to the Admiralty. The same principle applies to the proceeding of all other Courts, and is shown to be equally true in the case of proceedings by attachment in a Court of common law, in Freeman *v.* Howe (24 Howe, 450), and has lately received a very full and complete exemplification in the case of Gumbel *v.* Pitkin (124 U. S. 132), in which the Circuit Court of the United States, which has no jurisdiction in controversies between citizens of the same State, was declared competent to enforce the priority of attachments issued out of the State Courts against property in possession of the Circuit Court, where the process of the State Court could not be executed by reason of the prior possession of the marshal, and where the Federal Court would have no jurisdiction between the parties themselves. The opinion of Mr. Justice MATTHEWS contains a full citation of the cases, showing the inherent right and duty of any Court having possession of the property to protect the rights of all parties having an interest in the property by intervention in one form or another. The same principle is asserted in Krippendorf *v.* Hyde (110 U. S. 276).

"It cannot be questioned under these decisions that the Court of Common Pleas, having the rightful custody of this vessel, can protect the rights and interests of these seamen against the vessel itself, although it has no original jurisdiction to enforce their right for wages by proceedings *in rem*. That such a right could be exercised by the sale of the vessel as chargeable, is fully justified by the case of Taylor *v.* Carryl, as reported in 12 Harris, 269. Such a sale, like a master's sale of a vessel, in a case of necessity, is for the benefit of all concerned, and discharges all liens, substituting the fund for the property, out of which the seamen's wages could be paid. ('The Amelie,' 6 Wall. 18.)

"Although the sale under an execution on a judgment in such proceeding would pass no title, except that of the defendants, and would not discharge maritime liens, the sale of the property

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as perishable is really and truly, as stated in the case of Taylor *v.* Carryl, and in the authorities there cited, a proceeding *in rem*, to which all the world are parties. Such a sale does not deal with the title of any one, but with the property itself, independently of ownership by the defendants, and of the result of the suit. It is the right of the Court, in the exercise of its jurisdiction, to preserve the property for the benefit of all concerned, owners as well as creditors, so that property in possession of the Court shall not be permitted to deteriorate by the absence of the claimants of the property or their failure to take it out of the hands of the sheriff. A vessel lying at a wharf in charge of a ship-keeper alone cannot have that care and attention which a vessel receives, as to its equipment and structure, from the master and his crew while employed, and it deteriorates in value. Interest runs upon the claim, while the vessel earns no income to pay anybody. Wharfage and insurance must be paid, and the sheriff's custody fees must run on until the expiration of the time when the judgment can be obtained and the property released by a sale under an execution, when it again becomes subject to the enforcement of the maritime liens which are not displaced. A vessel in such a situation becomes both chargeable and perishable, and the delay which would accompany a writ of error might eat up the whole value of the property as a *res*, leaving those injured only the redress by suit against the sheriff. In this view the Court deals with the property as perishable and chargeable, and not with the title of the actual owners, who may not be parties to the cause, and such a sale passes a title clear of all liens against it, and substitutes the fund produced by such a sale in the place of the vessel itself. The vessel itself is sold, and not the interest of any one owner. The case of Magee *v.* Beirne (3 Wr. 50) was a case involving the sale of cattle under a foreign attachment, which were sold as chargeable. The decision was pronounced by a competent judge, who held such a sale to be a proceeding *in rem*, which would pass the title to the property without regard to the validity of the attachment or its ownership. This statement is more than a dictum. It was involved in the case. It turned out afterward that the defendant was not the owner of the cattle, and the real owner sued the sheriff for unlawfully seizing them as the property of the defendant. The sheriff in the action brought against him for unlawfully seizing the cattle pleaded the order of sale under which he disposed of the cattle by direction of the Court.

"The Court did not doubt the validity of the sale, and held that it would have been a valid defence if the title to the cattle had been in dispute, but it could not avail, as the action was in trespass for unlawfully seizing the same as the property of another man than the defendant in the writ. This also is the decision in Covell *v.* Heyman (111 U. S. 176). The case of Megee *v.* Beirne was argued by very able counsel, and the opinion of the Court as to the validity of the sale of the property attached, as perishable, is not by way of illustration, but by way of answer to points presented and discussed.

"In the opinion of the Commissioner, the possession of the 'Giulio R.' by the sheriff under the attachment out of the State Court being lawful, the seamen are remitted to that Court for the protection of their maritime priority in the vessel, which this Court is prevented from enforcing by reason of the said attachment. In his opinion, proceedings in this case by this Court would not be proper against the vessel itself, and no order of sale thereunder would pass a title to the vessel or any part thereof."

J. Rodman Paul (*A. Sydney Biddle* with him), for the petitioners.

Although the writ of foreign attachment was against only three undivided fourths of the vessel, the sheriff was bound to execute it by taking actual possession of the whole vessel, since he could not segregate the part interests.

Morgan *v.* Watmough, 5 Wharton, 125.

This Court therefore has jurisdiction, and may order the vessel to be sold as perishable or chargeable. Such a sale is different from a sale in execution, and passes the whole title, whether the defendants have any title or not.

Megee *v.* Beirne, 3 Wr. 50.

[THAYER, P. J. The question is, whether the case of Morgan *v.* Watmough is applicable. That case was not presented to us at the former hearing.]

John F. Lewis (*Alfred Driver* with him), contra.

The proposition that in a proceeding against one of several joint owners, the property of all can be sold without notice, is monstrous. The sheriff had not the power to seize the undivided one-fourth of the vessel, which confessedly does not belong to the defendants. Morgan *v.* Watmough was a case of partnership, and the co-owners of a ship are not partners.

THE COURT. And now, May —, 1889, on consideration of the petition and affidavits, and in view of the action taken by the District Court of the United States, it is ordered that the bark "Giulio R.," her tackle, apparel, and furniture therein named, be sold by the sheriff, as perishable and chargeable, at public sale, after advertisement in the manner directed by law for the sale of personal property on execution.

WILLSON, J., absent. E. P. B.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JUNE 14, 1889.* [NO. 7.

Supreme Court.

ADDITIONAL RULES, FILED JUNE 7, 1889.

Addition to Rule II.

Provided, That no case shall be placed on the argument list, where the writ of error, certiorari or appeal shall not have been taken twenty days before the return day.

Addition to Rule XXI.

The history of the case must not contain an argument or any portion of the testimony.

Rule XXV. is amended so as to read as follows:—

The brief of the argument must contain a clear statement of the points on which the party relies, with such reasons and arguments as he may see proper to add, together with all the authorities which he thinks pertinent. Where the error assigned is to the finding of fact by an Auditor or Master, the printed argument shall contain a synopsis of all the evidence bearing upon such disputed question of fact, with a reference to the page or pages of the paper-book where such evidence may be found *in extenso.*

Rule XXVI. is amended so as to read as follows:—

Where an authority is cited the principle intended to be supported by it must be stated. A mere reference to the book will not be sufficient. Pennsylvania cases decided since the commencement of the State Reports must be cited by the volume of said State Reports. Wherever decisions of this Court are cited from the Legal Periodicals, they must be accompanied by the certificate of counsel that said cases have not been reported in the State Reports. The addition to Rule XIX. adopted February 6, 1888, is hereby supplied.

Addition to Rule XXXII.

All paper-books exceeding 20 pages in length shall be accompanied by a full and complete index. The names of the parties, and the name of the Court to which the writ of error, certiorari or appeal is taken shall appear on the cover in all cases.

Addition to Rule XXXVIII.

Provided, That no cause shall be certified off after the short list is taken up on Wednesday morning.

Jan.' 89, 410. May 10, 1889.

Marlin v. Waters.

Judgment for want of affidavit of defence—Practice under Act of May 25, 1887—Statements—When necessary to serve copy, and when notice of filing only, in order to obtain judgment.

A declaration with sworn statement of claim, and copies of notes upon which suit was brought, were filed in an action of assumpsit. The summons was served and an appearance entered by the defendant. No copy of the statement, nor notice of filing the same was served upon him, and twenty days after the return day, judgment for want of an affidavit of defence was taken under a local rule of Court. This judgment was subsequently stricken off by the Court for want of compliance with the terms of the Act of May 25, 1887:

Held, that the judgment was properly stricken off.

The Act of May 25, 1887, prescribes a new method for taking judgment for want of an affidavit of defence, which supersedes all others. The Act was intended to promote uniformity, and its provisions as to such judgments are general and applicable to all Courts. Under the provisions of the fourth and sixth sections of said Act, if the plaintiff wants to hold the defendant to an affidavit of defence upon his coming into Court, *i. e.*, on the return day, he must *serve a copy of the statement* before the return day. If he chooses to wait until the defendant is in Court, he need only *file* his statement and *give notice.*

The provision of the fifth section of the Act that "judgment may be moved for for want of an affidavit of defence, for the whole or part of the plaintiff's claim, as the case may be, *in accordance with the present practice* in actions of debt and assumpsit," refers only to the mode of taking judgment, and specially to taking it for part of the plaintiff's claim which is provided for by rules of Court and not by statute.

This section should properly have preceded or followed the fourth and sixth. Its purpose is clearly to save the prior practice, but only so far as not superseded by the new provisions of the Act.

Gould *v.* Gage, 118 Pa. St. 559 (S. C., 20 WEEKLY NOTES, 553), followed.

Error to the Common Pleas of Warren County.

Assumpsit, by H. A. Marlin against S. W. Waters, upon two promissory notes drawn by the defendant.

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The facts were these: The plaintiff brought suit upon two promissory notes, signed by defendant, and payable to the order of George R. Wetmore, which notes were, by Wetmore, before maturity and for value received, indorsed by him and sold and assigned to Marlin & Stephenson, and by them sold and delivered to Marlin, said Marlin being an innocent holder of said notes for value. A præcipe for summons, and declaration with sworn statement of claim, setting forth copies of said notes, were filed August 1, 1887; thereupon summons in assumpsit was issued, returnable the first Monday of October. On September 15, 1887, defendant was personally served, and October 1, 1887, appeared by counsel. On February 17, 1888, plaintiff took judgment for want of an affidavit of defence in accordance with the following rule of Court:—

Rule 6. In all actions founded on book accounts, bills, notes, bonds, and other instruments of writing for the payment of money, and in all actions upon covenants or contracts for the payment of money, or for the performance of some other duty or thing of a specified cash value, whether under seal or not, in all suits upon recognizances, judgments, mortgages, mechanics' liens and other records, and in actions of debt on foreign judgments and the judgments of justices of other States, if the plaintiff shall have filed a copy of the account or instrument of writing on which the suit is founded, with his declaration, on or before the return day of the writ, he shall be entitled to a judgment by default for the amount so claimed, at any time after twenty days from and after the return day of the writ, unless the defendant, or some one for him, knowing the facts, shall have filed an affidavit of defence in which the nature and character of the defence shall be clearly and specifically stated.

On May 14, 1888, defendant moved the Court to strike off the judgment for the reason that no copy of plaintiff's statement of claim was served upon defendant, nor notice given to defendant of the filing of the same, as is required by Act of May 25, 1887. A rule to show cause was granted, which on May 28 was made absolute, and judgment stricken off by the Court for the reasons above assigned.

Plaintiff then took this writ, assigning for error the action of the Court.

John B. Chapman (*W. B. Chapman, S. P. Johnson, W. M. Lindsey*, and *James O. Parmlee* with him), for plaintiff in error.

Unless section 5 of the Act of May 25, 1887, is meaningless, the Legislature did not interfere with the practice existing at the time of the passage of the Act.

The plaintiff followed the practice existing in Warren County, and it was error to strike off the judgment.

Charles H. Noyes (*Watson D. Hinckley* with him), for defendant in error.

The Act of May 25, 1887, did not have in mind the local practice under the rules of different Courts, and established an entirely new method of procedure.

May 29, 1889. The Court. The plaintiff took judgment for want of an affidavit of defence in accordance with the rule of Court of the Common Pleas, without reference to the Procedure Act of 1887, and the Court struck off the judgment for failure to comply with the provisions of that Act. This raises the single question in the case, whether that Act meant to leave prior methods of taking judgment for want of an affidavit of defence entirely unaffected, and to give a new and additional method of its own, or whether it intended to prescribe its method as the only proper one, and to supersede all others.

This question was virtually decided in Gould *v.* Gage (118 Pa. 559), and has been so understood by the Courts of this (Philadelphia) county (see Friederich *v.* Anderson, 22 Weekly Notes, 524). But as Gould *v.* Gage was argued rather upon the sufficiency of the copy filed, as a statement under the Act of 1887, than upon the general question of the effect of the Act on rules of Court previously existing, the decision does not seem to have attracted general attention as to the latter point, and it may therefore be well to consider the matter a little more in detail.

The Act was undoubtedly intended as a step towards uniformity of practice, and its provisions as to judgments for want of affidavits of defence are general, and applicable to all Courts. Section four provides that "the plaintiff shall be at liberty to serve a copy of his statement on the defendants," and if such service is made not less than fifteen days before the return day it shall be the duty of the defendant to file an affidavit of defence on or before the return day.

Section sixth provides that if the plaintiff shall neglect to serve a copy of his statement fifteen days before the return day, he may file it on, or any time after, the return day, and have judgment in fifteen days after notice of such filing.

The distinction between these two methods is plain. If the plaintiff wants to hold the defendant to an affidavit immediately on his coming into Court, *i. e.*, on the return day, he must *serve a copy of the statement*. If however he chooses to wait till the defendant is in Court, as required to be on the return day, then plaintiff need only *file* his statement and *give notice*. Under this system the defendant is not bound to any unreasonable diligence, nor in any danger of being taken unaware. He knows he must be served either with a copy before the return day, or with a notice after it. It is highly improbable that the Act meant to leave him subject to a third contingency not imposed by its own terms, but by a rule of Court. Thus in the present case the rule of Court of Warren County entitles the plaintiff to judgment in

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twenty days without notice to the defendant, if a copy of the instrument of writing has been filed on or before the return day. If this rule is still in force, the defendant was liable in the present case to a judgment in fifteen days with notice, or in twenty days without. A statute which as already said, was intended to promote uniformity, ought not to be so construed as to create or preserve such diversities unless its language is perfectly clear to that effect.

The sole doubt arises from the fifth section, which provides that "judgment may be moved for for want of an affidavit of defence, for the whole or part of the plaintiff's claim, as the case may be, *in accordance with the present practice* in actions of debt and assumpsit." It is however fairly inferrible that this refers only to the mode of taking judgment, and specially to taking it for part of the plaintiff's claim. This, so far as I am aware, is only done under rules of Court, at least I have not found any statute which directs or authorizes it, and it was probably with special reference to preserving this feature, as well as the general practice on the subject, that the fifth section was introduced. It was manifestly put in the wrong place, between the fourth and sixth sections. Those sections, as already seen, provide for the time and conditions of judgment, and should be read in immediate connection. The fifth, which refers only to the mode, has a separate branch of the subject, and logically should have either preceded or followed the other two. But though thus somewhat out of place, its purpose in the general scheme is clearly to save the prior practice, but only so far as not superseded by the new provisions of the Act. We are therefore of opinion that the parts of the rule of Court relating to the time and conditions of filing the statement and taking judgment, were superseded by the direct provisions of the Act, and as plaintiff's judgment failed to observe the latter, it was properly struck off.

Order affirmed.

Opinion by MITCHELL, J. H. C. O.

Jan. '89, 279½. April 17, 1889.

Miller v. Hulme.

Overpayment by administrator—Agreement to refund—Power of attorney to bind his client—Auditor's report as matter of evidence.

An administrator is presumed to know the condition of his decedent's estate, and when he voluntarily makes payments to distributees, they are not legally bound to refund. He is chargeable with knowledge of the amount of claims against the estate in making such payments.

Carson *v.* McFarland (2 Rawle, 118); Hinkle *v.* Eichelberger (2 Pa. 483); Edgar *v.* Shields (1 Grant, 361); Natcher *v.* Natcher (47 Pa. 496), cited as to voluntary payments.

Where it does not appear from the proofs that the guardian of a distributee, nor any one for him, has made any agreement to refund an overpayment made to him, he cannot be compelled to refund.

An attorney by virtue of his employment as such merely, has no general power to create and impose a legal obligation on his client under such circumstances. A client is not bound in such a case by the action of his attorney without proof of express authority.

An Auditor's report, which does not show an assignment of the excess in an overpayment but does show that there was an agreement to assign upon which the adjudication is based, is not receivable in evidence to prove an agreement of any one of the overpaid parties to refund, but is proper evidence to prove that a certain claim was presented and was partially allowed under an alleged agreement of counsel.

Error to the Common Pleas of Columbia County.

Case, by H. H. Hulme, executor of Samuel Appleman, deceased, who was guardian of Otis Pealer, to recover from Charles W. Miller certain moneys received by Miller as attorney for said guardian.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*.

Defendant offered in evidence the report of the Auditor in Catharine Pealer's estate, to show that Otis Pealer, by his guardian, had received an excessive amount from the estate which was adjusted through the audit, so as to work a transfer of that excess to the guardian of Alva Pealer. Objected to as irrelevant, because the evidence offered does not tend to show that the defendant is the owner of any claim against Samuel Appleman or Otis Pealer. Objection sustained—evidence excluded. (First assignment of error.)

The Court (H. M. HINCKLEY, P. J.) charged the jury, *inter alia*, as follows: "This question of Mr. Miller's compensation is a question of fact for you to determine: you must do this from the testimony that has been given in the case. If you believe that Mr. Miller has performed services, for which he has received no compensation, then it would be your duty to inquire what those services were worth, and, in arriving at a decision upon that question, you will be guided by the testimony which you have heard from the witness stand; [having arrived at a decision as to what that should be, then it would be your right to deduct that amount from the amount otherwise due the plaintiff, and to render a verdict in favor of the plaintiff for the difference.] It is contended by plaintiff's counsel that Mr. Miller's work was so negligently and improperly done, and that it has made the plaintiff so much trouble to collect the balance, that Mr. Miller is entitled to no compensation. If it is true, as is

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contended by plaintiff's counsel, that this work was negligently done, if it was true that it was so improperly done that it worked great damage and injury to the plaintiff, then, as a matter of law and a matter of common sense, Mr. Miller would be entitled to nothing; if he rendered no service, he is entitled to no compensation. I am unable now to recall any testimony in this case showing such negligence; if there is any you will recollect it. If you find that he did an injury to this plaintiff, then, of course, [he would be entitled to no compensation, but your verdict would be for the whole amount of money collected, with its interest;] and, if you find that Mr. Miller is entitled to compensation, that his services were worth something to the plaintiff, it is your duty to determine what that something is and deduct that amount, as I have already said, from the amount of the debt and interest otherwise due."

Verdict for plaintiff for $128.84, and judgment thereon. Whereupon defendant took this writ, assigning for error, *inter alia*, the rejection of the above offer of evidence and the portions of the foregoing charge included between brackets.

John G. Freeze (*Charles G. Barkley* with him), for plaintiff in error.

Ephraim H. Little (*Robert R. Little* with him), for defendant in error.

The defendant received the money as attorney for the guardian of Otis Pealer; he was therefore bound by an implied contract to pay the money over to the client.

First National Bank of Lock Haven *v.* Mason, 95 Pa. 113.
Tagg *v.* Bowman, 108 Id. 276.
Citizens' Bank *v.* Alexander, 120 Id. 476.
Simpson *v.* Pinkerton, 10 Weekly Notes, 423.

Attorneys have no authority to enlarge the powers of an Auditor. It requires the express agreement of the parties.

Willis *v.* Willis, 12 Pa. 162.

May 6, 1889. The Court. This action was brought by H. H. Hulme, executor of the last will and testament of Samuel Appleman, deceased, to recover from Charles W. Miller, Esquire, $182.29. received by him as attorney for Samuel Appleman, who, in his lifetime, was the guardian of Otis Pealer, in the distribution of the estates of Daniel, Ira, and Elias Pealer, deceased. The defendant does not deny that the money is in his hands, but he alleges that whilst he receipted for it as the attorney of Appleman, guardian, etc., it was, by virtue of an arrangement previously made, applicable to a debt due Alva Pealer, for whom Miller was also acting as an attorney.

The matters alleged by way of defence are in substance as follows: That in the distribution of the estate of Catharine Pealer, deceased, Alva Pealer was entitled as a creditor to a claim of $959.14; but certain of the heirs of that estate, viz: Otis, Hiram, and Enos Pealer had each already received $116.17 beyond their distributive shares, by means whereof the administrators were wanting in funds to complete the distribution; that the parties in interest were represented as follows: Enos, Hiram, and Eli, as heirs, and Hiram and Eli, as accountants, by Samuel Knorr, Esq., Alva, as a creditor, and Otis, Alva, and Savilla, as heirs, by Charles W. Miller, Esq.; that all the parties being thus represented it was agreed by counsel that Alva Pealer should have the benefit, by assignment, of the over-payments stated, and that he should accept them in part payment of his claim; that acting upon this agreement of counsel the Auditor allowed Alva only $610.63, which with the three over-payments of $116.17 each amounted to $959.14, the full value of his claim, and that thereupon Alva became and was entitled to receive from the other estates as they fell in, money that if no error had been made, would have gone to Appleman as guardian of Otis Pealer for re-payment of the same received by him more than his distributive share.

To establish these facts, the defendant offered in evidence the report of the Auditor, which was refused by the Court upon the ground that no assignments were shown to have been made in pursuance of the agreement alleged. It is true there was no formal or written assignment, but the agreement to assign was noted by the Auditor on his report and the adjudication is based upon it. The report was not receivable in evidence for the purpose for which it was offered, but it was proper evidence to show that the claim of Alva was presented to the Auditor; that it was adjudicated in his favor, and was allowed to the amount of $610.63 only under the alleged agreement of counsel; but as between Appleman and Miller it would not be competent proof of the agreement on part of Appleman to repay the money. It is not pretended that Appleman was present in person at the time, or that he then or afterwards agreed to pay the $116.17 to Alva. It does not even appear that Miller made, or undertook to make any such agreement for him; according to the memorandum made by the Auditor Miller simply agreed to accept an assignment, in part payment of Alva's claim—that and no more; and if he had, we think, without proof of express authority, he would not in such a case be bound by the action of his attorney. The overpayment to Appleman appears to have been voluntary, and he was not legally bound to refund; "when an administrator pays out money," says our brother Paxson in Montgomery's Appeal (92 Pa. 206), "he is presumed to know the condition of the estate. The assets are in his hands, and he is familiar with their amount and value. He ought to know, and is chargeable with knowledge

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of the amount of claims against the estate, when he makes a payment on account of a distributive share. It would be a great hardship upon distributees to whom an administrator has voluntarily made payments on account of their shares if they may be called upon for repayment after the lapse of years. They may have spent it, or increased their style of living in entire good faith and in ignorance of any overpayment." So here, the guardian may have expended the money, or made himself liable for his ward upon the faith of it. That the payment must be regarded as a voluntary payment, is settled by numerous cases. (Carson *v.* McFarland, 2 Rawle, 118; Hinkle *v.* Eichelberger, 2 Pa. 483; Edgar *v.* Shields, 1 Grant's Cases, 361; Natches *v.* Natches, 47 Pa. 496.) An attorney by virtue of his employment as such merely, has no general power to create and impose a legal obligation on his client under such circumstances.

As Appleman had received money from the estate of Catharine Pealer, deceased, to which, in good conscience, he was not at the time entitled, there was, perhaps, a moral obligation to repay; it may be also that Alva's partial relinquishment of his right to participate in the fund in relief of the administrators, and in aid of the distribution, was a sufficient consideration to support an agreement; yet, as we have said, it does not appear in the proofs that any such agreement was at any time made, either by Appleman or by any one for him.

Moreover, Miller was not only the attorney for Otis Pealer, or his guardian, but also for Alva, and even if the power to bind Appleman might be implied from his professional relation merely it would certainly not be competent for him, of his own motion, as attorney for the former, to make a contract with himself, as attorney for the latter, which would bind Otis or his guardian for repayment of the money.

In the absence of any proof or of any offer to prove an express agreement on the part of Appleman to refund this money, or of an agreement to that effect made under his direction, or approved or ratified by him, the report of the Auditor was rightly refused.

We have no doubt Mr. Miller throughout this whole transaction acted in the utmost good faith, with the intention of saving trouble and litigation, but according to the admitted facts, the law is clearly against his right to retain the money.

The judgment is affirmed.

Opinion by CLARK, J. H. S. P. N.

Jan. '89, 325. April 10, 1889.

Howe's Appeal.

Wills—Construction of—Intention of testator—Intestacy.

Where a testator by his will provided that after the payment of his debts and funeral expenses, "all my property consisting of bonds, mortgages, ground rents, stocks, and personal effects in the State of Pennsylvania be sold" and the fund divided among the children of his sister and his adopted daughters, a lot of ground in Pennsylvania will not pass under this provision of the will.

The words "all my property consisting," etc., do not mean all the testator's property in Pennsylvania.

In ascertaining a testator's intention the words he has chosen must be read according to their plain and ordinary meaning, and the interpretation must be in conformity with the meaning of the words rather than with some supposed meaning of the testator.

While a testator is to be presumed as intending not to die intestate, yet the heir is not to be disinherited except by express words or necessary implication.

Baker's Appeal, 115 Pa. 590, followed.

Appeal of Elizabeth D. Howe, Mary J. Hansell, Walter G. Howe, William M. Howe, Annie M. Caldwell, Philip F. Igoe, guardian of Robert J. Igoe, and Mary E. Loder, heirs-at-law of George H. Howe, deceased, from the decree of the Common Pleas No. 4, of Philadelphia County, distributing the proceeds of a sheriff's sale.

George H. Howe died on March 14, 1881, seised, *inter alia*, of certain premises on the west side of Forty-first Street, north of Powelton Avenue, having first made his will as follows:—

After the payment of all my just debts and funeral expenses I do order that all my property consisting of bonds and mortgages, ground-rents, stocks, and personal effects in the State of Pennsylvania, be sold and, after deducting my funeral expenses and debts, as aforesaid, I do order that the remaining sum be equally divided among the children of my sister, Elizabeth D. Howe, the children of my adopted daughter, Elizabeth Supplee, and the children of my adopted daughter, Sarah Ann Shaffer. All the children living at my decease to have share and share alike. I also give and bequeath to my dear sister's daughter, Jane, all my property in Pendleton County, State of Kentucky, and I hereby nominate and appoint Jeremiah T. Wilson, of Philadelphia, State of Pennsylvania, executor of this my last will and testament.

The Forty-first Street lot was afterwards sold for taxes by the sheriff and the proceeds of this sale were paid into Court.

The fund was claimed by the children of the sister and adopted daughters, as legatees under the foregoing will, and by the heirs-at-law of the said George H. Howe who alleged that he had died intestate as to such real estate.

The matter was referred to Henry V. Massey, Esq., as Auditor, who reported that the said

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George H. Howe died intestate as to the lot sold, as above set forth, and the same did not pass under his will but vested in the heirs-at-law, and awarded the fund to the said heirs.

The executor of the said will and the children of Elizabeth D. Howe and the adopted daughters excepted to these findings of the Auditor, and the exceptions were afterward sustained by the Court, in an opinion by WILLSON, J., and the fund awarded to the exceptants. Whereupon the above appellants took this appeal assigning for error the action of the Court in sustaining the foregoing exceptions and in making the said decree of distribution.

Edwin Saunders Dixon, for appellants.

Edwin O. Michener, for appellees.

May 6, 1889. THE COURT. The will of the testator is very brief. The substance of its dispositions is contained in the following words: "After the payment of all my just debts and funeral expenses I do order that all my property consisting of bonds, mortgages, ground-rents, stocks and personal effects in the State of Pennsylvania be sold and after deducting my funeral expenses and debts as aforesaid I do order that the remaining sum be equally divided among the children of my sister Elizabeth D. Howe, the children of my adopted daughter Elizabeth Supplee, and the children of my adopted daughter Sarah Ann Shaffer . . . I also give and bequeath to my dear sister's daughter Jane all my property in Pendleton County, State of Kentucky." The testator died seised of specific real estate in Pennsylvania which was sold for taxes after his death and on the distribution of the proceeds of such sale the present contention arises; the question is, did the testator die testate or intestate as to such real estate?

It can scarcely be questioned that literally and upon the ordinary reading of its very terms, the clause relating to property in Pennsylvania has a limited signification. The words "all my property consisting of bonds and mortgages, ground rents, stocks and personal effects in the State of Pennsylvania" include so much of the testator's property in Pennsylvania as comes within the designated description. They do not mean all the testator's property in Pennsylvania. To give them that meaning we must strike out as surplusage the remaining words of the clause after the words "all my property;" we have no right to do this, because the testator has inserted them, and it is not within the function of the Court to make a will produce a certain meaning by eliminating operative words which the testator has written into it. It is his undoubted right to do as he pleases with his own, and it is the business of the Courts to enforce the wishes he has expressed. We are therefore not at liberty to read this will literally as we would read it if the descriptive words which follow the words "all my property" were left out. We must declare the testator's meaning with all those words in. The Auditor in the Court below held that the testatator died intestate as to the real estate sold for taxes, but the learned Court thought differently and held that it passed by the terms of the will. Such a ruling can only be sustained upon the theory that it is necessary in order to effectuate the testator's intention. But in ascertaining such intention the words he has chosen must be read according to their plain and ordinary meaning, and the interpretation must be in conformity with the meaning of the words rather than with some supposed meaning of the testator. We can see no ambiguity in the words of this will and therefore have no occasion to resort to rules of interpretation which are intended only for the solution of ambiguous language. One of these rules chiefly invoked in the present case, is, that a testator is to be presumed as intending not to die intestate, but another rule of quite equal, and perhaps still greater force, is that the heir is not to be disinherited except by express words or necessary implication. Thus in Rupp *v.* Eberly (79 Pa. 141), we said: "The maxim is imbedded in the common law that an heir can be disinherited only by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed. (1 Jarman on Wills, 465.) That this rule has been uniformly recognized in Pennsylvania is proved by all the cases in which the point has been discussed." (Bender *v.* Dietrick, 7 W. & S. 284.) It is argued with great earnestness for the appellees that the words "all my property" must be construed as evincing an intention to dispose of all the testator's property in Pennsylvania both real and personal. If there were no other words of description of course this conclusion would be inevitable, but the mere fact that there are other words, which being literally read, do restrain the generality of those words and limit them to certain individuated species of property, is itself proof that they were not intended to have their general meaning; else why insert the additional words? We cannot say they were uselessly and unmeaningly written into the will. On the contrary we find them there and must, if we can, enforce them because they are there. Moreover we have quite recently declared the meaning of the same words in a similar collocation. In Baker and Wheeler's Appeal (115 Pa. 590), the testator directed as follows: "I leave and bequeath all my property (as stated in my father's will) to my wife Mary S. Wheeler." We held there was no ambiguity in these words and that although the words "all my property" were used by the testator their meaning must be

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limited to certain property of which he had a power of disposal by his father's will. We regard this case as entirely analogus to the present. The immediate collocation in both cases limits and restrains the application of the words in their general sense. In the case we are now discussing this conclusion is strongly enforced by other considerations. Thus the word "ground-rents" indicates an interest in real estate, and this is given by express mention and the maxim *expressio unius est exclusio alterius* becomes applicable. But in addition to this the testator adds as part of the words which complete the description of the property given, the words "and personal effects" thus plainly showing that while he was including, and manifestly intended to include, all property of a certain class to wit, "personal effects," he intended nothing more. Surely if he had intended to include also all "real estate" he would have said so in this immediate connection, or at least would not have said "and personal effects" only. Still further is this construction enforced by the consideration that the property enumerated is not given in specie but is to be sold and the proceeds to be divided. Hence if we hold that the language in question includes the testator's real estate, we must hold that a power to sell all the testator's real estate is given by this will. To the creation, and for the execution, of such a power as this, there is not a single appropriate word in this will. No power to sell real estate is expressly given, except as to the ground-rents; no allusion even is made to the lot and buildings on Forty-first Street, or to the lot of ground on Race Street, Philadelphia, much less is any express power given to the executor or to any one, to sell them, and if we find such a power to exist under this will we must find it entirely by inference and without any appropriate words whatever. We are not authorized to take such a liberty. Testamentary powers to sell real estate are of the utmost importance. They are a vital part of the title to be passed to the purchaser and should be clearly expressed and not to be left to rest only upon a doubtful inference. Recurring now to the disposing clause of the will let us repeat it in the light of the foregoing suggestions: "I do order that all my property consisting of bonds and mortgages, ground-rents, stocks and personal effects in the State of Pennsylvania, be sold", etc.

The plain and ordinary meaning of these words is that the testator directs that so much of his property as consists of bonds and mortgages, ground-rents, stocks and personal effects, in the State of Pennsylvania to be sold, and the proceeds divided in a certain way. As to any other property he may own in Pennsylvania there is no direction. He takes especial care to order the sale of all his personal property, and one kind of real estate. Other kinds of real estate are not included, and that circumstance is evidence they were not intended to be included, but all kinds of personal estate are included by express mention, and this is most persuasive evidence that he could not have intended to include specific pieces of real estate not mentioned or embraced within any clearly apt words of general description.

When the testator desires to dispose of his real estate in Kentucky he speaks with perfect plainness thus: "I also give and bequeath to my dear sister's daughter Jane, all my property in Pendleton County, State of Kentucky." If he had desired to make a similar disposition of his property in Pennsylvania we must infer he would have used similar words. The fact that he did not is evidence that he did not so intend, and as this view of the case conforms to our view of the other aspects of the will we are obliged to hold that the real estate in question, not having been devised away from his heirs by the will, passed to them under the intestate law, and therefore they take the fund arising from its sale.

The decree of the Court below is reversed at the cost of the appellees, and the record is remitted with instruction that the fund in Court be distributed according to the report of the Auditor.

Opinion by GREEN, J. H. S. P. N.

Jan. '89, 117. March 6, 1889.

Keim's Appeal.

Wills—Construction of—Life estate—"Children"—Word of purchase—Bills of review.

Primarily and generally the word "children" in a will is a word of purchase, and while it may be used to signify "heirs" or "heirs of the body," it will not be so construed unless the testator has employed other words indicative of an intention to use it as a word of limitation.

Under a devise to tenants in common for life, with remainder to their children in equal shares, or their heirs, the first takers have no freehold of inheritance. The fact that the first takers were without children when the will was made, as well as when it took effect by the death of the testator, does not change the rule.

H., by her will, devised a lot to her two nephews, I. K. and B. K., "in common during life . . . to be enjoyed by the said I. K. and B. K. during life, and immediately after their decease the same shall descend to their children in equal shares, or their heirs, yet so that the children of each only divide the share that belonged to their father." On petition of the devisees, the Orphans' Court ordered a private sale of the lot under the Price Act, and appointed B. K., one of the devisees, trustee to make the sale, which he did for $5504.12. Both of the devisees subsequently died,

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never having had any children. B. K. died testate leaving a widow, his executrix, who filed her account of the money received by B. K. for the lot devised by H. This account was duly confirmed, and the Court ordered the balance to be paid to the administrator d. b. n. c. t. a. of H., which was done. Subsequently the widow of B. K. presented a petition claiming that under H.'s will B. K., her husband, was entitled to one-half the proceeds of the sale of the lot absolutely, and not merely to the interest thereon during his life. She therefore prayed for a bill of review:

Held, that the will gave a life estate in the lot to B. K. and his brother as tenants in common, with the remainder to their children respectively, and that as both tenants for life had died without ever having had any children, the money which represented the land reverted to the estate of the testatrix H., to be distributed under the residuary clause of her will.

In the next preceding clause of her will, H., after giving a life estate to other two of her nephews, directed that, immediately after the death of either life tenant, "the undivided half of the one so dying shall go to and be enjoyed, in equal shares, to his children or to their heirs:"

Held, that this showed an evident intention by the testatrix that the remainder thus disposed of should go to the children under the provisions of her will, and not that they should take as heirs of their deceased parent.

Held also, that the use of the word "descend" in the devise in question was not sufficient to overcome the evident intention of the whole will.

Semble, that a bill of review is too late after the money has been actually paid to the person entitled thereto, in accordance with the decree of the Court.

Appeal of Sara L. Keim, executrix of De Benneville Keim, deceased, from a decree of the Orphans' Court of Berks County, dismissing her petition for relief, and the citation granted upon Abner K. Stauffer, administrator d. b. n. c. t. a. of Esther High, deceased.

The facts in this case are sufficiently set forth in the opinion of the Supreme Court.

The Court below (SCHWARTZ, P. J.) dismissed the petition and citation; whereupon the petitioner took this appeal, assigning for error the above action of the Court.

Horace Roland (*Isaac Hiester* with him), for appellant.

S. M. Meredith (*A. K. Stauffer* with him), for appellee.

April 15, 1889. THE COURT. One of the questions involved in this contention is, whether under the fifth clause of their aunt's will Isaac H. Keim and De Benneville H. Keim took anything more than a life estate in the lot devised to them "in common during life, . . . to be enjoyed by the said Isaac H. Keim and Benneville H. Keim during life, and immediately after their decease the same shall descend to their children, in equal shares, or their heirs, yet so that the children of each only divide the share that belonged to their father."

The question arose thus: On petition of the devisees, in 1856, the Orphans' Court ordered a private sale of the lot, under the Act of 1853, and appointed De Benneville H. Keim trustee to make the sale. He gave bond and sold the lot in pursuance of the order for five thousand five hundred and four dollars and twelve cents ($5504.12). Both of the devisees afterwards died without issue. Neither of them ever had any children. De Benneville H. Keim died testate, leaving a widow, the appellant, whom he appointed executrix. In April, 1886, she filed in the register's office what purports to be "Account of Sara L. Keim, executrix of De B. Keim, who was the trustee for the sale of real estate (devised by Esther High in her last will and testament, proved May 5, 1848, to Isaac H. Keim and De Benneville Keim for life), appointed by the Orphans' Court of Berk's County," etc. In that account she charges herself "with the following sums which have become due and payable upon the death of said De Benneville Keim, deceased, according to the will of said Esther High, deceased:"—

"To amount secured in lot of ground, . . . in which said De Benneville Keim had a life interest a one-half, and which property was sold by order of the Orphans' Court for . .	$5504 12
"To one-half of $5504.12 . . .	2752 06
"To four shares Farmers' Bank stock	244 00
	$2996 06
"Total credits claimed, .	82 50
"Showing balance . . .	$2913 56"

This account was duly confirmed, and on October 19, 1886, the Court ordered $2667.56 of the balance, representing the fund raised by sale of the lot, etc., to be paid to A. K. Stauffer, administrator de bonis non, etc., of Esther High, deceased; and, as appellant represents in her petition, hereinafter referred to, the said sum was paid by her to the administrator de bonis non in pursuance of the order of Court.

In thus settling the account and distributing the balance, the fund arising from sale of the lot was evidently treated as representing real estate in which appellant's husband, De Benneville H. Keim, had merely an estate for life.

In May, 1887, appellant presented her petition to the Orphans' Court, setting forth in substance, *inter alia*, that under the will of Esther High and the proceedings in said Court her husband was entitled to one-half of the proceeds of sale of the lot, absolutely, and not merely to the interest thereon during his life; that through ignorance of her rights, etc., errors occurred in the statement of her account as executrix of her deceased husband and in the decree distributing said balance, and praying the Court that so much

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of the account as she alleged to be erroneous may be reviewed and corrected.

The demurrer and answer to the petition raised two principal questions; (1) Whether the bill of review is not too late after the money has actually been paid to the person entitled thereto in accordance with the decree of the Court; and (2) Whether De Benneville Keim and his brother took anything more than a life estate in the lot under their aunt's will, or in the proceeds of sale after the land was converted into money by virtue of the proceedings in the Orphans' Court.

As to the latter question, the learned Judge of the Orphans' Court was of opinion that the will gave a life estate in the lot to De Benneville Keim and his brother as tenants in common with remainder to their children respectively, but inasmuch as the tenants for life both died without ever having had any children, the money which represented the land reverted to the estate of the testatrix, Esther High, to be distributed under the residuary clause of her will. In this we think he was right. Primarily and generally the word "children," in a will, is a word of purchase, and while it may be used to signify "heirs" or "heirs of the body," it will not be so construed unless the testator has employed other words indicative of an intention to use it as a word of limitation. The devise in this case is to "Isaac H. Keim, and De Benneville Keim, in common during life," to be enjoyed by them "during life," thus clearly defining and limiting the estate given to them. The remainder is given to their children in equal shares, etc. The general rule undoubtedly is that under a devise to one for life, with remainder to his children, the first taker has no freehold of inheritance. The fact that the devisee was without children when the will was made, as well as when it took effect by the death of the testator, does not change the rule. (Cote *v.* Von Bonnhorst 41 Pa. 243).

It is suggested that the use of the word "descend," by the testatrix, indicates an intention that the children should take directly from their respective parents, and not under her will, by way of remainder; but, we think an examination of the whole will discloses no such intention. In the next preceding clause, after giving a life estate to other two of her nephews, she directs that immediately after the death of either life-tenant, "the undivided half of the one so dying shall go to and be enjoyed in equal shares to his children or to their heirs." In this, she evidently intended that the remainder thus disposed of should go to the children under the provisions of her will, and not that they should take as heirs of their deceased parent. On the whole we think there was no error in construing the clause of the will in question.

As to the other question, we incline to think the appellee's demurrer should have been sustained, but the decision of the Court being in favor of appellant, the question is not necessarily before us.

Neither of the assignments of error is sustained.

Decree affirmed, and appeal dismissed at the costs of appellant.

Opinion by STERRETT, J.

May 6, 1889. Re-argument refused.

S. H. T.

Jan. '89, 95. February 1, 1889.

Philadelphia Trust, etc., Co.'s Appeal. Turpin's Estate.

Decedent's estate—Trusts—Increments of stock in the form of stock and scrip dividends, based upon the earnings of the company—When capital, and when income.

Where a corporation having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits.

The form in which a dividend is declared has no bearing upon the question of the title to such dividend.

A dividend when declared becomes a liability of the company as soon as it is payable.

A scrip dividend was declared convertible into stock as soon as the necessary authority to increase the capital stock of the company could be obtained, the company retaining the money, or profits earned, which represent it.

Held, that when converted into stock, the value of the old stock would not necessarily be impaired, for the reason that it represents money, and by the increase of cash capital enables the company to extend its operations.

Dividends of stock and scrip convertible into stock, *held* to be income under the facts in this case.

Appeal of the Philadelphia Trust, Safe Deposit, and Insurance Company, trustees for Emma S. Turpin under the will of Edward A. Turpin, deceased, from the decree of the Orphans' Court of Philadelphia County confirming the adjudication upon the account of said trustees.

Edward A. Turpin died June 22, 1880. He was possessed, at the time of his death, of forty-three shares of the capital stock of the Elgin National Watch Company, of the par value of $1000 each. By the will he gave three-fourths of his estate to the Philadelphia Trust, Safe Deposit, and Insurance Company as trustees for his three children, Emma S. Turpin, Edward B. Turpin, and Peterfield Turpin.

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The provision of his will constituting this trust was as follows:—

6. The remaining three shares or fourth parts I give, devise and bequeath to the Philadelphia Trust, Safe Deposit and Insurance Company, their successors and assigns in trust nevertheless to and for the following uses, intents and purposes that is to hold the same in trust for my three children, Edward B. Turpin, Peterfield Turpin, and Emma S. Turpin, (one of the said shares for each of my said children) during their respective lives as follows viz., to invest and keep the same invested either in the securities I may hold at the time of my decease or in such others as my trustees in their discretion may from time to time purchase not restricting them to legal investments, and I hereby release my said trustees from all liability to loss that may occur by reason of such investments; to collect and receive the income, and to pay the net income so received to my three children respectively, and never by way of anticipation, and so that the same shall not be accessible to any creditor, assignee, or mortgagee of my said children, or any of them, or to any husband of my said daughter. And from and after the decease of my said children respectively, to transfer convey and assign the share held in trust for the one so dying to such person or persons as would be entitled to receive the same under the intestate laws of the Sate of Pennsylvania, in force at the time of this writing, had my said child died seised of such estate absolutely provided that nothing herein contained shall authorize any one to receive any portion who is not of my blood.

At the division of his estate thirty-three of these shares were transferred to the said Philadelphia Trust Company as trustees for his three said children, one-third, viz: eleven shares for each. For some years before the testator's death no dividends had been paid by the said Elgin Company, but at the time of his decease, according to its books the capital stock of the company stood at $884,000 and it had a surplus of $331,-451.96; together, $1,215,451.96. The affairs of the Elgin Watch Company became extremely prosperous from shortly before the testator's decease, and since his death it has paid in cash dividends for the most part ten per cent. per annum, and in one year twenty per cent. Besides that the company has made, as it appears in the adjudication and testimony, two dividends of stock, one on the 1st of May, 1883, of thirteen per cent., amounting to $116,000, and a further dividend of one hundred per cent. on May 1, 1885, amounting to $1,000,000. Notwithstanding these dividends the books of the company still show a large surplus. In May, 1887, this surplus appeared as somewhat over $1,500,000. The company had at that time exhausted its power of issuing stock, and then made what they called a dividend of fifty per cent. in bonds or scrip. The total amount of this issue was $1,000,000, and was represented by twenty year bonds bearing six per cent. interest, which bonds the company reserved a right after five years (viz., after May, 1892), to redeem or to convert into shares of capital stock at par, if by that time it should have acquired the right to make such increase of capital.

The questions involved in the appeal were as to whether the dividends made in stock in 1883 and 1885, and in bonds in 1887, are capital or income under the terms of the will. In order to give an opportunity to raise this question, the Philadelphia Trust Company, at the request of Miss Turpin, one of their *cestuis que trustent*, filed their account of her trust, in which these dividends in stock and bonds were included as capital. The *cestui que trust* for life objected to their being so included, and contended that they should be treated as income. The Auditing Judge sustained her contention and directed the accounts to be modified accordingly. On exceptions filed to this adjudication it was confirmed by the Orphans' Court. (See Turpin's Estate, 21 WEEKLY NOTES, 542.)

This appeal was then taken by the trustees, and the action of the Court assigned for error.

In the case as originally appearing in the Orphans' Court another question was raised relating to a possible equity of redemption in a stranger in some or all of these shares, but since the hearing in the Orphans' Court, satisfactory evidence having been found of the extinguishment of any such possible equity of redemption, this matter was not therefore before the Supreme Court.

Richard L. Ashhurst, for appellants.

While accepting the rule laid down in—

Earp's Appeal, 4 Casey, 368.
Moss's Appeal, 2 Nor. 264.
Biddle's Appeal, 3 Out. 380.
Vinton's Appeal, Id. 434—

we contend that this case is not within the rule. As to the distinction, see—

Brander *v.* Brander, 4 Vesey, 801.
Paris *v.* Paris, 10 Vesey, Jr. 185.
Barclay *v.* Wainewright, 14 Id. 66.
In re Barton Trust, L. R. 5 Eq. 243.
Minot *v.* Paine, 99 Mass. 101.
Clarkson *v.* Clarkson, 18 Barb. 646.
Gilkey *v.* Paine, 14 Atlantic Rep. 205.

John Thompson Spencer, for appellees, cited—

Earp's Appeal, *supra*.
Moss's Appeal, *supra*.
Millen *v.* Guerrand, 67 Ga. 284.

Brandner *v.* Brandner, *supra*; Paris *v.* Paris, *supra*, were overruled in Barclay *v.* Wainewright (14 Ves. Jr. 66), and are not the law in this country.

Clarkson *v.* Clarkson, 18 Barb. 646.

February 11, 1889. THE COURT. The single question presented by this record is whether the stock and scrip dividends declared by the Elgin National Watch Company, are to be distributed to the tenants for life as profits, or retained by the trustee as a portion of the capital

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or *corpus* of the trust estate. It is not denied, that under the the will of Edward A. Turpin, the life-tenants are entitled to the income or profits of this particular stock, nor do I understand it to be disputed that the said dividends were declared out of profits earned by the company. Under these circumstances, the case would appear to come fairly within the rule laid down in Earp's Appeal (28 Pa. 368), and Moss's Appeal, (83 Id. 264). It was said, in the case last cited: "Where a corporation having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits." It was urged however that the present case does not come within this rule, for the reason that the scrip is in the form of an obligation, which might in the future affect the value of the stock, and perhaps destroy it; and thus annihilate the capital of the trust fund. I do not understand that the form in which the dividend is declared has any bearing upon the question of the title to such dividend. The scrip dividend is convertible into stock as soon as the necessary authority to increase the capital stock of the company can be obtained; and had such authority existed at the time, the dividend would doubtless have been declared in stock. Every dividend when declared becomes a liability of the company as soon as it is payable. In this case the company distributes scrip, and retains the money, or profits earned, which represents it. When converted into stock, if it even should be, the issue of the new stock will not necessarily impair the value of the old, for the reason that it represents money, not water, and by this increase of cash capital enables the company to further extend its operations.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

PER CURIAM. H. C. O.

[See next case.]

Orphans' Court.

Oliver's Estate.

Decedent's estate—Principal and income—Life-tenant and remainderman.

Testator gave to his daughter "all the net rents, issues, profits, and income of his estate," and bequeathed his estate, after her death, to a charity. He owned 5582 shares in an unincorporated association having 20,000 shares of stock, which had been formed by himself and others, for the purpose of dealing in and developing Western lands. The company had bought and sold, during his life, about 10,000 acres of land, and had not engaged in mining, or other development of property. At the time of testator's death, this association held 600 acres of land. Its stock was supposed to have a merely nominal value, and in the appraisement of testator's estate his 5582 shares were valued at five dollars. Subsequently it was supposed that this land contained valuable copper deposits, and forty acres of it were sold for $500,000. The association then declared "a dividend out of the profits arising from the sale of land to the Calumet and Hecla Mining Company of $19.50 per share," and testator's executors received accordingly $108,849:

Held, that this sum was income, and payable to testator's daughter, the holder of a life-interest in his estate.

PENROSE, J., dissents.

Sur exceptions to adjudication upon the first account of James B. Chandler and Mrs. Catharine W. Richardson, trustees under the will of George L. Oliver, deceased.

In their account the trustees treated as income the sum of $108,849, received from the Metalline Land Company, an unincorporated association, in which the testator held a large interest. This disposition of this sum was approved by the Auditing Judge (HANNA, P. J.), and it was accordingly awarded to testator's daughter, the life-tenant of his estate. Exceptions were filed by the Merchants' Fund Association, a charitable association, which is entitled to the testator's estate in remainder after the death of his daughter.

The facts will be found stated in full in the opinions following.

J. Bayard Henry and *George Junkin*, for exceptants.

Richard C. Dale and *Henry C. Olmsted*, contra.

March 2, 1889. THE COURT. It seems to be settled as the law of this State that the surplus earnings of a corporation which have accumulated in the lifetime of the testator, but which were not divided until after his death, belonged to the corpus of his estate; but the dividends declared, which have been actually earned since the death of the testator, belong to the income and are payable to the life tenant, no matter whether such dividends are in cash, stock or scrip. The test seems to be that, what has been earned, accumulated, and actually existing in the lifetime of the testator, is principal, but what is earned after his death is income. (Earp's Appeal, 4 Casey, 368; Moss's Appeal, 2 Norris, 264; Biddle's Appeal, 39 Leg. In. 179; Wiltbank's Appeal, 14 P. F. Smith, 256; Thomson's Estate, 11 WEEKLY NOTES, 482, and Turpin's Est., 45 Leg. In. 124, affirmed by the S. C. February 11, 1889. Preceding Case.)

As was said by PAXSON, J., in Moss's Appeal, "We are in no doubt about the law; that can be ascertained with mathematical precision.

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The difficulty is in applying the principles of law, however well settled, to the facts of a particular case." This case furnishes an illustration of this difficulty.

When this testator died there came into the hands of his executors and trustees 5582 shares of stock in the Metalline Land Company of Lake Superior, which were appraised at $5.00. This seems to have been all the value that was placed upon these shares by competent persons at that time.

This company had been formed by the testator, and others in 1862, "for the purpose of purchasing lands, and developing mines of copper and other valuable minerals, and disposing of the same. It was not incorporated, and although it carried on its business in much the same way as a corporation, it must be regarded as what it in fact was, a partnership. It was organized under articles of association, whereby the holding of the titles to the lands as joint tenants, the management of the business of buying and selling lands, and of declaring dividends upon the profits thereof, was vested in three trustees. The capital stock of the company was represented by 20,000 shares, divided among the several stockholders according to their respective interests. The total amount of capital paid in was $38,000.

This company did nothing in the way of developing mines, but confined its operations to speculating in lands, so that between the time of its organization, and the year 1882, about 10,000 acres of land were bought and sold. These sales were made at different times to different purchasers, and out of the profits thereof dividends were declared and paid to the stockholders. At the time of the testator's death 600 acres remained in the hands of the trustees undisposed of, and it does not appear that for a number of years before his death there had been much, if anything, done by the trustees, excepting keeping up the organization of the company, and making assessments upon the stockholders for the purpose of paying expenses, taxes, etc. There had been no sales of land for some time.

This was the status of affairs at the time of the testator's death in June, 1886. Over two years afterwards, as found by the Auditing Judge: "By reason of developments upon lands adjoining those held by the trustees, and which formerly belonged to them, it became the opinion of mining experts that the lands still held by the trustees contained deposits of copper ore of immense value. A great excitement ensued, and producers of copper, and investors and speculators in copper mining stocks became convinced of mines of untold wealth buried in the lands of the Metalline Land Company. These lands immediately appreciated in value beyond the most sanguine expectations of the trustees, and in October, 1888, they sold to the Calumet and Hecla Mining Company forty acres for the sum of $500,000 in cash, or $12,500 per acre."

The trustees then passed a resolution declaring "a dividend out of the profits arising from the sale of land to the Calumet and Hecla Mining Company of $19.50 per share," and there was paid to the accountants on the shares held by them $108,849. The trustees have still on hand belonging to the company 560 acres of land and a large sum of money in cash greatly in excess of the capital, so that it was not impaired by this dividend.

The testator by his will gave to his daughter "all the net rents, issues, profits and income" of his estate, and the question raised is whether this dividend was principal or income.

For the purpose of determining this question, let us first consider what was this company's object and purpose, whether the business was one that was recognized by law, and what was the status of the several stockholders therein with reference to the real estate held by it, and the profits made by any sales thereof.

All these questions were settled by the Supreme Court, in Kramer *v.* Arthurs (7 Barr, 165), in the case of the Pittsburgh Land Company, which was an unincorporated company organized to deal in lands as this was.

Chief Justice GIBSON says: "That an incorporated joint stock company is an ordinary partnership, and that there may be a partnership, to deal in lands, are elementary principles that have not been disputed. The latter was expressly recognized by this Court in Brady *v.* Colhoun's Admin'rs (1 Penna. Rep. 147). Partnerships, says Gow on Partnerships, page 6, 'are not necessarily confined to trades in commercial adventures. They may lawfully exist in cases unconnected with commercial speculations. For instance a partnership may exist between attorneys and farmers as well as between merchants or bankers.' It would be absurd to let the nature of the article dealt in change the nature of the contract; or not to let partners give to the land the attributes of a commodity, as between themselves and those standing in their places, especially in a country where it is a chattel for the payment of debts, and not infrequently a subject of speculation. Where it is brought into a concern as stock, it is, as between the partners and the person who has knowingly dealt with one of them for it, to be treated as personal estate belonging not to the partners individually, but to the company collectively. The members of this company being sharers of profit and loss, were partners to the world, but between themselves they had only a contingent

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interest in the profits to be derived from the lands when the concern should be wound up, not a vested estate as tenants in common of the lands themselves; and to a purchaser with notice or its equivalent, neither of them could part with more, either by a voluntary or involuntary conveyance."

The interest of the estate of George L. Oliver then was not a vested estate in the lands, but a contingent interest in the profits to be derived from them when sold.

If this position is correct then there is no force in the argument urged by the remaindermen, that as the copper in these lands was what made them valuable, and it existed at the time of the testator's death, the value was then there, and although its extent was not ascertained, its product must be regarded as part of the corpus of the estate.

The force of this argument is still more weakened when we consider that the intrinsic value of the land sold is not even ascertained to-day. The price at which it was sold was purely a speculative one, and based, perhaps, upon a fictitious valuation, resulting from the excitement incident to the supposed discovery of a valuable vein of copper ore. Time may yet develop the fact that there is no increased value in the land, or, if there is, it has been greatly overestimated. There have been too many hundreds of thousands of dollars lost by people who have bought land, supposing that the bowels of the earth were filled with treasures of gold, silver, coal, etc., to conclude that in this case the value must necessarily be there because the consideration was paid for it. As it is uncertain to-day whether the value supposed to be in these lands exists, of course it is equally uncertain as to whether it existed at the time of the death of the testator, but whether it existed or not can make no difference, for the interest of the testator therein was not in the lands, but in the prospective profits of a company dealing in them, in which company his interest was represented by the number of shares of stock which he held.

The next consideration is whether the phenomenal "profit" was earned since the death of the testator. Perhaps the fact that this profit is so extraordinarily large is the reason why we have this case to consider. If it had been an ordinary dividend upon these shares the right of the life-tenant thereto would not have been called in question, but the principles which govern must be the same, without regard to the amount. The general meaning of the word "earn" is "to acquire by labor, service or performance, to deserve and receive as compensation," and whenever we use the word it necessarily implies some labor or service for which the earnings are the reward. In this case the company did nothing upon these lands since the death of the testator, and for a number of years prior thereto. In fact it does not appear that it ever did anything but buy the land, pay the taxes as they fell due and payable, and wait for an opportunity to sell as customers offered. This seems to have been the object and purpose of the organization, to buy and sell lands, and as it had abandoned the scheme of developing land for mining purposes, this then was the only way by which it could earn any profits for the shareholders.

Now, it so happened, that over two years after the testator's death, while the company was carrying this land in pursuance of the purposes of its organization as just stated, by reason of a fortunate circumstance a purchaser was found for a small portion of it at an enormous price, and a large profit was realized on these shares of stock, which at the time of the testator's death were appraised at a mere nominal sum. Now when was this profit earned? The profit was the fruit of the sale, and a sale for the purposes of profit was the object of the company's organization. It seems to us that the profit was earned when the sale was accomplished. There had been nothing done before that time to earn this profit, and all that was then done was the action of the trustees of this company in taking advantage of this speculative "boom" in copper mines, and then negotiating this very advantageous sale of a part of this land before the bubble should burst. The effecting of this sale is how the profit was earned, and as this took place long after the death of the testator, we think it is a profit which, under his will, belongs to his daughter.

The exceptions are dismissed, and the adjudication confirmed.

Opinion by FERGUSON, J.

Dissenting opinion by PENROSE, J.

Unquestionably the sale by "The Metalline Land Company of Lake Superior," since the death of the testator, of forty acres of land in Michigan, has resulted in immense profit upon his original investment in 1864; and the gain appears still larger if the value of his ownership at the time of his death is to be estimated by the appraisement of what was called his "stock" in that company. But the question for consideration, as between the persons taking under his will for life and in remainder, is, to whom does that profit go? and in the consideration of that question the fact that the profit was large or small does not furnish the least aid.

If the ownership had been simply that of stock in an incorporated company, it is not easy to see, under any of the authorities in this State, how a distribution of the proceeds of sale of part of the lands composing the capital of the company—even though its business was that of

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buying and selling lands—could be regarded as income to which the tenant for life is entitled. The test by which this is to be determined, according to the well-established, common-sense rule of Earp's Appeal, is, when was that which had been divided as profit earned? If in the lifetime of the deceased stockholder, it forms part of the capital of the estate owned by him when he died; if it was earned after that event, it is regarded as income. But if it arises from a sale of the very property itself, owned by the company in the lifetime of the stockholder, can the profit be said to have been earned or to have arisen after his death? The price at which the sale is made merely ascertains the value of that which existed at and before such death precisely in the condition in which it was at the time of the sale. *Non constat* that if previously offered it would not have brought the same price, or at least a large advance over the first cost; and whether it would or not, if the thing sold was capital, how could the proceeds be anything else, no matter when the rise in value occurred? Suppose a ticket in a lottery—chartered, we will say, under the laws of Louisiana—purchased by the testator for five dollars, after his death draws a prize of $10,000; or that in a pile of oyster-shells which had accumulated in his cellar during a long period of years the executor discovers a pearl of immense size and beauty; or, to bring the case still nearer that now before us, that some speculator or visionary, imagining that it contained such a pearl, chose to buy the worthless shells for some fabulous sum; what would be thought of a claim by the person to whom the testator has given the income of his estate only?

Vinton's Appeal (3 Outerb. 434), it appears to me, decides this case, still treating it as one involving merely the ownership of stock in an incorporated company. That case decides that where a corporation makes a sale of its property or franchises and distributes the proceeds in the shape of a bonus to its stockholders, this is considered as capital, and will be reinvested for the benefit of the remainderman, irrespective of the intention of the corporation—a principle which seems to be generally recognized. (Wheeler *v.* Perry, 18 N. H. 307; Heard *v.* Eldredge, 109 Mass. 258; Gifford *v.* Thompson, 115 Id. 478; Barclay *v.* Wainewright, 14 Vesey, 66; Clarkson *v.* Clarkson, 18 Barb. 646; Reed *v.* Head, 6 Allen, 174; Balch *v.* Hallet, 10 Gray, 402, etc.) As was well said by the Judge in the Court below, in Vinton's Appeal, "The capital of a company is not merely the value of the shares. Everything which is necessary to carry into effect the purposes of the company is capital. Even where profits assume this character they become capital, and cannot be treated as profits nor can they cease to be capital. Capital is necessarily a homogeneous whole. If this were not so it might be converted, piecemeal, into profits or something else and be extinguished." Of course, the proportion which the entire capital bears to the part sold does not influence or change the result. The proceeds of capital, or any part of it, stand in the place of the capital itself, and the name by which they may be designated by the directors cannot alter their nature. *Mutato nomine fabula de te narratur.* As was said by Chief Justice GIBSON, in Commonwealth *v.* Pool (6 Watts, 32), in speaking of the effect of a sale in partition, the sale "works a conversion of the form without a transmutation of the essence." The law looks, not at what is said, but at what is done.

It does not do to say that Vinton's Appeal was not decided by a unanimous Court. It has never been reversed, and we are not to assume that it will be. *Stare decisis* is a rule which we, at least, are bound by, however it may be with the Supreme tribunal.

But we may concede that under the process suggested by Judge BLACK in his dissenting opinion in Hole *v.* Rittenhouse, Vinton's Appeal will take the regular course—distinguished, doubted, overruled: its being thus treated will not affect the present case. The testator was not the mere owner of stock. The so-called company was simply a partnership, and the certificates of "stock" were nothing but the evidence of his ownership of a proportionate part of the property belonging to the firm. We cannot escape this aspect of the case or the consequences flowing from it. The partnership, it is true, was of a peculiar character; that is to say, the share of each partner was freely assignable—either in whole or in part—without causing a dissolution, the assignee being at once recognized as a member, and as such becoming entitled to all rights of ownership. There was, however, no provision made as to the period during which the business should be carried on, nor for the contingency of the death of an owner. It cannot be questioned that any living owner might, at his pleasure, dissolve the firm and insist upon a winding up of its affairs; nor is it easy to see anything in the articles of association to avoid dissolution as a consequence of the death of a member. That the question has not heretofore been raised is quite immaterial.

The tenth article of the partnership agreement provided the form of the "stock" certificate and the method of its transfer; but all of this, under the twelfth article, might be changed at any meeting of the stockholders by a vote of two-thirds. On the other hand it was provided by article second—which in the article just referred to was declared to be "fundamental . . . bind-

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ing upon all interested"—as follows: "The property of the company shall be divided into twenty thousand shares of five dollars each, each of which shall *entitle the proprietor to an undivided twenty-thousandth part of all the property which now belongs or may hereafter be acquired by the company, or which may hereafter be in any way held by the trustees* hereinafter named or their successors in said trust for the use and benefit of the said company." In other words, the stock certificates were designed only to facilitate the transmission of ownership, and the rights of the owners bear no resemblance to the rights of stockholders in the usual and proper sense of the word.

The testator retained his ownership in the property under this article, from 1864 to the time of his death, in the proportion to the whole of 5582 to 20,000—or more than one-fourth of the entire assets; and such ownership became fixed at the instant of his death, as part of the corpus of his estate, though the legal title was still in the trustees appointed in the partnership articles. His will directs that at the death of the tenants for life the principal of the residue and remainder of the estate, real and personal, of which he "may die seised," shall go to the Merchants' Fund Association for the purposes there set forth; there being given to the tenants for life, in the meantime, "all the net rents, issues, profit, and income" of such residue and remainder. Of what did he die "seised?" for it is that which must determine the rights of the respective parties to whom the estate is thus given. Clearly, under the article just referred to, what he was seised, or possessed of, if the ownership is to be regarded as personalty, was not shares of stock, but the 5582-20,000 of the lands belonging to the partnership—subject, of course, to the payment of the liabilities of the firm and the settlement of partnership balances; and the surviving members of the firm, or their trustees, held, to the extent of his ownership, in trust for, and liable to account to his representatives. It is wholly immaterial whether his interest be regarded as real or personal estate, or whether it consisted of his original investment only or of profits or accretions thereon; whatever he owned was capitalized by his death and the terms of his will. As a matter of law, however, it may be remarked that while during the continuance of a firm, and until the settlement of its affairs, lands belonging to it are treated, as between the partners, as personal estate (and this is all that was decided in Kramer *v.* Arthurs 7 Barr, 165, and in innumerable other cases: Erwin's Appeal, 3 Wright, 535; Meily *v.* Wood 21 Smith, 488; etc. etc. etc.), there is a resulting trust in favor of the heir or devisee after such settlement has taken place. (Foster's Appeal, 24 Smith, 391). The distribution of the proceeds of the lands sold by the trustees, shows that all partnership demands have been fully satisfied; and the purposes of the conversion having thus been accomplished, the decedent's share of such proceeds resumes, in equity, its original character. It has never been supposed that any increase in the value of partnership assets accruing after the death of a partner and before final liquidation was to be treated as income; nor is it made any more so by reason of the fact that the liquidation is partial only and that there still remains other property in the hands of the surviving members.

Even where an investment of a fund is made—in personal securities or land—during the continuance of a life estate, any gain by reason of appreciation of investment, no matter how purely speculative and unreal it may be, belongs to the remainderman and not the tenant for life. (Hubley's Estate, 16 Philadelphia, 327; Middleton's Appeal, 7 Outerbridge, 92; Scholefield *v.* Redfern, 32 L. J. Ch. 627.)

It may be added in conclusion, though the fact is not at all important, that both the purchaser of the lands and the surviving partners regarded the transaction as something different from a sale by a company; and the ratification of the sale by the shareholders, conveying all their "right, title, and interest in the land," was stipulated for and given. And the same idea is manifested by the receipt taken for the sums distributed, which, instead of being for a dividend or share of profits earned, is as follows: "Received from the Metalline Company of Lake Superior the amounts standing opposite to our respective names at the rate of nineteen dollars and fifty cents for every share of stock held by us as partners in said company, being in full for the third dividend, declared November 2d, 1888, and payable on and after November 3d, 1888. This dividend is made with funds received by the Company . . . . from the sale of forty acres of land . . . . situated in Houghton County, Michigan, to the Calumet and Hecla Mining Company, completed October 27th, 1888."

The testator died in June, 1886; and the sale so made was the first that had taken place since 1882. All of the lands were purchased prior to 1865, and nothing was ever done in the way of developing them.

In my opinion the exceptions on behalf of the Merchants' Fund Association should be sustained, and the testator's share of the proceeds of the land sold to the Calumet and Hecla Mining Company directed to be held as part of the corpus of the estate. J. D. B., Jr.

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January 23, 1889.

Humphries's Estate.

Will—Undue influence—Testamentary capacity —Issue, when awarded.

An issue to test the validity of a will, will be granted only on evidence sufficient to sustain a verdict against the will.

Fraud, restraint, or other undue influence must be shown by either direct or circumstantial evidence to have been a present operating restraint or influence at the very time of making the instrument.

Sur appeal from register, and demand for an issue.

The facts are set forth in the opinion of the Court.

Edward Barry (*George W. McPherran* with him), for contestant.

When Mrs. Humphries married the testator she had another husband living, from whom she erroneously supposed she had obtained a divorce. The first husband reappeared, and the fact that he was living was known prior to the execution of the will. Therefore, as Mrs. Humphries was not legally the wife of the testator, the burden of proving the will was shifted upon the proponent, and was in itself sufficient to send the case to a jury.

Dean *v.* Negley, 5 Wright, 317.
Main *v.* Ryder, 3 Norris, 217.

James M. Beck (*William F. Harrity* with him), for proponent.

While the marriage might have been invalid through the innocent mistake of the parties, yet this fact so explained, would not in itself raise a presumption of undue influence.

Wainwright's Appeal, 89 Pa. 220.

February 2, 1889. THE COURT. After a careful consideration of the entire testimony, we fail to discover any sufficient reason to justify the award of an issue upon either ground alleged by the contestant.

The testator, although advanced in years, and suffering from a disease which proved fatal within a few hours subsequent to the execution of the will, was fully conscious at the time of its preparation and execution, of his own volition sent for his conveyancer, a well known and reputable citizen, who had transacted his business for years, and when he reached his bedside, clearly and intelligently gave him the necessary instructions for the preparation of his will, indicated to him, voluntarily, the sole object of his bounty, his wife, with whom he had lived for nearly thirty years, named the executors he had selected, and after the paper was prepared and read over to him expressed his satisfaction with its provisions, and then affixed his signature to it, and acknowledged it to be his will in the presence of his attending physician, the conveyancer, and the husband of a stepdaughter, whom he had appointed an executor. No other person was present, and neither of the three witnesses made any suggestion whatever to the testator respecting the disposition of his estate. His wife was ignorant of the preparation and execution of the will, and did not enter his room until perhaps half an hour after it was signed; and when she did so the venerable dying man cheerily greeted her with the remark, "Manda, I've made you my banker," to which she naturally and affectionately replied, "Never mind, Danny, only get well; never mind talking about anything else."

Little need be said after the recital of such a touching scene as this, except that the testimony is most clear and convincing that the testamentary capacity of testator was unaffected either by the infirmities of age, or the disease from which he was suffering and so speedily caused his death. And the remark of Chief Justice SHARSWOOD, in Wainwright's Appeal (89 Pa. St. 220), "There was never a case in which a will was executed less liable to exception on this ground," may well be applied in the present case.

And so with the alleged undue influence exercised by the sole beneficiary upon the mind of testator. This is also unsupported. As already stated, she was not present at the execution of the will, and there is not a *scintilla* of evidence that she was remotely connected with either its preparation or execution. And in reply to the earnest argument of counsel upon this point, it will suffice to say, it is fully disposed of by the law as laid down in Dean *v.* Negley (5 Wright, 317); Main *v.* Ryder (3 Norris, 217), and Wainwright's Appeal (*supra*).

In the latest reported case upon the subject, Herster *v.* Herster (23 WEEKLY NOTES, 117), the rule settled in Wainwright's Appeal (*supra*), Knauss and Seip's Appeal (114 Pa. St. 10), and Herster *v.* Herster (116 Id. 612), is reiterated by the Court in an elaborate opinion by Justice CLARK.

It follows, therefore, that to warrant the granting an issue, there must be evidence sufficient to sustain a verdict against the will. And the fraud, restraint, or other undue influence must be shown by either direct or circumstantial evidence to have been a present operating restraint or influence at the very time of making the intrument.

No such evidence appears in this case.

The issue is therefore refused, and the appeal dismissed, each party to pay his own costs.

Opinion by HANNA, P. J. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JUNE 21, 1889.* [No. 8.

Supreme Court.

Jan. '89, 436. May 1, 1889.

Altenburg v. Commonwealth.

Criminal law—Indictment—Practice—Pleading—High License Act of 1887*—Provisions of section* 17 *discussed.*

The general provisions of the "High License Act," of 1887, are designed to regulate the sale of liquors by the various classes of venders known to the law, and are not directed against the use of such liquors by the individual citizen, and do not interfere with his right to supply his table with them, or furnish them to his family or his guests.

The provisions of sect. 17 of the Act in regard to furnishing liquors by sale, gift, or otherwise, on any election day, on Sunday, or at any time to any minor, person of known intemperate habits, or person visibly affected by intoxicating drink, is not confined to dealers, but is directed against "any person."

Licensed dealers may sell to all persons except those who belong to the excepted classes. A man without a license may give liquors in like manner, but to the excepted classes, no man may lawfully sell or give.

The law does not forbid a farmer or any private citizen from using at his table or supplying to his help or to his neighbors calling at his house, cider, beer, or other intoxicant in a social way, but he may not furnish drink to those intoxicated.

The law does not restrain a man's private indulgence in drink. It does take notice of public drunkenness.

The suspension of the traffic in intoxicating drinks on Sunday, or the furnishing liquor to one already visibly intoxicated, are matters of public concern, and are within the range of a wise exercise of the police power.

A defendant was indicted for furnishing liquors on certain Sundays, in 1888, and acquitted. He was afterwards indicted and tried for furnishing liquors to persons visibly imtoxicated. The Commonwealth introduced evidence to that effect, which was admitted, which covered various days in 1887 and 1888, and among these were several Sundays in 1888. Defendant objected to the evidence relating to the Sundays in 1888, on the ground that he had been indicted, tried, and acquitted upon the general charge of furnishing liquors on Sunday during that year, and that this necessarily covered the charge upon which he was then on trial as to the same Sundays. The record of the indictment for furnishing liquor on Sundays and acquittal, was offered in evidence by defendant, but excluded, and the Court refused to instruct the jury that they must not consider the evidence made use of, or that might properly have been made use of on the former indictment:

Held, to be error.

Error to the Quarter Sessions of Crawford County.

At the September Sessions in 1888, three indictments were preferred against John W. Altenburg. One was for furnishing liquor on Sunday; another for furnishing liquor to persons visibly affected by intoxicating drink, and the third for furnishing liquor to men of known intemperate habits. At the November Sessions, 1888, the defendant was put upon trial on the indictment for selling or furnishing liquor on Sunday. While the jury was out deliberating on this case the defendant was put upon trial on the other two cases, they being by consent of counsel tried before the same jury. The jury trying the Sunday case returned a verdict of "not guilty," the prosecutor and defendant each to pay one-half the costs. The jury trying the other two cases failed to agree, and were discharged. At the February Sessions, 1889, the defendant was put upon his trial for furnishing liquor to men of known intemperate habits. The jury returned a verdict of "not guilty," the prosecutor, naming him, to pay the costs. At the same term the defendant was put upon his trial for furnishing liquor to persons visibly affected by intoxicating drink, during the period of two years prior to September 8th, 1888.

This last is the case in question. The Sunday case covered all Sundays between September 8, 1887 and September 8, 1888. The indictment for furnishing liquor to men of known intemperate habits charged the defendant in four separate counts with furnishing liquor to Peter Rhodes, Washington Proper, George Wheatman, and Milo Higley. The indictment for furnishing liquor to men visibly affected by intoxicating drink was composed of four counts, and the persons named were Peter Rhodes, Washington Proper, Cyrus Bidwell, and David Kightlinger.

At the trial on the last mentioned indictment the Commonwealth offered the same evidence that had been offered at the November Sessions, 1888, when the same defendant was being tried for furnishing liquor on Sundays. The defendant first objected to the evidence touching all Sundays covered by the Sunday indictment, of which he had been found not guilty at the November Sessions, and also put in a special plea as follows: "That at No. 45, September Sessions, 1888, in the Court of Quarter Sessions of Crawford County, the defendant was indicted for furnishing liquor on Sundays, between the 8th day of September, 1887, and the 8th day of September, 1888, and that on the trial of said cause defendant was acquitted, and as to the dates and

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days above given, to wit: all Sundays between the 8th day of September, 1887, and the 8th day of September, 1888, the defendant pleads former acquittal."

All the evidence offered by the Commonwealth concerning the Sundays mentioned in the Sunday indictment were admitted by the Court, notwithstanding objections by defendant. Exception. (First, second, third, and ninth assignments of error.)

The Court directed the parties to go to the jury on the special plea, treating it as a plea of former acquittal.

Upon this point the Court charged the jury, *inter alia*, as follows: "The defendant pleaded not guilty to the various counts in this indictment, and, in addition to the plea of not guilty, filed a plea which is known in the law as a plea in bar, as a denial of the right of the Commonwealth to prosecute at all, because of the fact that the defendant was formerly tried for the same offence, tried on the same facts now set up in this indictment, and was acquitted; and therefore, by reason of the protection which the Constitution gives to every man against a second trial for the same offence, he ought not now to be put upon trial at all. And the question which you are now to determine, as a preliminary question, is the truth or the untruth of the plea set up by the defendant.

"You are not now to inquire whether the defendant is guilty or not of the offence charged in the indictment. That is not before you. [The single question which you are now to determine by a verdict, either in favor of the Commonwealth or the defendant, is whether the defendant has ever been heretofore tried on the facts now set up by the Commonwealth, on the trial of this case. It is not a question as to the weight which you are to give to the evidence offered by the Commonwealth, tending to show the guilt of the defendant of the fact charged in the indictment. That comes afterwards, if you find your verdict on this special count in favor of the Commonwealth.

"You will observe, therefore, gentlemen, the single inquiry for you to make is, was the defendant ever tried on the facts now set up by the Commonwealth, and relied upon for his conviction in this case. And you are to determine that by considering the evidence now offered of the fact charged in the former indictment, and the evidence there offered in support of it.] (Fourth assignment of error.)

"The indictment is for furnishing intoxicating drinks to persons visibly affected by intoxicating drink. The offence charged in the former indictment, which was tried, was for furnishing liquor to persons on Sunday. The indictments charged distinct offences. There is no connection between the offences charged in the two indictments. Unless, therefore, the evidence now offered on the trial of this case, and material to the determination of this question of the guilt or innocence of the defendant on this indictment, was competent evidence on the trial of the indictment for furnishing liquor on Sunday, your verdict should be for the Commonwealth. In other words, if the Commonwealth has now offered evidence tending to show that the defendant has furnished intoxicating drinks to the persons named, which evidence could not have been admitted on the trial of a person for furnishing liquor on Sunday, then the Commonwealth is entitled to a verdict. . . . .

"The Court instructs you that all the evidence tending to show the furnishing cider or other liquors by the defendant, on other days than Sunday, to any of the persons named in the indictment, is evidence which could not have been offered on the trial of the indictment for furnishing liquor on Sunday. That other indictment charged a specific offence, the gravamen of which was that the defendant, on the Sabbath day, furnished liquor to various persons. If it had appeared on the trial of that case that liquor was furnished Monday, Tuesday, or any other day of the week except Sunday, the evidence would not have been competent evidence. It might have tended to establish the fact that the defendant furnished liquor to some person, but if it did not appear that it was done on Sunday, the evidence would go for nothing. You see, therefore, that evidence that tends to show furnishing liquor to persons visibly affected with intoxicating liquor on week-days is evidence which would not have been admissible on the trial of the case for furnishing liquor on Sunday, and therefore, is directed towards a different offence.

"If, therefore, you find the facts offered by the Commonwealth relate to a different day than Sunday, the Commonwealth is entitled to a verdict on this preliminary issue.

"If you should find a verdict for the Commonwealth on this preliminary issue, then you come back into the box, and try the case on as to whether the defendant was guilty of furnishing intoxicating drinks to persons who at the time the drinks were so furnished, were visibly intoxicated.

"[If you understand the instructions of the Court, you will perceive your inquiry is whether the evidence now offered by the Commonwealth, relates to transactions on other days than Sundays, the charge for selling on Sunday having been tried at the former Court."] (Fifth assignment of error.)

Defendant requested the Court to charge:—

(1) That the issue to be tried by the jury is whether or not the facts specially pleaded in the special plea are true, and not whether the facts

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set forth in the indictment are true. *Answer.* The issue you are trying is the issue as to whether there has been a former acquittal of the defendant on the facts now relied upon by the Commonwealth for the conviction of the defendant. (Sixth assignment of error.)

(2) That under all the evidence in this case touching the special plea, to wit, the plea that defendant was tried to No. 45, September Session, 1888, in the Court of Quarter Sessions of Crawford County for furnishing liquor on Sundays between the 8th day of September, 1887, and the 8th day of September, 1888, and that on that trial the defendant was acquitted of the said offence, their verdict must be for the defendant. *Refused.* (Seventh assignment of error.)

The jury found for the Commonwealth upon the special plea.

Defendant then offered in evidence the record of No. 45, September Sessions, 1888, together with the verdict of not guilty, for the purpose of showing that the question of selling on Sundays had already been determined in favor of the defendant, and asked the Court to withdraw that part of the evidence from the jury.

Objected to for the reason that it is not responsive to the present issue trying, and because the issue that it is responsive to has already been determined by the jury, and the records show that it has been decided in favor of the Commonwealth. The defendant has not been tried for this offence, and is not now the second time in jeopardy.

THE COURT. I know of no legal aspect of the case in which it is competent. I can readily see that it might be desirable to have the fact established, but the only way for the defendant to avail himself of former jeopardy is by pleading. If you can satisfy a jury, or the Court, where the matter is of record, that the fact is as the plea, you have your discharge. Otherwise you have to try the general issue. Offer overruled. Exception. (Tenth assignment of error.)

It appeared that defendant, who was a farmer, living in the country, prepared cider for his family use, which was not sold by him but was drunk by his family, hired help, neighbors, and such friends as called at his house; that as he was finishing his harvesting his employés and himself made up a purse, giving the money to a neighbor, and requesting him to purchase a case of beer. The beer was bought and left on defendant's premises, where it was drunk by the persons contributing to its purchase, and some of their friends.

The jury convicted the defendant upon one count of the indictment, and he was sentenced to pay a fine of $50 and costs, and to an imprisonment of twenty days, whereupon defendant took this writ, and assigned error as above.

H. J. Humes (*R. C. Frey* and *A. B. Richmond & Son* with him), for plaintiff in error.

Pearson Church (*J. D. Roberts, district attorney* with him), for the Commonwealth.

May 27, 1889. THE COURT. The defendant below was not the keeper of a hotel or restaurant, but a farmer. He was indicted and put on trial for furnishing spirituous, vinous, malt, or brewed liquors to persons visibly affected by intoxicating drink. The indictment was drawn under the Act of 1887 known as the High License Law, which makes it a misdemeanor to furnish liquors by gift, sale, or otherwise to persons visibly affected. It is true that the general provisions of the Act of 1887 relate to and are designed to regulate the sale of liquors by the various classes of venders known to the law. They are not directed against the use of such liquors by the individual citizen, and they do not interfere with his right to supply his table with them, or furnish them to his family, or his guests. But when he goes beyond this limit he goes beyond the protection to which a citizen as such is entitled, and his acts become a subject of police interest and control. The 17th section of the Act of 1887, provides that it shall not be lawful "for any person, with or without license to furnish by sale, gift, or otherwise to any person any spirituous, vinous, malt, or brewed liquors," on any election day, on Sunday, nor at any time to any minor, person of known intemperate habits, or person visibly affected by intoxicating drink. This provision is not confined to dealers but is directed against "any person." The thing forbidden is not the sale but the furnishing of liquors to one visibly affected. Whether the furnishing be by "gift, sale or otherwise" is of no consequence so far as the misdemeanor is concerned. The licensed dealers may sell to all persons except those who belong to the excepted classes. A man without a license may give liquors in like manner, but to the excepted classes no man may lawfully sell or give.

The defendant was charged with having furnished liquors to persons who were at the time visibly affected by intoxicating drinks, in other words, visibly intoxicated, and to whom therefore it was unlawful either to sell or give, or in any manner to furnish such liquors.

The Commonwealth offered evidence for the purpose of showing that the defendant had furnished liquors to persons visibly affected on various days in 1887 and 1888, and among these were several Sundays in 1888. The defendant's counsel objected to the evidence relating to the Sundays in 1888, alleging as a reason for such objection that the defendant had been indicted, tried, and acquitted upon the general charge of furnishing liquors on Sunday during that year.

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He alleged that the evidence had been actually made use of on the former trial, and necessarily passed upon by the jury; and that a verdict acquitting him of the charge of furnishing to any person on these Sundays covered the charge upon which he was now being tried, as to the same Sundays. Without insisting on the objection, and making the necessary proof to the Court, the defendant filed, by leave of the Court, an informal plea of former acquittal, and went to the jury on the issue so raised. But the offences charged in the two indictments were different. He had been tried and acquitted upon an indictment charging him with furnishing liquors on Sunday. He was now on trial for furnishing to persons visibly affected. Upon the plea of former acquittal the jury found for the Commonwealth and we do not see how they could have done otherwise. The trial then proceeded on the plea of not guilty, and there was evidence enough independently of that which related to the Sundays of 1888 to justify the jury in finding a verdict of guilty. But the evidence relating to those Sundays was before the jury, and it is impossible for us now to tell whether their verdict rests upon the proof that was properly before them, or on that which had been passed upon on the former trial. The defendant's counsel offered the record of the indictment and acquittal which they gave in evidence on the plea of former acquittal, as a defence under the plea of not guilty, as to the days covered by it, but it was excluded by the Court. They then asked the Court to instruct the jury that in determining the guilt or innocence of the defendant they must not consider the evidence made use of or that might properly have been made use of on the trial of the former indictment. This the Court declined. The result was that the defendant failed to secure in any manner the benefit of his former trial and acquittal, and may for anything that it is possible for us to gather from this record have been convicted for furnishing liquors to a person visibly affected on a Sunday in 1888, notwithstanding his acquittal at the previous term of furnishing to any person on those days. This is due largely to the manner in which the question was raised by the plea of former acquittal. It is probable that the better way would have been to stand on his objection to the evidence, and make his showing to the Court, or if the question was to be raised by plea it should have been by pleading specially, in addition to the general issue, the former indictment, trial, and acquittal as a defence to so much of the present indictment as covered the days included in the former.

If the fact so pleaded were found to be as alleged then the defendant was entitled to the benefit of it. The gist of the offence charged in the first indictment was the furnishing of liquors on a prohibited day; that in the second was the furnishing to members of a prohibited class. The first verdict determined that he furnished liquors to no one on the Sundays of 1888. This included the prohibited classes as well as others, and he ought not now to be called upon to defend himself again from the charge of furnishing on those days. Notwithstanding the manner in which the defendant raised the question by his plea of former acquittal, we think the Court should have taken care that the defendant was not convicted improperly. The jury should have been distinctly advised that the evidence submitted to them on the plea of former acquittal should not be considered as before them on the general question of the guilt or innocence of the defendant; and as the fact of the former acquittal was brought to the attention of the Court, although not perhaps in the most regular manner, the jury should have been told that the defendant ought not to be convicted upon proof of acts done on the several Sundays which were covered by the first indictment.

It is suggested by counsel for the plaintiff in error that there is an important constitutional question involved in this case and they say in reference to it, "We claim the Act of May 24, 1887, does not authorize the conviction of a farmer or private citizen for giving cider or beer to his hired help or neighbors in a social way while calling at his house, and if the law does go that far it is unconstitutional."

It is a sufficient reply to this suggestion that the question is not raised in this case. We incline to the opinion as we have already said that a citizen may use on his own table or in his own house just such beverages as he pleases. That is a matter of private habit or of domestic usage with which the Act of 1887 does not intermeddle. It is only when the conduct of the individual is such that the public morals or the public peace are affected by it, that it becomes a matter of public concern and is subject to the examination and control of the criminal courts. Now the proper observance of the Sabbath, in the judgment of the law making powers in all Christian governments, has an effect upon public morals. The wheels of commerce stop on that day in obedience to the law, and the traffic in intoxicating drinks is suspended. If a licensed dealer cannot be allowed to furnish persons with such drinks on Sunday surely an unlicensed citizen can give no reason why he should be allowed to do so. The furnishing of drink to one already visibly intoxicated is a matter of public concern.

The law does not restrain a man's private indulgence in drink. It does take notice of public drunkenness. If one has already passed the line of sober self control all men licensed or unlicensed must take notice of it and regulate their conduct accordingly. They must not furnish by

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sale, gift or otherwise the further supply of drink that may turn the excited man into an unreasoning brute. Such restrictive provisions, like the laws regulating the sale of poisons and of fire arms, are properly within the range of a wise exercise of the police power and ought to be faithfully enforced.

The Act of 1887 is not directed against the making or use of cider by the farmer. He may both make and use it as he will. He can have it on his table or in his field. That is his personal privilege. But when he allows men to assemble in his barn or about his premises who are visibly intoxicated and he sells or gives to them intoxicating liquors while in that condition, his conduct affects not himself or his family merely, but his neighbors and the public, and becomes a subject of investigation and punishment under the provisions of the Act of 1887.

Judgment reversed, and *venire de novo* awarded.

Opinion by WILLIAMS, J. H. C. O.

Jan. '89, 22. March 12, 1889.

Commonwealth v. Green.

Criminal procedure and practice—Indictment founded upon presentment of grand jury—When sustainable—Presentment of grand jury—Nature and requisites of—Testimony of grand juror as to matters before the grand jury—When admissible.

Upon the examination of witnesses before a grand jury in a case of assault and battery, it appeared that the assault took place in a disorderly house kept by one of the witnesses, one G. The grand jury then made a presentment against G. for keeping a disorderly house. By leave of the Court an indictment against G. was submitted to a subsequent grand jury by the district attorney, and returned a true bill. Upon a motion to quash the indictment a member of the first grand jury was allowed to testify as to what influenced the grand jury in making the presentment under objection by the Commonwealth, and the indictment was quashed:

Held, that the evidence of the grand juror as to the facts relating to the presentment was admissible.

Held further, that the indictment was properly quashed.

A grand juror may testify, not as to his own counsels or those of his fellow jurors, or to any other matters which he has sworn to keep secret, but merely to the nature of the issue or question under investigation, and to the fact that the jury acted upon the testimony, and not upon their own knowledge or observation, in making a presentment.

An indictment cannot be sustained without the previous examination of the accused before a magistrate, except—

(1) Where criminal courts of their own motion call the attention of grand juries to, and direct the investigation of, matters of general public import, which from their nature and operation in the entire community justify such intervention.

(2) Where the attorney-general or district attorney, *ex officio*, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused.

(3) Where the indictment originates by the presentment of a grand jury, which is the notice taken by them of an offence from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the Commonwealth.

Upon a presentment the proper officer of the Court must frame an indictment before the party accused can be put to answer it.

The employment of this power can only be justified by some pressing and adequate necessity, and it must be exercised under the supervision of the proper Court of criminal jurisdiction. In all cases its exercise is subject to their revision and approval.

Where a Court in the exercise of its discretion sustains an indictment founded upon a presentment, and the defendant is brought to trial and conviction upon it, it is quite improbable that the Supreme Court on a writ of error would disturb the judgment; it would only interfere upon a flagrant abuse of this discretion.

Error to the Quarter Sessions of Northampton County.

A presentment was made by the grand jury at the February Sessions, 1888, against Lizzie Green, the defendant, "for keeping and maintaining a common bawdy house for the practice of fornication," etc. By leave of the Court an indictment was prepared and sent to the grand jury at the following April Sessions, charging defendant with keeping a disorderly house, which was returned a true bill.

The case being called for trial, defendant moved to quash the indictment on the ground that it was not based upon an accusation made before a committing magistrate, founded on probable cause, and supported by oath or affirmation; that it was not based upon a presentment by the grand jury made from the personal knowledge or observation of its members, or upon the testimony of witnesses sent before them by the Court; and that the offence is not of that nature which required the extraordinary intervention of the Court to order it to be investigated by the grand jury.

In support of the facts alleged as to the presentment, defendant called as a witness Dr. W. E. Buckman, a member of the grand jury which made the presentment. The district attorney objected upon the ground "that a member of the grand jury cannot be called to testify as to what took place in the grand jury room, or as to what influenced the grand jury as to making their presentment." (Objection overruled.) The witness then testified, that while the grand jury were hearing a case, preferred by one Edmonds against a man by the name of Walp for assault and battery, the testimony showed that the assault had

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taken place at Lizzie Green's house, who was in attendance as a witness. The testimony as to what took place there on this occasion was of such a character that the grand jury of their own motion, without any suggestion from the Court or district attorney, preferred the presentment on which the indictment against defendant was grounded.

The Court, SCHUYLER, P. J., quashed the indictment, saying, *inter alia* :—

"Substantially the same objections were urged, without effect, against the indictment in McCullough *v.* Com. (67 Pa. 30), but in that case the indictment was grounded on a constable's return, a return which the constable was bound to make and which was in the nature of an official information. Besides, the return was made under the sanction of a special oath, which the Supreme Court treated as the equivalent of an oath and charge before a magistrate. So in Com. *v.* Wilson (2 Chest. Co. R. 164), the attempt to quash the indictment failed, although there had been no previous hearing and binding over of the defendant to answer. The indictment in this case was based on a presentment for selling hard cider without a license. But the Court had 'given in charge' to the grand jury by whom the presentment was made the subject of the frequent violations of the license laws and had instructed them to present to the Court any information they possessed which might aid in lessening the evil referred to. There can be no doubt that the grand jury may make a valid presentment in reference to any criminal matter that has been given them in charge by the Court. Brown *v.* Com. (76 Pa. 319), is another case in which the attempt to quash the indictment on the ground that it had been 'sent before the grand jury without previous prosecution, hearing or binding over' proved unsuccessful. The objection in this case, however, was purely technical. There had been a trial and conviction of the same defendant on an indictment found presumably in the regular way, but the judgment was reversed by the Supreme Court. The district attorney then sent up a new indictment, but without a new complaint or binding over. Clearly there was nothing wrong in that.

"The case in hand differs from those mentioned above. Here, during the investigation of an indictment against a third party for assault and battery, the grand jury learned for the first time of the existence of the house kept by the defendant. Following the cue thus received, the grand jury, *of their own motion*, without authority from or even the knowledge of the Court, called before themselves witnesses, and upon the information thus gained they made their presentment. It is not pretended that a single grand juror had any personal knowledge respecting the defendant or the house kept by her. That this was an unusual mode of proceeding is beyond question. That it was unlawful is made equally clear by the exhaustive discussion of the general subject by Judge KING in Lloyd's Case (3 Clark, 188).

"On the argument of the motion to quash we permitted the defendant to examine one of the grand jurors, against the protest of the district attorney, to show that the presentment was not made upon the personal knowledge of the grand jury, but upon the testimony of witnesses as above indicated. In Gordon *v.* Com. (92 Pa. 220), the Court say that the oath of secresy administered to grand jurors 'should not be so construed as to punish the innocent, or obstruct the due course of justice.' There is no pretence that the grand jury did the defendant an intended wrong. They acted innocently, and there would seem to be no good reason why they should not be permitted to give testimony, the sole purpose and effect of which is to enable the Court to correct a mistake which, however innocent, if permitted to go uncorrected, will deprive the defendant of a valued right. But even without the oral testimony, we think this indictment should be quashed, it not appearing upon the record affirmatively that the case presented was one that fell within the extraordinary jurisdiction of the grand jury.

"1888, April 12th, Indictment quashed."

The Commonwealth then took this writ assigning for error (1 and 3) the quashing of the indictment; (2) the admission of the testimony of the grand juror.

Russell C. Stewart, district attorney, for plaintiff in error.

In reviewing the quashing of an indictment, the proper remedy is a writ of error and not a *certiorari*.

Act of May 19, 1874 (P. L. 219), Purd. Dig. 711.
Com. *v.* Wallace, 114 Pa. St. 405.
Com. *v.* Capp, 48 Id. 56.

He also cited, as to the second assignment of error :—

Whart. Crim. Pr. 263, § 378.
Gordon *v.* Com., 92 Pa. St. 220.
Zeigler *v.* Com., 22 WEEKLY NOTES, 111.

As to the propriety of the presentment :—

4 Bl. Com. 301.
Story Comm. § 928.
Whart. Cr. Pr. 233, § 337.
McCullough *v.* Com., 67 Pa. St. 30.
Brown v. Com., 76. Id. 337.
Rowand *v.* Com., 82 Id. 408.

P. C. Evans, for defendant in error.

The grand juror was called to explain what was the issue before the grand jury, and therefore the testimony was admissible.

Gordon *v.* Com., 92 Pa. St. 220.
1 Whart. Ev. § 601.

Zeigler *v.* Com., *supra*, does not apply to this case, because the witness was not a member of

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the grand jury which found the indictment, but of the one which made the presentment.

A presentment found not on the knowledge of the grand jury, but upon information delivered to them by others, should be abated on plea of the defendant.

4 Bl. Com. 401.
State *v.* Love, 4 Humph. (Tenn.) 255.
State *v.* Caine, 1 Hawk. (N. C.) 352.
McCullough *v.* Com., 67 Pa. St. 30.
Const. of Pa., Art. I., §§ 8 and 9.

May 27, 1889. THE COURT. The indictment in this case was for keeping a disorderly house; it was based upon a presentment of the grand jury, the indictment having been prepared in pursuance thereof, and sent to a subsequent grand jury, with the permission of the Court. A rule was taken to quash the indictment, upon the ground that the presentment was not made upon the knowledge and observation of the grand jury, but upon evidence taken before them on another complaint. At the hearing of the rule, a member of the grand jury was called to testify as to what influenced the grand jury in making the presentment, and it appeared that the presentment was made upon the testimony of certain witnesses examined upon a charge of assault and battery, against some other person than the present defendant, under investigation by the grand jury, and not from their personal knowledge and observation.

That the grand juror was a competent witness for this purpose cannot be doubted. (See Gordon *v.* Commonwealth, 92 Pa. 216, and cases there cited.) He did not testify as to his own counsels, or to those of his fellow-jurors, or to any other matters which he was sworn to keep secret, but merely to the nature of the issue or question under investigation, and to the fact that the jury acted upon the testimony, and not upon their own knowledge or observation in making the presentment. If such testimony were not admissible it would be impossible, in most cases, to ascertain the sources of information from which a presentment was made; and, although the charge may be wholly groundless, originating in mere popular clamor, or in the malice of an unknown accuser, not only the accused, but the Court itself, would be powerless to develop the facts; for the presentment, although made in good faith, may disclose nothing to indicate the source from which the information came. We can discover no rule of evidence, or of public policy, which would exclude the evidence of a grand juror in such case.

We are equally clear that the testimony of the witness was brought upon the record, under the exception taken at the hearing, according to the provision of the first section of the Act of 19 May, 1874 (P. L. 219). The offer of the witness was to establish the matters alleged as grounds for quashing the indictment, and the testimony was in accordance with the offer. The only question is upon the sufficiency of the evidence, and of this there can be no doubt. The fact must therefore be taken as established, that the presentment was made upon the testimony of witnesses examined before the grand jury, and not upon the knowledge and observation of the grand jurors.

Criminal actions are usually instituted upon complaint, under oath, before a magistrate or other proper officer, upon which, if it appear that a criminal offence has been committed within the jurisdiction, a warrant is issued and the defendant arrested and brought before the magistrate for a hearing. If, upon the hearing, there be a probable case of guilt, the prisoner is held for trial in the Court having jurisdiction of the offence. Whilst this is the usual method pursued in criminal procedures, there are certain exceptional or extraordinary modes of preferring criminal charges, well recognized in practice. These extraordinary modes of criminal procedure are very fully defined and set forth in the foot-notes of Wharton's Criminal Law, page 458, in a charge of the late Judge KING, which has in a number of cases received the approval of this Court. Three exceptions to the general method of procedure are there recognized. The first of these is, "where Criminal Courts, of their own motion, call the attention of grand juries and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention."

This power of the Court, it is said, will only be thus exercised, however, in the investigation of general and public evils, such as great riots, general public nuisances, and flagrant vices; it will not be applied in cases of ordinary crime.

The second exception is, "where the attorney-general, *ex officio*, prefers an indictment before a grand jury, without a previous binding over or commitment of the accused."

This power is properly exercised where there is occasion for great haste in applying the machinery of the law, or where the exigencies of the case and the public interests may reasonably require such action to be taken. The procedure in such cases, however, is under the supervision of the Court, and if the process and power is misapplied the Court will vindicate itself in restraining its exercise.

The third exception is that which is originated by the presentment of a grand jury. A presentment, properly speaking, says the learned Judge, is the notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment being laid before them

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at the suit of the Commonwealth. This is the definition given in the Law Dictionary by Bouvier, and by Blackstone (4 Bla. Com. 301), and is the definition recognized and adopted by this Court.

It is true that in some of the earlier cases in Federal Courts, and in some of the States, it has been held that it was within the province and power of the grand jury to call witnesses, and to institute prosecution of their own motion, and the definition given by the late Dr. WHARTON is therefore more comprehensive. (Whar. Crim. Law, 212.) But he admits that in Pennsylvania the law is now somewhat narrowed (sec. 455), and that the view which may be considered as accepted in the United States Courts, and in most of the States, is, that the grand jury may act upon and present only such offences as are of public notoriety, and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the Court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate. (Whar. Crim. Law, sec. 457).

"In this State," says Mr. Justice AGNEW, in McCullough *v.* Commonwealth (67 Pa. 33), "the power of the grand jury is more restricted, and the better opinion is, that they can act only upon and present offences of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the Court, and such as are sent up to them by the district attorney; and in no other cases can they indict without a previous prosecution before a magistrate, according to the terms of the Bill of Rights. (1 Wh. C. L., ed. 1868, sec. 458, and note.) It has, therefore, been held not to be allowable for individuals to go before the grand jury with their witnesses and to prefer charges. Such conduct is looked upon as a breach of privilege on part of the grand jury and as a highly improper act on part of such volunteers. Its effect is to deprive the accused of a responsible prosecutor, who can be made liable in costs, and also to respond in damages for a false and malicious prosecution. It is in violation of the Act authorizing the defendant to refuse to plead, until the name of a prosecutor be indorsed on the bill of indictment. The usual course where a presentment is thus surreptitiously procured, and bill founded upon it, has been to quash the indictment on motion, and before plea pleaded."

The presentment therefore, as a basis for the indictment, was wholly insufficient, for the reason, that it was not found by the grand jury, upon their own knowledge and observation.

It has been suggested however, that if the presentment of the grand jury was not authorized by law, it may be treated as a mere suggestion, by which the attention of the Court was called to the commission of the crime, and that the district attorney having, with leave of the Court, sent up an indictment, the proceeding may be sustained under the other exceptions to the usual mode of criminal procedure, already specified. As we understand the practice, the presentment of a grand jury is *ex mero motu*, and is rarely, if ever, presented in technical form. "Upon such presentment, when proper, the officer employed to prosecute afterwards frames a bill of indictment, which is then sent to the grand jury, and they find it to be a true bill (2 Hawk. Pl. C., c. 25, sec. 1; Bouvier 452.)

Upon a presentment, the proper officer of the Court must frame an indictment, before the party accused can be put to answer it (Story on Constitution, 657; Wh. Cr. Law, 212).

What was done in this case is just what is done in all cases of a presentment by the grand jury: the presentment was placed in the hands of the district attorney, by the Court, with instructions to put it in the technical form of an indictment, signed by the Commonwealth's officer, for the formal action of the grand jury, and upon return thereof, the defendant was liable to process, and was required to plead.

It is certainly true, however, as we have said, that the district attorney in an exigency, or when the occasion seems to require, may prefer an indictment before a grand jury without a previous binding over or commitment, but this power is only to be exercised under the circumstances stated for the public good, and then the proceeding is always under the supervision and control of the Court. "In practice," says Judge KING, "however, the law officer of the Commonwealth always exercises this power cautiously—generally under the direction of the Court, and never unless convinced that the general public good demands it." "It is to be exercised in the ordinary case," says Mr. Justice WOODWARD in Rowland *v.* Commonwealth (82 Pa. 405), "under the supervision of the proper Court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the Court could be brought here for purposes of review, only when the abuse of their discretion should be found to have been both manifest and flagrant. Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open Court for leave to send up an indictment, and in such cases it would be the duty of the prosecuting officer to act promptly, and upon his own reponsibility. While, however, the possession of this exceptional power by prosecuting officers cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity it is the duty of the Quarter Sessions to set the officer's act aside."

It is plain that the exigency of this case did

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not require, or even appear to require this extraordinary exercise of power, on the part of the district attorney. There was no emergency, no demand of haste, no effort to escape, not even any appearance of an escape, there was no public good to be observed, indeed there was absolutely nothing to call for this unusual method of procedure, and it is not pretended there was. It is true that in this case the indictment was prepared and sent to the grand jury "with leave of the Court," but the Court upon being informed that the presentment was not made upon the knowledge and observation of the grand jury, and was therefore no presentment at all, had a right to revoke that leave, and to quash the bill, which was done.

It was stated at the argument, that the indictment was sent to the grand jury with leave of one Judge, whilst the order to quash was made by another Judge of the same Court; and the suggestion carries with it the intimation that the discretion of the Court having been exercised by one Judge, it was not an appropriate act of discretion for the other to set the previous action aside. It is sufficient to state in reply to this, that the record does not disclose the fact, that the orders were by different Judges of the same Court; and it would avail nothing, if it did, for this Court takes cognizance of the orders, decrees, and judgments of a Court of record as such, no matter how for the time being it may be constituted. Although the Judges holding it may from time to time differ, it is at all times the same Court here. With the amenities and courtesies which may be supposed to be due between Judges of the same Court we have nothing to do. But there is not necessarily any conflict of opinion shown upon this record. The sending of the bill to the grand jury was undoubtedly right as the matter then stood, and the order quashing the bill was certainly right when the facts appeared. If the Court in the exercise of its discretion had sustained this indictment, and brought the defendant to trial, and conviction upon it, it is quite improbable that this Court on a writ of error would have disturbed the judgment; it is only for a flagrant abuse of this discretion, as we have said, this Court would interfere. But the same Court which in the exercise of its discretion directed the indictment to be sent to the grand jury, upon being informed as to the illegality of the presentment, in the exercise of the same discretion, afterwards quashed the bill. We think that discretion was properly exercised, and the proceedings of the Quarter Sessions are affirmed.

Opinion by CLARK, J.

STERRETT, J., dissents. H. C. O.

July '88, 24. May 7, 1889.

City of Bradford v. Downs.

Amendments—Pleading—Practice—Evidence—Declarations—Contributory negligence.

In an action by a parent to recover damages on account of injuries sustained by a minor son, the declaration set forth that the injuries were permanent, and that plaintiff had thereby lost his son's services, and incurred expenses for surgical and medical attendance. Subsequently after plea pleaded, the Court allowed an additional count to be filed setting forth the death of the boy in consequence of the injury, and the loss to the plaintiff of his services by reason of his death:

Held, that as in the original count the injuries were alleged to be permanent, involving a total loss of services, the additional count did not in reality enlarge the cause of action, and that therefore it was not error to allow the additional count to be filed, and to refuse to strike off the same.

In the above case evidence was offered by defendant of the boy's declarations made subsequent to the accident to the effect that he had received his injuries in another manner, and at another time and place:

Held, that these declarations were not part of the *res gestæ*, and that the rights of the father could not be affected by the declarations of the son; and that therefore it was not error to exclude the evidence.

In the above case defendant requested the Court to charge that if the jury believed that the child alleged to have been injured did not have such care, attention, and medical treatment as a prudent person would bestow upon a child so injured, then the plaintiff was guilty of negligence, and was not entitled to recover. The Court refused so to charge, on writ of error:

Held, that the lack of proper treatment would have been no answer to the claim for the original injury however it might have been as to the count claiming damages for the death of the boy, and that therefore it was not error for the Court to reply as was done in this case: "The facts assumed in this point will not entirely defeat a recovery, but may properly reduce the amount thereof. This is for the jury to determine."

Error to the Common Pleas of McKean County.

Case, by Thomas Downs against the City of Bradford to recover damages on account of injuries alleged to have been occasioned to the plaintiff's minor child by reason of the negligence of the defendant.

The declaration contained two counts both stating in substance that in August, 1881, the plaintiff's son, a lad of about seven years of age, fell into a hole in the sidewalk on Mechanic Street in the city of Bradford, which had been negligently permitted by the defendant to exist; and that the said son had in consequence suffered permanent injury to his knee cap, and that the plaintiff had thereby lost the services of his said son and incurred expense for surgical and medical attendance and for nursing. Subsequently by leave of the Court after plea pleaded an additional

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count was filed setting forth the death of the boy in consequence of said injury and the loss to the plaintiff of his services by reason of his death.

On the trial, before MORRISON, J., the defendant moved to strike off the additional count in the declaration filed as above. The Court refused to strike off the same. Exception.

It appeared that the injury occurred on September 3, 1881, and that the suit was brought on February 2, 1885, and that the injury which the boy sustained resulted in his death about four years after the accident. Defendant offered to prove declarations made by the deceased subsequent to the accident that the injury to his knee cap had been occasioned in another manner, and at another time and place. Objected to. Objection sustained. Evidence excluded. Exception. (Second assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows:—

(8) If the jury believe the child alleged to have been injured did not have such care, attention, and medical treatment as a prudent person would bestow upon a child so injured, then the plaintiff is guilty of negligence and your verdict must be for the defendant. *Answer.* "Answered in the negative. The facts assumed in this point will not entirely defeat a recovery but may properly reduce the amount thereof; this is for the jury to determine."

Verdict and judgment for the plaintiff for $1342. Whereupon the defendant took this writ, assigning for error, *inter alia*, the refusal to strike off the additional count in the declaration; the exclusion of the above evidence and the refusal of defendant's point as above.

G. L. Roberts and *M. F. Elliott* (with whom was *D. H. Jack*, city solicitor), for the plaintiff in error.

The amendment was improperly allowed.

Steffy *v.* Carpenter, 37 Pa. St. 41.
Royse *v.* May, 93 Id. 454.
Tyrrill *v.* Lamb, 96 Id. 464.

The declarations of the boy were competent evidence.

Aveson *v.* Lord Kinnaird, 6 East, 188.
Gilchrist *v.* Bale, 8 Watts, 357.
Stein *v.* R. R. Co., 7 Leg. Gazette, 223.

For an injury resulting from mutual or concurring negligence no action will lie, because there can be no apportionment of damages.

R. R. *v.* Norton, 24 Pa. St. 465.
Stiles *v.* Geesey, 71 Id. 439.

J. M. McClure (with whom was *Mullin*), for defendant in error.

The amendment to the declaration was admissible.

Beates *v.* Retallick, 11 Harris, 288.
Hartman *v.* Keystone Ins. Co., 9 Id. 466.
Steffy *v.* Carpenter, 1 Wright, 41.
Knapp *v.* Hartung, 23 Smith, 290.

May 27, 1889. THE COURT. This was an action on the case brought in the Court below against the city of Bradford to recover damages for an injury to the plaintiff's son, a lad of about seven years of age, caused by his stepping into a hole in the plank side-walk of said city. The injury appears not to have been considered very serious at the time; at least no complaint was made to the city authorities until the commencement of this suit. The injury occurred on September 3, 1881; the suit was not commenced until February 2, 1885. The injury which the boy sustained, resulted in his death, about four years thereafter. This fact was alleged by the plaintiff and has been found by the jury. Under such circumstances the case has not much to commend it The delay of about four years in giving notice of the accident, or making any claim therefor, certainly placed the city at a great disadvantage, and left the municipality practically at the mercy of the plaintiff, whose claim rests upon his own testimony and that of his wife. Our duty, however, is to dispose of the case as we find it, to revise the rulings of the Court below upon the law. While the specifications of error are numerous, there are but few which require comment. We cannot say the Court erred in not striking off the amended declaration. The first declaration contained two counts, in each of which damages are claimed for the loss of the boy's services by reason of his injury. In the amended declaration damages are claimed for the loss of his services occasioned by his death. This would seem to enlarge the cause of action somewhat, yet it is more seeming than real, as the first *narr.* alleged the injuries to be permanent, involving a total loss of services. We cannot say that the amendment of the *narr.* was not allowable.

There is no merit in the second specification, which alleges error in excluding the boy's declarations, made some time after the accident. They were not part of the *res gestæ*, and as the action was by the father for the loss of services, we do not see how his rights can be affected by the declarations of the son. It is true the plaintiff claims by reason of the injury to the boy, but his legal rights are independent of that fact, and cannot be defeated by anything the son can say or do. This specification is not sustained.

The only other specification we consider it necessary to refer to is the sixth, which alleges error in the answer to the defendant's eighth point. The point could not have been affirmed as it would have withdrawn the case from the jury. This could not have been properly done. The defendant might have been entitled to a more specific instruction had it been asked for. The point was as follows: "If the jury believe the child alleged to have been injured did not

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have such care, attention, and medical treatment as a prudent person would bestow upon a child so injured, then the plaintiff is guilty of negligence, and your verdict must be for the defendant." As the case stood under the pleadings the learned Judge would have been justified in refusing this point. The lack of proper treatment would have been no answer to the claim for the original injury, however it might have been as to the count claiming damages for the death of the boy. Hence it was not error in the learned Judge to say, in answer to the point: "Answered in the negative. The facts assumed in this point will not entirely defeat a recovery, but may properly reduce the amount thereof; this is for the jury to determine." Had the defendant desired an instruction bearing only upon the amended count in the declaration the point should have been differently framed. As presented to the Court we see no error in the answer of the learned Judge.

Judgment affirmed.

Opinion by PAXSON, C. J. L. L., JR.

Jan. '89, 182. April 3, 1889.

Buzby v. Philadelphia Traction Company.

Common carrier — Negligence — Contributory negligence—Duty of foot passengers in crossing streets.

A passenger upon a cable car got out upon the north side where he was in safety. Without waiting for the car to move on, or looking, he turned sharply around the rear of the car, and started to cross the street. There was room between the tracks for him to stand in safety, and to see the whole track. Instead of looking he stepped upon the the south track, and was struck and injured by another car going east:

Held, that he was properly nonsuited upon the ground of contributory negligence.

Due and ordinary care must be exercised in crossing public streets, as in all other transactions of life. Even upon the side-walk, specially devoted to the use of foot passengers, a man is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other rights, and to use his own with due regard thereto.

Error to the Common Pleas No. 2, of Philadelphia County.

Case, by Joseph A. Buzby against the Philadelphia Traction Company to recover for injuries received by plaintiff owing to the alleged negligence of defendant.

Upon the trial, before MITCHELL, J., it appeared that plaintiff had been a passenger upon one of defendant's cable cars going west on Market Street, upon which there is a double track. The back platform of the car was inclosed upon one side. Plaintiff got out safely upon the highway on the uninclosed side. The inclosed side was that toward the other track; the uninclosed side was that toward the pavement. There was a space of four and one-half feet between the tracks, which is reduced about one foot on each side, by the overhanging of the cars. He neither looked nor waited for the car to move on but walked around the back of the car which he had left, and attempted to cross the south track, when he was struck by a car going east, and injured.

Upon the conclusion of plaintiff's evidence, the Court entered a nonsuit, saying: "While the well settled rule of law, that a person crossing a railroad track must stop, look, and listen, does not apply to city passenger railways, the rule is perfectly plain that a person must look where he is going. It appears from the evidence that the plaintiff stepped off the defendant's car without looking where he was going, and therefore I grant the motion for a nonsuit, and discharge the jury from the consideration of the case."

Plaintiff thereupon took this writ, assigning for error the entry of the nonsuit.

Samuel Gustine Thompson (*Agnew MacBride* with him), for plaintiff in error, cited—

R. R. Co. *v.* Werner, 8 Nor. 59 (6 WEEKLY NOTES, 520).
R. R. Co. *v.* Hagan, 11 Wr. 247.
Schum *v.* R. R. Co., 11 Out. 8 (16 WEEKLY NOTES, 305).
R. R. Co. *v.* Peters, 1 Crum. 215 (19 WEEKLY NOTES, 418).
Schmidt *v.* McGill, 5 Crum. 412 (21 WEEKLY NOTES, 485).
McWilliams *v.* Keim, 22 WEEKLY NOTES, 372.
Chicago Railway Co. *v.* Robinson, 18 N. E. Rep. 772.

David W. Sellers (*Gavin W. Hart* with him), for defendant in error.

It was the duty of plaintiff to look where he was going. Plaintiff testifies he did not look. If he had looked he would have seen.

Even if a person swears he looked, and did not see, yet if from other evidence in the case it appears that looking would have disclosed the danger, he cannot recover.

Carroll *v.* R. R. Co., 12 WEEKLY NOTES, 348.
R. R. Co. *v.* Ritchie, 6 Out. 425 (13 WEEKLY NOTES, 197).
Moore *v.* R. R. Co., 12 Id. 349 (16 WEEKLY NOTES, 53).
R. R. Co. *v.* Bell, 22 WEEKLY NOTES, 370.
Marland *v.* R. R. Co., 23 Id. 93.
Morgan *v.* R. R. Co., Id. 189.

May 27, 1889. THE COURT. The plaintiff had been carried to his destination, had alighted from the car in a place of safety, and his relation to the defendant as a passenger had ceased. The

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case therefore is the ordinary one of a traveller about to cross a public street, on which are two sets of railroad tracks, besides the usual space for wagons, etc., between the sidewalks.

Counsel for plaintiff in error seem to lay much stress on the argument that the case is not within the imperative rule for railroad crossings, that the traveller must stop, look, and listen. But no such test was applied in the Court below to the plaintiff's conduct. On the contrary, it was expressly disclaimed, though the counsel for defendant called attention to the fact that the cars in question were so-called cable cars whose controlling motive power was steam.

But the case was tried below, and must be tested here upon the universal rule which requires due and ordinary care in crossing public streets, as in all the other transactions of life. Even on the side-walk, specially devoted to the use of foot passengers, a man is bound to look where he is going, and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where each is bound to take notice of such other rights, and to use his own with due regard thereto. The language of C. J. GORDON, in Schmidt *v.* McGill (120 Pa. 412), is precisely applicable to the present case: "Here was a place where both parties must be on the lookout; the one for passing teams, and the other for foot passengers. Both have the right of way, and both must be equally cautious."

The facts in the present case were undisputed. By his own evidence it appeared that plaintiff got out on the north side of the car, and was in a place of entire safety. If he had looked to the right he could have seen the south track, from which alone danger was to be apprehended, for a square or more to the west, except for a moderate space nearest to him where the car out of which he had just got would obstruct his vision. If he had waited a moment for the car to move on again, he would have had an unobstructed view of this space. He neither looked nor waited, but turning sharply around the rear of the car started to cross the street. There was still a chance, however, for prudence and care. The space between the two sets of tracks was four and a half feet, and the overhang of the cars rather less than a foot on each side, still leaving room enough to stand in complete safety where a turn of his head would have shown him the whole track he was about to step on. Instead of looking, he bolted ahead right into the car which was upon him at the instant he set foot on the track.

This was a plain disregard of the dictates of the most ordinary prudence, and there was no room for a jury to be allowed to draw any other inference. The accident was unfortunate, but it was clearly the result of his own negligence, and the nonsuit was properly ordered.

Judgment affirmed.

Opinion by MITCHELL, J. H. C. O.

Jan. '88, 396. January 15, 1889.

Hestonville, Mantua, and Fairmount Passenger Railroad Co. v. Biddle et ux.

Negligence—Railroads—Children—Trespassers

A boy of twelve was riding with some others on the lower step of the front platform of a bob-tail car, by invitation of another boy, who was driving with the assent of the regular driver, who was inside the car. The driver ordered the boys off twice, but they failed to obey. A short time after, he ordered them off again. The boy driving called out that he would stop, and attempted to do so, but the driver seized the brake, at the same time pushing one of the boys off the car. The boy in question thereupon jumped or fell, rolled under the wheels, and was killed. In an action to recover damages from the railroad company for his death:

Held, that while under the circumstances it was undoubtedly the duty of the driver to put the boys off, using a reasonable amount of force if necessary, yet he was not justified in putting them off by force or compelling them to jump off while the car was in motion, and that the company was liable accordingly.

Biddle *v.* R. R. Co., 17 WEEKLY NOTES, 436; S. C., 112 Pa. St. 551, followed.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by Francis F. Biddle and wife against the Hestonville, Mantua, and Fairmount Passenger Railroad Company, to recover damages for the death of Clarence Biddle, the minor son of the plaintiffs, alleged to have been killed through the fault of the company defendant.

On the trial, before LUDLOW, P. J., a nonsuit was awarded, which the Court in banc subsequently refused to take off. On writ of error the judgment of nonsuit was reversed, and a new venire awarded. (17 WEEKLY NOTES, 436; 112 Pa. St. 551.)

On the second trial, before FINLETTER, P. J., the following facts appeared: The tracks of defendant extend from its depot at Forty-third and Lancaster Avenue to George's Hill, in the Park. On these tracks the company run one-horse cars, with a driver who acts in the dual capacity of conductor and driver. John Lynch was the driver of the car at the time of the accident. On the Sunday when it occurred Clarence Biddle, a lad of about twelve years of age, with two other boys named Gerhart, went about noon to the Park. In the afternoon, about five o'clock, they came to George's Hill, where defendant's car was standing. The driver was inside. A boy, named

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Salnack, was on the front platform and was holding the reins. Clarence Biddle said, "Can I get on too?" Harry Salnack said, "I can't let you on; I don't own the car." Clarence said, "Won't you let me on?" He then said, "Well, yes; get on, get on." The three boys got on, and young Biddle and young Gerhart were on the step of the car. A short distance from George's Hill the driver saw the boys on the steps and platform, and ordered them off. He then again went into the car, and further on discovered the boys still on the platform. He then said to them, "You boys get off now." One of them said, "All right." This was just west of Fifty-second Street. East of Fifty-second Street the car stopped for a passenger. After the passenger had got on and the car had started, the driver, again finding the boys had not got off, came to the door of the car a third time, and said, "You boys get off here." Salnack then said, "Wait, Clarence, I will stop for you," and was about to put on the brake, when the conductor seized it, and pushed one of the boys off. Clarence, who was standing on the lowest step, was frightened, and either jumped or fell off; in so doing he rolled under the wheels and was killed.

The defendant requested the Court to charge in substance that the boy was a trespasser, and that defendant was not liable, except for intentional injury or gross negligence. That if the car was going slowly when the conductor ordered him off, and if being frightened by the order he jumped or fell and was injured, the company was not liable, and finally, that under all the evidence the verdict should be for the defendant. The Court refused so to charge, and charged *inter alia*, as follows:

"Having fixed the position of the boy and the rate at which the car was going, the question arises whether there was anything in what was said or done or omitted to be done by the driver which an ordinarily careful driver would not have said or done or omitted upon that occasion. If there was, then the driver is negligent. Would an ordinarily competent and careful driver have stopped the car upon that occasion? If he would, then it was negligence in the driver not to have stopped the car upon such an occasion."

Verdict and judgment for the plaintiffs in the sum of $2500. Whereupon the defendant took this writ, assigning for error the refusal of its points and the portion of the charge above cited.

Samuel Gustine Thompson, for the plaintiff in error.

It is submitted that the learned Judge erred in treating the boy as a passenger, and holding the company liable for want of ordinary care, while, in fact, the boy was an intruder and not a passenger, and as such the company could only be liable for gross negligence or wilful misconduct.

Moore *v.* R. R. Co., 11 Weekly Notes, 310.
Railroad Co. *v.* Hummel, 8 Wright, 375.
Cauley *v.* Railroad Co., 14 Norris, 393.
Duff *v.* Railroad Co., 10 Id. 458.
Flower *v.* Railroad Co., 19 Smith, 210.

Richard P. White (*George H. Earle, Jr.*, with him), for the defendants in error.

The law of this case has been already decided upon the previous writ of error and cannot be re-examined.

Supervisors *v.* Kennicott, 94 U. S. 498.
Clark *v.* Keith, 106 Id. 464.
Chaffin *v.* Taylor, 116 Id. 567.

There was a measure of duty owing by the company to the deceased.

Arnold *v.* R. R. Co., 115 Pa. 140.
R. R. Co. *v.* Toomey, 91 Id 256.
R. R. Co. *v.* Lewis, 79 Id. 33.
R. R. Co. *v.* Mohr, 83 Id. 232.
R. R. Co. *v.* Hummell, 44 Id. 375.
Biddle *v.* R. R. Co., 112 Id. 551.
Sanford *v.* R. R. Co., 23 N. Y. 343.
R. R. Co. *v.* Brockett, 121 U. S. 637.
Ramsden *v.* R. R. Co., 104 Mass. 121.
R. R. Co. *v.* Hack, 66 Ill. 242.

January 28, 1889. The Court. This case presents no features essentially different from those which it did when it was here before. (See 112 Pa. 551.) We then held that it was error in the Court below to enter a compulsory nonsuit. It now comes up with a verdict in favor of the plaintiff.

Clarence Biddle, the lad who unfortunately lost his life by this accident, was upon the defendant company's car by the sufferance of the conductor. The car was what is popularly known as a "bob-tail" car, *i. e.*, a car with a Slawson box, and a driver who also acts as conductor. At the time of the injury the car was being driven by a boy. The latter invited one at least of the party of boys of whom the deceased was one, to get on the car. Young Biddle got on about the same time, and the conductor subsequently shoved one of the boys off the car, and compelled the others to get off whilst the car was in motion. If a company permits a boy to drive its car, and such driver invites or encourages other boys to get on, it is well to understand that if the conductor subsequently puts them off, he should stop his car for that purpose. It was undoubtedly his duty to put them off, using a reasonable amount of force if necessary; but to put them off by force, or compel them to jump off while the car was in motion was quite a different matter. This case differs essentially in its facts from Cawley *v.* The Railroad Company (98 Pa. 498), and the other cases cited by the learned counsel for the plaintiff in error.

Judgment affirmed.

Per Curiam. L. L., Jr.

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Orphans' Court.

Rowan's Estate.

Decedents' estates—Act of May 5, 1855—Adopted child—Rights of, in the estate of her adopted father, upon his dying intestate.

Sur exceptions to adjudication.

The following are the facts as found by the Auditing Judge, FERGUSON, J.: W. Ellwood Rowan died Oct. 20, 1887. By his will dated Aug. 18, 1886, he gave to his wife Josephine Rowan one-third of his real estate to be in full settlement and lieu of any dower or rights of any kind in his estate; and all the rest, residue, and remainder of his estate he gave unto the Guarantee Trust & Safe Deposit Co., in trust for his daughter Louisa F. Rowan upon certain trusts therein particularly recited.

Decedent had no children of his own, but had adopted as his daughter Louisa S. Fite by a decree of the Court of Common Pleas made February 15, 1873, upon the petition of the decedent joined in by the father of the child. The decree in accordance with the Act of Assembly in such cases directed that she should assume the name of Louisa Fite Rowan and have all the rights of a child and heir of the said W. Ellwood Rowan, and be subject to the duties of a child. The marriage of the decedent to his present widow was on March 24, 1886.

The widow of the testator elected to take the share of the decedent's estate which she would be entitled to under the intestate laws, instead of the bequest to her under the foregoing will, and claimed that as the decedent died without issue, she was entitled to one-half of the fund for distribution. On behalf of the decedent's adopted daughter, it was claimed that the widow was only entitled to one-third.

The Auditing Judge awarded one-third to the widow, and the balance to the trustee for the daughter. To this award the widow excepted.

Charles H. Sayre, for exceptant.

The word "issue" in our intestate laws, means "offspring," "progeny," "descendants."

The statutes conferring rights upon adopted children, being in derogation of the general laws of inheritance, should be strictly construed.

Keegan *v.* Graghty, 101 Ill. 26.
Stanley *v.* Chandler, 53 Vt. 619.

The Legislature has not given the adopted child the same position or condition as a natural child or issue.

There can be no doubt that under the intestate laws, the widow takes one-half where there is no issue, and the word "issue" must mean *issue in fact*. No other construction is possible. The only question that can be raised is whether the Act of 1855 deprived the widow of any rights, or gave to the adopted child all the rights of issue under the intestate laws. That such is not the case has been decided in the following cases:

Commonwealth *v.* Nancrede, 32 Pa. 389.
Packard's App., 37 Leg. Int. 135.
Harp *v.* Comth., 56 Pa. 500.
Wayne's Est., 18 WEEKLY NOTES, 10.
Dorsey's Est., 15 Id. 403.

In the Act of 1855, the clause conferring upon the adopted child the "rights of a child and heir" was introduced for the purpose of enabling such child to inherit from the adopting parent. It does not follow that the widow was to be excluded or any of her rights taken away; if such was the intention of the Legislature, that intention could, and should have been expressed in plain terms.

Arthur Biddle, contra.

All the authorities in Pennsylvania concede that the adopted child is entitled, under the Act of May 4, 1855, to inherit from the adopting parent.

Commonwealth *v.* Nancrede, 32 Pa. 389.
Johnson's Appeal, 6 WEEKLY NOTES, 437.
McCully's Appeal, 10 Id. 86.
Comth. *v.* Powell, 16 Id. 297.

The cases cited from Illinois and Vermont, by counsel for exceptant, do not apply as they turn upon the peculiar wording of the statutes of those States.

It being clearly established by the authorities that the adopted child will inherit under the intestate laws from the adopting parent, it is equally clear that such child can only inherit according to the scheme of distribution pointed out by those statutes, but if Mrs. Rowan's claim to take one-half of the estate be correct, then the adopted child could not take under the intestate Acts, but must take according to some other scheme of intestacy. But none such exists; therefore the child would be entitled to two-thirds, and the widow to one-third and not to one-half as the latter contends.

The fact that the adopted child is liable to pay the collateral inheritance tax is immaterial; since the exemption of lineal heirs therefrom is not a legal right, but a privilege expressly given by the statute, which is to be strictly construed; and it was upon this ground that the liability of adopted children to the tax has been sustained.

Wayne's Estate, 18 WEEKLY NOTES, 10.

March 30, 1889. THE COURT. The widow of testator has refused to accept the provisions of the will in her behalf, and elected to take the same share of the estate to which she would be entitled had her husband died intestate. He

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left no issue. In 1873, however, and thirteen years prior to his marriage with the claimant, he adopted the principal legatee as his daughter, and who, by the decree of the Court of Common Pleas, was authorized, not only to assume the name of testator, but it was declared she should "have all the rights of a child and heir of the said W. Ellwood Rowan, and be subject to the duties of a child." This was in strict conformity with the Act of May 4, 1855, 1 Purdon, 78.

The widow, however, contends that as testator died without leaving issue, she becomes entitled, according to the intestate Act of April 8, 1833, and by her election to take against the will, to one-half of the personalty absolutely. The Auditing Judge refused to sustain this view, and awarded to her one-third of the personal estate, as if her husband had died intestate leaving issue. And this, we think, is the proper conclusion. To do otherwise would be to disregard the plain provision and evident purpose of the Act of 1855, and render the adoption by the foster parent of no effect. The question seems to us too clear to admit of argument. The Act of 1855 is to be read into and form a part of what is termed the "intestate law" of the State, and when it declares that the adopted child shall "have all the rights of a child and heir," share the inheritance with the natural born children, if any, of the adopting parent, in case of intestacy, and inherit from and through each other "as if all had been the lawful children of the same parent," we can but conclude it means what it says. As was so tersely remarked by the present Chief Justice (Wineland's Appeal, 118 Penna. 37), commenting upon the mandatory provisions of the Act of 1833, that a will "shall be signed at the end thereof," and "that's the end of it."

The exceptions are dismissed and adjudication confirmed.

Opinion by HANNA, P. J. W. M. S., JR.

March, 1889.

Palmer's Estate.

Issue devisavit vel non—When awarded—Testamentary incapacity—Evidence necessary to establish.

Sur appeal from register, and demand for an issue.

The facts are set forth in the opinion of the Court.

John V. McGeoghegan and *A. Sydney Biddle*, for contestants.

F. Carroll Brewster, Jr., and *F. Carroll Brewster*, for proponents.

April 9, 1889. THE COURT. We have laboriously perused more than four hundred and fifty type written pages of testimony, a large portion wholly irrelevant, composed of multitudinous questions and answers foreign to the inquiry, and which could have been omitted, to the great relief of the Court, economy of expense incurred, and time consumed, abridged the labors of examiner and counsel, preserved the amenity of professional intercourse, and enabled to be kept in view the sole object of the investigation, which is simply to ascertain the mental condition of testatrix, at the date of the execution of her will, whether she was possessed of sufficient testamentary capacity to intelligently dispose of her estate, and whether the disposition made was her own voluntary act, untrammelled and uncontrolled by the undue or improper suggestions and influence of others.

And after this careful examination of the testimony, we have reached the conclusion that as it is so conflicting and contradictory, respecting the mental condition of testatrix, it is proper that an issue should be granted. The law presumes the existence of mental capacity, and consequently that testatrix possessed testamentary capacity when she executed her will, and this presumption must be overcome by proper evidence. When the evidence is conflicting, a state of facts affirmed on the one side and denied on the other, it becomes then the province of a jury to pass upon the credibility of witnesses and the weight to be attached to their testimony. It is not for the Court to decide (Rees *v.* Stille, 38 Pa. St. 138; Ketterer's Estate, 17 WEEKLY NOTES, 15; Thomas's Estate, 20 Id. 336).

And even although the Judge should be of opinion that, if sitting as a juror, he would not upon the evidence, unite in a verdict against the will still he is bound to submit the case to the jury. "He must be prepared to go further than that, before he can deprive the jury of its proper control of the dispute" (Herster *v.* Herster, 116 Pa. St. 612).

In that case the Court below was reversed for directing the jury to return a verdict in favor of the will, being of opinion there was no evidence of undue influence.

And it was held, following Knauss and Seip's Appeal (114 Id. 10), that on the trial of an issue *devisavit vel non*, the Judge is only justified in directing a verdict in favor of the proponent when, if the testimony is such that after a fair and impartial trial, resulting in a verdict against the will, he would, after a careful review of all the testimony, feel constrained to set aside the verdict, as contrary to the manifest weight of the evidence.

And the same case lays down the rule, "If the state of the evidence is such that the Judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed. This

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simple and safe test is supported alike by reason and authority."

In the case before us, the testimony on behalf of the contestant is that, on May 16, 1885, the testatrix, a single woman, perhaps sixty years old, and her sister, also a single woman, a few years her senior, each executed a will, bequeathing to the other her entire estate, in case she survived, but if she did not survive, then to the person with whom they boarded, an acquaintance of many years, but a stranger to their blood; that for some years prior to the execution of the will, testatrix had declined both in bodily health and mental vigor; that she was melancholy and taciturn, incapable of attending to business, feeble minded, unable to attend to her toilet, always under the care and supervision of her elder sister, was not permitted to go alone into the street, from fear of accident; that at times she would stealthily leave the house, and be brought back as a child; that she was unable to intelligently converse, wholly under the control of her sister and subservient to her will.

And the scrivener, who prepared the wills for the sisters, and collected their rents and income during five years previously, admitted that testatrix gave him no directions concerning the preparation of her will, and that it was in accordance with the suggestions from the elder sister, in which she quietly acquiesced.

The narrative of the preparation and execution of the will, as detailed by him, does not seem inconsistent with the theory of the proponents, that testatrix was fully aware of the nature and character of the testamentary paper she executed; and, to use his own language, "She had sufficient mental capacity upon that day to make a will."

But he admitted she was under the control of her elder sister; that she was in ill health at and immediately after the making of the will; that about five or six months subsequently, "she seemed not to have the same strength of mind that she had formerly, and further on she became quite weak in her mind." That she would not undertake to manage her property, without the assistance of her sister, and, in his opinion, she would not have executed her will, unless encouraged by the presence of her sister, and urged by her suggestion.

And furthermore, the testimony of the only surviving subscribing witness to the will is so evasive, contradictory, and wanting in candor, as to make the propriety of submitting the case to a jury still more evident. How far his confessed falsehood can be reconciled with his belief of the mental capacity of the testatrix is not for the Court to determine.

As we have already remarked, in Gibson's Estate (11 WEEKLY NOTES 355), "we cannot pass upon the credibility of the witnesses, as a general rule, although it is well settled that the demand for an issue may be determined upon the weight of the evidence."

Then, as opposed to this testimony, we have that of the witnesses for the proponent. The reserve and taciturn behavior of the testatrix is attributed to shyness and modesty. Her constant dependence upon her elder sister is the result of her affection and confidence in her superior judgment and wider experience; that she possessed sufficient intelligence to transact business and bestow care and attention upon her property; that she was able to converse intelligently and entertain visitors. Her breach of decorum at the table was owing to the lack of refined deportment and deficiency in polite education.

And although it is admitted that shortly after the execution of the will, indications of both mental and physical debility became apparent, and which increased until she became physically "nothing more than a skeleton," and in the language of her medical attendant, her mental condition was "in a great measure due to senile decay, precipitated or increased by the physical condition that then existed," yet, in his opinion, at the date of the will, less than one year prior to the time of which he was testifying, he considered her capable of making a will.

The witnesses for contestant unite in their statement of facts, upon which they base the opinion that testatrix, at the date of the will, and previously thereto, was deficient in testamentary capacity, while, on the other hand, those of the proponents, upon facts related by them, are of the contrary opinion, as it must be conceded, in some instances, with a certain degree of qualification, which detracts from the weight to be given to their conclusion.

Without further commenting upon the testimony, it seems to us that an issue of fact has been presented within the purview of the Act of March 15, 1832, Purd. 1476, pl. 20, which provides that "Whenever a dispute upon a matter of fact arises before any Register's (Orphans') Court, the said Court shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county for the trial thereof, ... and the facts established by the verdict shall not be re-examined on any appeal," and which requires us to grant an issue.

As before stated, we cannot pass upon the truthfulness of the witnesses, and we are not prepared to say that if a verdict should be found against the validity of the will, upon the testimony here presented, we would be justified, if sitting as a trial Judge, in setting aside the verdict, as contrary to the weight of the evidence.

The appeal is sustained, the issue granted, and precept awarded.

Opinion by HANNA, P. J. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JUNE 28, 1889.* [No. 9.

Supreme Court.

Jan. '89, 241. February 28, 1889.

Honesdale Glass Co. v. Storms.

Evidence — Contract — Construction of — Parol evidence to vary written contract.

An apprentice entered into an arrangement to serve with a glass company for a term of years under a stipulation that a certain percentage of his wages should be held back until he had served his full term. A disagreement having taken place as to when the term expired, the apprentice ceased work and the company refused to pay him his back wages. Subsequently a written agreement was entered into between the parties reciting that the apprentice had agreed to serve for the time claimed by the company, "and that he left the said company's employment, thus breaking his agreement, and forfeiting all his claims on said company," and agreeing to employ him for one year from date at stipulated wages: "His wages, less forty per cent., and ten per cent., to be paid him according to our rules for paying apprentices, and this to be in full of all demands." At the expiration of the year the apprentice claimed not only his year's wages, but also the amount of back wages under the old agreement. The claim being denied he brought suit, and introduced the evidence of several witnesses to show that he signed the latter agreement upon the faith of a representation and promise that he should be paid his back wages, and under a threat that if he did not sign they would not be paid. The glass company denied this and set up the agreement as a bar to the claim:

Held, that the evidence was so clear, precise, and indubitable that it was admissible to contradict the written agreement, and that the question was properly submitted to the jury.

Held further, that there was nothing in the agreement inconsistent with the idea that the company had agreed to condone the alleged forfeiture and to pay the plaintiff his back wages in consideration of his agreeing to remain with them for a further period.

Error to the Common Pleas of Wayne County.

Assumpsit, by George W. Storms against the Honesdale Glass Company to recover back wages alleged to be due to plaintiff.

On the trial, before SEELY, P. J., the following facts appeared: The defendants owned and operated a glass factory and employed the plaintiff as an apprentice. By the contract a certain percentage of the compensation due him was to be retained until the close of his term of apprenticeship, and if he failed to perform his duties properly, or left before the term of apprenticeship closed, this "back money," as it was called, became forfeited. The plaintiff alleged that this contract was oral; the defendants alleged that it was written; but there was no dispute as to its terms, except in relation to the period of apprenticeship and the date of its commencement. The plaintiff contended that it was for four years, and began October 1, 1881; the defendants contended that it was for four and one-half years, and began March 1, 1882.

On October 1, 1885, the plaintiff declined to remain longer as an apprentice, alleging that his term of apprenticeship was ended, and accordingly ceased to work. The defendants, alleging that the term continued until four and a half years from March 1, 1882, refused to pay the "back money" retained from his wages, amounting to $531.82.

On October 24, 1885, the following agreement was entered into between the parties:—

"This agreement made October 24, 1885, between George Storms, of Texas Township, Wayne County, Pa., and the Honesdale Glass Company, of Honesdale, Pa., parties of the second part. That whereas, said George Storms was an apprentice to the parties of the second part for four and a half years from March 1, 1882, and that as he left the said company's employment, and thus breaking his agreement and forfeiting all his claims on said company, now this new agreement, made October 24, 1885, witnesseth: That said parties of the second part agree to take said George Storms for the term of one year from November 1, 1885, to finish his trade as glass blower, on the following conditions: To pay him the net prices that we adopt, less forty per cent. off, then ten per cent. to be retained as a back money, to be paid him at the expiration of the twelve months, providing he has attended faithfully to his work and obeys the foreman or the parties of the second part, and any disobeyment of orders, refusing to work, or put in moulds at any time, or fails to work his time out, he forfeits his place and all back money, and any and all loss of time is to be made up after the time expires. His wages, less forty per cent., and ten per cent., to be paid him according to our rules of paying apprentices, and this to be in full of all demands.

HONESDALE GLASS COMPANY, [L. S.]
per W. W. WESTON.
GEORGE STORMS, [L. S.]

Witness,
ALBERT J. HENDERSON."

Evidence was introduced on behalf of the plaintiff to show that he was induced to sign this agreement by a representation and promise on the part of defendant that if he would sign the agreement and serve thereunder he should receive all the "back money" due him under the former agreement, and under a threat that if he did not sign he should not receive any of such back wages. This was denied by defendant. The evidence upon the point is fully set out in the opinion of the Supreme Court.

On October 24, 1886, when plaintiff finally quit defendant's employment, the sum of $43.61 was due him under the latter agreement. This

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was tendered him but he refused it, claiming also the "back money" retained under the first contract, amounting, October 1, 1885, to $531.82. This the defendants refused to pay and the plaintiff then brought the present action.

Defendants requested the Court to charge, *inter alia*, as follows:—

(3) That the plaintiff having proved by Henderson that the paper signed October 24, 1885, contained when he signed it the statement, "That whereas said George Storms was an apprentice to the party of the second part for four years and a half from March 1, 1882," he has fixed and agreed to that as the date, and he cannot now contradict it by parol, even though there might have been a blank left below that, which was afterwards filled, said alleged filling not referring to said date, and therefore the jury must accept the date set forth in said writing as correct, and that the term, even as claimed by the plaintiff, not having expired at the time he left, the plaintiff is not entitled to the back money, and their verdict upon that must be for the defendants. *Answer.* This requires us to say to you that your verdict must be for the defendants. Of course it means as to that part of the back money relating to the first contract of apprenticeship, and not as to the $43.00. We decline to say so to you, because we think there are other matters in this case which it is necessary to submit to you, and we refuse this point. (First assignment of error.)

(5) That the jury must not allow alleged conversations at Storms's house, before the time of the execution of the paper, to have any influence upon their minds, in considering the contract. Parties have a right to change their minds at any time previous to the execution, and there is no allegation that anything was said by Weston as to the contents or effect after Henderson and Storms had examined it and pronounced it all right. *Answer.* This is true, so far as the contents of the written contract are concerned. We have already said to you, more than once, that the plaintiff, when he signed that contract, must be presumed to have known what he was signing, and what the language of the contract was, and in that respect it cannot be affected by any conversation which had taken place previous. The latter part of this proposition, "there is no allegation that anything was said by Weston as to the contents or effect after Henderson and Storms had examined it and pronounced it all right," is a matter that you must determine. If the contract was signed at Mr. Weston's store, as Henderson and Storms say it was, Mr. Henderson testifies that at some time in the conversation while they were there, whether it was before, or after he had examined the contract we do not now recollect, that Mr. Weston said if he signed the contract he would get all his back money for four years. You will remember what that testimony was, and how it affects this matter. (Second assignment of error.)

(7) That under all the evidence the plaintiff is not entitled to recover anything except the $43.61. *Answer.* That we decline, because we desire to submit some questions to you. (Third assignment of error.)

The Court submitted to the jury, under the evidence, the question of the existence of a parol contract contradicting or varying the effect of the sealed agreement of October 24, 1885, as testified to by plaintiff's witnesses.

Verdict for the plaintiff for $628.24 and judgment thereon, whereupon defendants took this writ assigning for error the answers to their points and the charge of the Court as above.

H. Wilson (*A. T. Searle* with him), for the plaintiffs in error.

Parol evidence was inadmissible to vary the written contract

Phillips *v.* Meily, 10 Out. 543.
Thomas *v.* Loose, 4 Amer. 45.
Sylvius *v* Kosek, 2 Crum. 76.

George S. Purdy, for the defendant in error.

It is the undisputed law in Pennsylvania that "a written agreement may be modified, explained, reformed or altogether set aside by parol evidence of an oral promise or undertaking, material to the subject matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it."

Walker *v.* France, 112 Pa. St. 203.
Cullmans *v.* Lindsay, 114 Id. 167.
Greenawalt *v.* Kohne, 85 Id. 369.
Hoopes *v.* Beale, 90 Id. 82.
Whitney *v.* Shippen, 89 Id. 22.
R. R. Co. *v.* Swank, 105 Id. 555.
Ott *v.* Oyer's Ex'rs, 106 Id. 6.
Chalfant *v.* Williams, 35 Id. 212.

A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the writing, may be given in evidence.

Powelton Coal Co. *v.* McShane, 75 Pa. St. 238.
Graver *v.* Scott, 80 Id. 88.
Shughart *v.* Moore, 78 Id. 469.

In cases of mistake, or attempted fraud, parol evidence is admissible of the declarations of the parties at the time of the execution of the written agreement.

Kostenbader *v.* Peters, 80 Id. 438.
Greenawalt *v.* Kohne, 85 Id. 369.

The mere fact that there is some conflict of testimony is not material.

McGrann *v.* R. R. Co., 111 Pa. St. 171.
Hartley's Appeal, 103 Id. 23.
Ott *v.* Oyer's Ex'rs, 106 Id. 6.
Keough *v.* Leslie, 92 Id. 424.

April 8, 1889. THE COURT. The learned Court below distinctly charged the jury that if

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the plaintiff had forfeited his back pay, that was the end of the defendant's obligation, and that obligation could not be restored except by force of some subsequent agreement. The Court also charged that if the back pay was not forfeited the plaintiff would have a right to recover it unless he was cut off from doing so by some subsequent agreement. The defendant alleged in the first place that the back pay was forfeited by the plaintiff in consequence of his not serving out his time as apprentice, and that was one of the questions of fact for the jury to determine. It was entirely undisputed that the plaintiff had served the defendant for several years as apprentice and had a credit on their books, for which he was entitled to a verdict unless it was forfeited by his breach of his contract of apprenticeship, or voluntarily given up by a subsequent agreement. The original contract or indenture was not given in evidence, as it was either lost or destroyed, and there was conflicting evidence as to when the service commenced and when it ended. All of this was necessarily for the jury, and they have decided it in the plaintiff's favor.

The principal contention was upon the effect of a subsequent agreement for the plaintiff's re-employment. This was in writing, and it contained a recital that the plaintiff was an apprentice to the defendant for four and one-half years, from March 1, 1882, and that he had left the defendant's employment and thus forfeited all claims on the defendant, and then proceeded to express a new contract for the plaintiff's re-employment for one year, from November 1, 1885, upon certain terms mentioned. This contract the plaintiff performed not to the end of the time, but when the defendant tendered him a small balance of $43.61, claiming that was all they owed him, he declined to receive it, claiming that they owed him the full amount of his back pay, to wit, $531.82. This the company refused to pay, and relied upon the second contract as excluding him from the right to recover it. If that contract prevails the contention of the defendant is sustained, and the plaintiff could recover no part of the back pay. It is true the facts which would defeat his right to recover the back pay, are a mere matter of recital in this contract, but as they would be material to, and would, in fact, be a part of the consideration of the new contract, they are an essential portion of it. In reply to this contract, the plaintiff says he was induced to sign it by means of a positive promise, made to him at, and immediately before the execution of the agreement, that if he would sign it he should be paid the whole amount of his back pay. This is denied by Weston, who prepared the contract and obtained the plaintiff's signature to it, but it is testified to by the plaintiff, by his father, mother, and sister, and also by Henderson, who was the subscribing witness and a disinterested person. The witness Stevens testified that he was present when the paper was signed, but he did not attest it and knew nothing about Henderson's presence, and he says nothing one way or the other as to what was alleged by the plaintiff and his witnesses in regard to the promise made by Weston concerning the back pay. On the one side, therefore, is the paper itself and the testimony of Weston, and on the other is the testimony of the plaintiff and Henderson as to what was said at the moment of execution, and the corroborating testimony of the plaintiff's father, mother, and sister as to Weston's promise, made either at the time of or very shortly before the execution. If the promise was made, and by that means the plaintiff's signature was obtained, it was of course a fraud to set up the contract afterwards against his claim for back pay. In that aspect of the case it comes within the very numerous decisions of this Court which hold substantially that where the execution of an instrument has been obtained by means of a fraud, or where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed, parol evidence may be be given to prove the fraud though it contradict the instrument. Some of these cases are the following: Greenawalt *v.* Kohne (85 Pa. 369); Hoopes *v.* Beale (90 Id. 82); Hartley's Appeal (103 Id. 23); Phillips *v.* Meily (106 Id. 537); Walker *v.* France (112 Id. 203); Cullmans *v.* Lindsay (114 Id. 167); Ott *v.* Oyer's Exrs. (106 Id. 6); Thomas *v.* Loose (114 Id. 35). Of course, in all this class of cases, the evidence must be clear, precise, and indubitable—not indubitable in the sense that there must be no opposing testimony, but in the sense that it must carry a clear conviction of its truth, as we said in Hartley's Appeal (103 Pa. 23). The evidence must also be sufficient to move the conscience of a Chancellor to reform the instrument, as we have said many times.

In the present case the evidence was given to the jury, with instructions in accordance with the above cited decisions, and the jury has found for the plaintiff, thus establishing the fraud. It only remains to consider whether there was evidence sufficient to warrant its submission to the jury. George W. Storms, the plaintiff, testified, after relating at considerable length the efforts of Weston to get him to sign the paper, and his own hesitancy to do so, as follows: "Q. What did Mr. Weston say to you in the store at the time you signed this paper? A. I walked in and bid him the time of evening, and told him I had come up and would like to see that paper, and he said, 'Here is the paper, sign it.' And

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he said, 'If you don't sign that paper now you will forfeit all your back money, and if you do sign that paper you will get all your money just as soon as you serve this one year—all of your four years' back money.' And I asked him if he had a copy, and he said he hadn't, but Mr. Stevens would give me a copy any time I wanted it. And he told me to take the paper and read it, and I could not read the paper, but I went down to the store, and Mr. Henderson was sitting there, and he looked at it, and he told me that the paper was all right as far as he understood it." He had previously testified to the controversy about the back pay, and that on one occasion, when Weston wanted him to sign the paper, he had expressed his unwillingness to sign a paper he did not understand, and asked for a copy; that then Weston, in reply to a suggestion that they should take it over to the house where his father and mother and sisters were, proposed that he would go along, and they accordingly went over together, and then talked about the paper. Henderson testified that he went to the store with Storms, and the paper was shown to him and he read it. He was asked: "Q. What was said with reference to Mr. Storms coming back? What did Mr. Weston say? A. Well, Mr. Storms spoke to him about signing the paper, and he gave it to him to look at, and Mr. Storms said he would like to have a copy, and Mr. Weston said he had something to do besides bothering with glass-blowers. He could sign that paper and go to work and get his money back, and if he didn't sign it he would never get another day's work in the factory and would never get a cent of his back money." "Q. You stated that Mr. Weston said that if he signed this paper he would get all his back money? A. Yes, sir." There was much other testimony by this witness giving the details of the transaction, but it is not necessary to repeat it, as the portion quoted is the most material part of it.

As to what took place at the house of Jacob Storms, the plaintiff's father testified: "When my boy's time was up he quit. After the boy quit Mr. Weston came down to the house and then he had the paper on his own side. And he came down to our house and stood right in front of the table and he said: 'I want your boy to sign that paper for one year and a few months more and I will give him one of the best places in the factory.' And my wife said, 'Has that anything to do with his four years' back money if he signs that paper,' and Mr. Weston said, 'No, not at all, but if he doesn't sign it see what your boy will lose; and not only your boy but see what we will lose,' and my wife and two daughters were there at the time. Q. What did he say about his back money? A. He said if he didn't sign that paper he would lose all his back money but if he signed it everything will be all right." The plaintiff's mother testified that Weston came to the house with a paper for George to sign, and being asked what was said replied: "He said that George must sign that paper and go back to work or lose his back money, and he said to me, 'Talk to the boy and ask him to go back and coax him to go back.' He said to me, 'Tell your boy to sign that paper and go back to work or else he will lose his back money.' Q. Did he say anything about his getting the best place in the shop? A. I asked Mr. Weston if George signed the paper and went back to work for another year if that had anything to do with losing the four years' back money and Mr. Weston said, 'No, that at the end of the year he should get his back money in full.'" Eliza Storms, the plaintiff's sister, having stated that Weston came to the house, was asked: "Q. What did Mr. Weston say in the house? A. He brought the paper there and told George to sign that paper, and George said he would not, and Mr. Weston said if he signed that paper he would get all his back money and the best place in the factory, and if he didn't sign that paper he would lose all his back money." From the sister's testimony it would seem that George was in the room when the conversation took place. The father and mother do not say whether or not he was then present. George said he went out a few minutes while Weston was talking to his parents, but it is a fair inference from all the testimony that this conversation took place on the same evening the paper was signed or very shortly before. But, however that may be, the testimony of all these witnesses is clear, precise, positive, very definite, and, if the witnesses are believed, indubitable in its character. We know of no reason to disbelieve the witnesses, except that they differ from Weston, but the jury were the judges of their credibility and they believed them. Moreover the probabilities of the case are strongly in the plaintiff's favor. The whole dispute was in reference to the back pay. Admittedly the plaintiff had served the defendant as an apprentice his whole time except a year and some months, even according to Weston's testimony. They finally agreed that he should serve one year more, leaving out the odd months, and the defendant would then regard the service as complete for the whole term. This being so why should the plaintiff not have his full pay? The defendant had received the full consideration for the full pay, why should they not make the payment? Because, says the defendant, the new agreement did not provide for it and contained recitals that the plaintiff had forfeited his claims on the company. While this would be a good answer, if it was quite clear that such was the real contract of the parties, the very dispute be-

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tween them is whether the execution of such an agreement, certainly very hard in its terms, was not procured by means of a promise that the back money should be paid. The proof is exceedingly strong that such was the fact. It was, according to the witnesses, accompanied by a threat that if he did not sign he would lose all his back pay, so that it was the very point in controversy, and it is very difficult to believe that if this was the subject of dispute up to the moment of execution the plaintiff would, all at once, abandon his whole claim and agree to give another whole year's service for nothing but the small pay of an apprentice and thus complete the term of his apprenticeship without receiving any part of the large amount he had already earned. Such a conclusion would be contrary to reason, would be highly injurious to the plaintiff, and is certainly opposed to the greatly preponderating weight of the testimony. The company was evidently contracting for the completion of the term of service according to their view as to what that term was. The plaintiff, claiming he had already completed the service, was reluctant to make any new contract inconsistent with his view of that subject. This being so the parties made mutual concessions, the company abandoning the few odd months over the year and the plaintiff agreeing to work one more year. The subject of the new contract, therefore, apparently was the determination of the term of service. This being the case it is almost, if not quite, impossible to understand why the plaintiff should agree not only to complete the time of his service as apprentice but also to abandon his entire claim for compensation for a full term's service. It is curious to observe in this connection that the new contract, while it recites that the original term agreed upon was four and a half years from March 1, 1882, "thus breaking his agreement and forfeiting all his claims on said company," does not proceed to declare the forfeiture or contain any agreement that the back pay shall be surrendered. So far as this recital is concerned it is entirely consistent with the idea of a mere statement that a forfeiture had been incurred but would be condoned. At any rate the recital is not followed up by any expressed or necessarily implied agreement by the plaintiff to surrender his back pay. The last clause of the contract which relates to the payment of the year's wages and says it shall be in full of all demands is too indefinite to be regarded as an explicit surrender of the back pay. It could only serve such a purpose by way of a trap, and would require very clear evidence that it was explained to, and so understood by, the plaintiff before it could with any justice receive such an interpretation. The great bulk of the evidence is in direct opposition to such a theory, and the contract itself does not speak in clear terms to the contrary. The Court below was right in submitting the case to the jury, and the assignments of error are therefore not sustained.

Judgment affirmed.

Opinion by GREEN, J. L. L., JR.

Jan. '89, 161. March 14, 1889.

Express Publishing Co. v. Aldine Press.

Alteration of contract—Interlineation—Evidence—Contemporaneous parol agreement.

An alteration in a written contract which does not change the legal effect of the instrument, is immaterial.

The interlineation of the word "before," in a contract which provided that the order should be "subject to countermand *by* June 15," is immaterial. A contract to complete work *by* a certain time, means that it should be done *before* that time.

Where a written contract provided that one of the parties (the plaintiff) was "not to supply an edition of this sheet" to any party other than the defendant in certain counties, evidence will not be admitted to show that an agent of plaintiff said that "an edition of this sheet," meant any sheet published by the plaintiff, when not accompanied by an offer to prove that some other parties in the counties named were supplied with its sheets by the plaintiff.

Error to the Common Pleas of Northampton County.

Debt by The Aldine Press against The Express Publishing Company, upon a certain contract between the parties. This suit was brought into the Common Pleas upon appeal from a justice of the peace.

The following facts appeared upon the trial, before SCHUYLER, P. J.: The Aldine Press were the publishers of an illustrated annual, with blank spaces for the insertion of advertisements. This annual was sold to country newspapers, whose imprint was put on the sheet. The newspapers then solicited advertisements, which were inserted in the blank spaces, and the publication issued as that of the newspaper. A canvasser for the Aldine Press called at the office of the Express Publishing Company, and obtained the following contract:—

NOTICE.

40 VESEY STREET, NEW YORK, JAN. 2, 1886.

—THIS ORDER FORM IS, when signed, merely a business letter of the signer to the party addressed.

It is expressly designed to set forth everything offered and expected, so as to prevent misunderstandings from haste, inadvertency, or any other cause.

All orders are solicited, subject to acceptance in New York City *on the face, as written.*

No one, away from this office, is authorized, at any time, to verbally or otherwise change, modify, or in any way affect the writing, which is the only thing considered and acted upon here.

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PAYMENT ON ACCOUNT of orders must be made only to the order of the Aldine Press, or of the undersigned,
GEORGE LINGARD, Sec. & Treas.

Easton, Pa., March 5, 1886.

To **George Lingard**, Sec. & Treas.,
at 40 Vesey Street, New York.

SIR:

PRINT for *us* an edition of your Octavo Annual Sheet for 1887, *Five thousand* sheets 24 x 38 inches, 32 pages, according to sample and Price List herewith, and by *June 25th* MAIL 8 blank dummies, for our use in canvassing (not samples) . . . } at *$187.50*

ALSO, *5000* Illuminated Covers for same, printed complete, except top title space, imprint and special matter . . . } at *$ 45.00*

Amounting in all to *$232.50*

which sum *we* hereby promise to pay, to your order, by *four months note or* cash, on delivery of the above, *subject to countermand before June 15th, 1886.*

THE FOLLOWING are the representations and conditions on which this order is made and to which, in case of acceptance, you are bound.

—The quality and workmanship of the edition must be equal to sample.

—Imprint is to be added on title page of sheet without charge.

—Edition, unfolded, to be delivered as per order herewith.

—You are not to supply an edition of this sheet, for the year 1887 to any other party in { *Warren Co., N. J.* / *Northampton Co., Pa.* }

CAUTION.
DO NOT SIGN until you have read the NOTICE on adjoining page relative to Agents' authority, &c.

[*Signed,*] *HOWARD MUTCHLER,*
Business Manager
Express Pub. Co.

References: First National Bank, Easton Pa.

The portions of the above contract in *italics* were written; the rest of the contract was printed.

The canvasser the same day on which he made this contract with the Express Publishing Co., also made a contract with the Easton Free Press, a paper published in Northampton County, but this contract was not fulfilled by a delivery of the sheets to the Free Press.

On June 16th, 1886, the order not having been countermanded by the Express Publishing Co., the Aldine Press notified them that the contract was accepted. On June 21st, eight blank dummies were sent by the Aldine Press through the mail to the Express Publishing Co., and on September 21st the annuals were sent, with a request for payment. Payment having been refused, this suit was brought.

Plaintiff offered in evidence certain depositions, taken under rule before commissioners in the city of New York, which depositions related to the contract in suit as above set forth. These depositions were objected to, because sections 77 and 82 of the Rules of Court had not been complied with, and because the words "June 25th," and the interlined word "before," were written in different ink from the other written words, and were not in the contract when signed. Objection overruled, and depositions admitted. (First assignment of error.)

Plaintiff also offered in evidence the contract as above set forth. Objected to, for reasons set forth in first assignment of error. Objection overruled. (Second assignment of error.)

Plaintiff also offered in evidence the annual ordered by the Free Press. Evidence admitted. (Third assignment of error.)

Eugene Clifton was offered as a witness by defendant to prove that the Aldine Press sold some of their blanks to witness, to be followed by evidence that after plaintiffs got these two contracts they chose as to which one they should fill. Offer overruled. (Fourth assignment of error.)

Defendant offered to prove by Howard Mutchler, that before the execution of the contract by him, and when the agent read him the clause, "You are not to supply an edition of this sheet for the year 1887, to any other party in Warren County, New Jersey, or Northampton County, Pennsylvania," he refused to sign it, but was assured by the agent that the words "edition of this sheet," meant any sheet published by the Aldine Press for that year, and that upon such representation the contract was signed. Objected to, because it was an effort to make a contract entirely different from the one in suit, which was by no means ambiguous. Objection sustained. (Fifth assignment of error.)

Verdict for plaintiff for $234.50, and judgment thereon. Whereupon defendant took this writ, assigning for error the admission and refusal of the above offers of testimony.

William Fackenthall (*O. H. Meyers* with him), for plaintiff in error.

H. D. Maxwell, for defendant in error.

May 13, 1889. THE COURT. The jury found under instructions which are not complained of, full performance by the Aldine Press of its contract with the Express Publishing Company; and the specifications of error call in question nothing but the rulings of the Court upon offers of evidence. The first specification relates to the admission of certain depositions taken upon a commission issued for that purpose, and the objection to them was that sections 77 and 82 of the Rules of the Court of Common Pleas of Northampton County concerning depositions had not been complied with. As those rules were not printed for our information, and we were not even told what they were, we cannot say whether there is, or is not, merit in the objection, and as no argument was made in support of this specification it is considered as abandoned.

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The second specification refers to the admission of the printed and written order made by the Express Publishing Company upon the Aldine Press, and accepted by the latter. This constituted the contract between the parties. It was objected to because of an interlineation appearing upon its face. This consisted of the word "before" written over the word "by." There was no erasure in the contract, and the interlineation was not material. A contract to complete work by a certain time, means that it should be done before that time. (Rankin *v.* Woodworth, 3 P. & W. 48.) An alteration is immaterial which does not change the legal effect of the instrument. (Miller *v.* Bird, 27 Pa. 244.)

The third specification is to the admission of evidence which was offered and received in the Court below without objection, and to which no exception was taken there. The most that can be said of this evidence is that it was not material as the case then stood; but we cannot see that it could inflict any injury upon the defendant.

The fourth specification is to the refusal of an offer by defendant, which was clearly incompetent when made, and which was not afterwards renewed, or made competent by any evidence in the cause. More than this, we cannot find that any exception was taken or bill sealed to the Court's refusal to allow it.

We think the offer contained in the fifth and last specification was properly denied. It did not propose to show a contemporaneous parol agreement which induced the defendant to sign the order, but merely that the agent said the words "edition of this sheet," meant any sheet published by the Aldine Press, and it was not accompanied by an offer to prove that any "other party in Warren County, N. J., or Northampton County, Pa.," was supplied by the Aldine Press with any of its publications for the year 1887. Besides, the defendant had distinct notice before signing the order that it was subject to acceptance on its face as written, and that no one was authorized to change, modify, or in any way affect the writing by verbal agreement or otherwise.

The order called for the mailing to defendant of "eight blank dummies" by June 25, and Howard Mutchler testified that the words and figures written in a blank space in the order were not in it when it was signed, but there was no attempt to prove that a different time was fixed for the mailing of the dummies, than that stated in the order.

It is in evidence, and not contradicted that defendant's order was accepted by the Aldine Press June 16, 1886, and that a duplicate of the order with the acceptance stamped upon it was mailed the same day to the proper address of the defendant. That it was received by the defendant by due course of mail is presumed and not denied. Yet not until the 21st of August following was any attempt made to countermand the order, and then not upon the ground that it had been altered, or that defendant had been duped into signing it, but upon the claim that the Aldine Press had agreed to supply another party with one of its publications for the year 1887.

We are of opinion that all of the specifications are without merit, and that the plaintiff in error has no just cause to complain of the rulings of the Court or the verdict of the jury.

The judgment is affirmed.

Opinion by McCollum, J. H. S. P. N.

July '88, 89. April 22, 1889.

Morgan's Appeal.

Mortgages—Assignment of—Rights and duties of assignee of mortgagee—Affected with notice of equitable defences.

The assignee of a mortgagee is bound to make inquiry of the mortgagor before purchasing the mortgage, and is affected with notice of any defence by way of payment, or growing out of the original equities between the mortgagor and the mortgagee, which inquiry would have brought to his notice.

Where a mortgage had been ordered by an Orphans' Court for the payment of a decedent's debts, and the mortgage was executed, but not confirmed, on a subsequent petition to the Orphans' Court by the assignee of the mortgagee for confirmation of the mortgage, the mortgagor administratrix filed an answer, wherein she claimed that the mortgage was given to secure an indebtedness due from the decedent, her husband, to the mortgagee for the cost of a house, that before her husband's death, when the debt was contracted, it was agreed that an indebtedness due and subsequently to become due by the mortgagee to the decedent and the mortgagor for his boarding and washing, should go in payment of the debt, and that after her husband's death she had continued to board the mortgagee, under an agreement that the balance due on the house should be so paid for, and further alleging that the mortgage had been fraudulently obtained. It was proved that the mortgagee boarded with the decedent for three years prior to said decedent's death, and with the widow for four or five years after said decedent's death, and had never paid anything on account of such boarding. The Court below having found that the indebtedness for boarding was intended to go in satisfaction of the debt for the house:

Held, (1) That the assignee of the mortgagee was affected with notice of this agreement; and (2) That the mortgage should be confirmed for the sum due on the house, less the amount due for boarding up to the date of the mortgage, with interest thereon, and the further sum due for such boarding up to the date of the assignment of the mortgage. (3) That the decree should date from the first day of the first sitting of the Orphans' Court after the execution of the mortgage.

Appeal of Amelia S. Morgan, administratrix of George P. Morgan, deceased, and Nannie B.

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Morgan, by her guardian, John Hurd, from a decree of the Orphans' Court of Blair County, approving and confirming a mortgage given by said Amelia S. Morgan, administratrix, to Edward Mountney.

The facts set forth in the petition filed, asking for the approval and confirmation of said mortgage, and proved by the depositions read at the hearing, were as follows: George P. Morgan died February 27, 1874. On April 27, 1874, Amelia S. Morgan, administratrix of George P. Morgan, petitioned the Orphans' Court for an order authorizing her to mortgage her husband's real estate to pay his debts, averring therein an indebtedness to one Edward Mountney, $2299.19, for the building of a house. The order was granted, and on July 23, 1874, she executed a mortgage to Mountney to secure payment of said sum of $2299.19. On December 14, 1874, Mountney assigned the mortgage to J. Levan Metzgar, the petitioner. After a proceeding by scire facias on the mortgage and judgment, a bill in equity was filed by the administratrix, asking that the mortgage be declared null and void, and that collection thereof be restrained, on the ground that the mortgage had never been confirmed, and that Nannie B. Morgan, a minor child of decedent, had no notice. This bill was dismissed by the Court below, but on appeal the decree was reversed, and an injunction entered as prayed for. (See Morgan's Appeal, 110 Pa. St. 271.)

The said Metzgar then filed this petition in the Orphans' Court, for the confirmation of the mortgage. It was admitted that the amount originally due from Morgan to Mountney was $2299.19, but the appellants filed an answer, *inter alia*, as follows:—

The mortgage set forth in petition was obtained by fraud of mortgagee, Mountney. Mountney boarded with George P. Morgan for nine years, and being indebted to him for his boarding, urged him to give him the contract to build for him (Morgan) a house, representing that one Geesey was debtor to him (Mountney) in a large sum of money; that he could employ Geesey to build the house, and in that way he could pay Morgan for his boarding; Morgan agreed, and the house was nearly finished at his death; Mountney continued to board with the administratrix for five years after the death of her husband, on an agreement that whatever was due for the building should be paid for by furnishing him board, lodging, washing, and mending his clothes, the said agreement having been made for the benefit of said Nannie B. Morgan. No settlement was ever had with Mountney, nor did he pay a farthing for his boarding, either on account of what was due to George P. Morgan, or Amelia S. Morgan. Amelia S. Morgan is an illiterate person, and reposing absolute confidence in Mountney, was deceived and tricked by him into the signature of her name to the petition for leave to mortgage, and to the mortgage, all of which were prepared by Mountney's counsel. That there was nothing due to Mountney at the date of the pretended petition for order to mortgage. That she borrowed no money on said mortgage, nor had she any arrangement, settlement, or understanding with Mountney to mortgage the property for $2299.19, or any other sum.

Mountney did not deny the terms of the contract to pay for boarding and washing, but the evidence as to the application of the sums due thereon was contradictory, though it was admitted they were not paid.

The Court found as facts that the bill for boarding was to go in satisfaction of the mortgage, and that Mountney had boarded with the Morgans for three years prior to Mr. Morgan's death. It was not denied that Mountney continued to board with Mrs. Morgan for four or five years after Mr. Morgan's death, and that he had never paid any board or washing bills.

Upon the above facts the Court below, DEAN, P. J., found as follows:—

"We are of opinion that George P. Morgan, at the date of his death, owed to Ed. Mountney for building his house, ... $2299 19

"That Ed. Mountney was indebted to George P. Morgan for thirty-six months' board, at the rate of $20 per month, ... 720 00

"Leaving a balance of, ... $1579 19 due from the estate of George P. Morgan to said Mountney; that this, by a reasonable construction, should from the nature of the transaction be considered as loaned under the order of the Court by Mountney to the administratrix for payment of debts of decedent, and that said decedent's estate to that amount was benefited thereby.

"Therefore the said mortgage so made by said administratrix to said Mountney, dated the 23d day of July, 1874, and recorded same day, is approved and confirmed in the sum of one thousand, five hundred and seventy-nine dollars and nineteen cents, only, payable as stipulated in said mortgage. This decree to date as if made on the first day of the sitting of the Orphans' Court at October Term, 1874."

Whereupon Amelia S. Morgan, administratrix, and Nannie B. Morgan, by her guardian, took this appeal, assigning for error, *inter alia*, the above decree, and the refusal to allow further credits on the mortgage.

Samuel S. Blair (*Andrew J. Riley* with him), for appellants.

Daniel J. Neff, for appellee.

May 20, 1889. THE COURT. The application to approve the execution of the mortgage by

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the appellant as administratrix is one that is addressed to the equity side of the Court and must be determined on equitable principles. The question to be considered is, what ought in good conscience to be done upon the facts of this case? If this question was to be settled upon the claims of Mountney, the mortgagee, to the consideration of a Chancellor it should be dismissed, for the testimony shows him to have acted in bad faith and to be entitled at the date of this application to little, if anything, from the estate which the appellant represents. If the bills for board and washing which he owes to the estate and to Mrs. Morgan, were fairly settled and applied on the debt due for the building of the house, it is doubtful whether there would be any of it left. But the equities are to be settled between Metzgar, the assignee of the mortgage, and the appellant. The assignment of the mortgage by Mountney to Metzgar was made on the 14th of December, 1874, and it passed such right as the assignor then had. A purchaser of a non-negotiable instrument is bound to make inquiry of the maker before purchasing, and is fixed with notice of any defence by way of payment, or growing out of the original equities, which inquiry would have brought to his notice. If Metzgar had inquired of Mrs. Morgan before his purchase he would have learned of the agreement of Mountney to apply his board bills upon the debt represented by the mortgage as payment *pro tanto*, and of the agreement that his accruing bills should be applied in like manner. He would also have learned that Mountney had continued to board with her up to that date, and that his bills, though not indorsed upon the mortgage, were a payment upon it. As these facts could have been learned by inquiry, Metzgar must be treated as having knowledge of them when he took an assignment of the mortgage, and the equities between him and the appellant must be settled on that basis.

The Court below found that Mountney was indebted for three years' bills unpaid at the date of Morgan's death. The same testimony shows with equal clearness that the bills accruing after that were to be applied to the same debt. The computation should be made, therefore, to the date of the mortgage instead of to the death of Morgan, and would make the amount then due as follows:—

Alleged cost of house		$2299 19
Board to date of mortgage, nearly forty-one months, at $20	$817 00	
Washing do. at $2 . .	82 00	
Interest	89 90	
		988 90
Due at date of mortgage if payments had been properly applied . .		$1310 19

After the date of the mortgage, and before the assignment to Metzgar, Mrs. Morgan paid to apply upon the mortgage the additional sum of $104.00, made up of board $94, washing $10, which, by the same general agreement, he was bound to indorse. This should have been indorsed before the assignment, but, as we have seen, the assignee is fixed with notice of the payment and takes subject to it.

We adopt the general view of this case which the Court below seems to have entertained, but we go still farther, as we recognize only the equities of the assignee. We therefore ascertain the amount due when the mortgage was given and confirm and ratify it for that sum; but we find that the further sum of $104 was paid upon it before the assignment and that the assignee had notice of such payment. He must take it, therefore, subject to such payment. The mortgage is therefore ratified, on petition of the assignee, for $1310.19, subject to an indorsement as of 14th December, 1874, of the sum of $104 paid at that date. Let the decree of confirmation be amended accordingly.

Opinion by WILLIAMS, J. C. K. Z.

Jan. '88, 362. March 4, 1889.

Kemmerer's Appeal.

Judgments—Opening of—Mortgage as surety for another's debt—Discharge.

D. and H. joined in a mortgage to B. covering all the real estate of D. and H.'s undivided interest in a tract of land called the "Homestead," as security for a debt of D. to B. H. owed nothing to B. and the bond which accompanied the mortgage expressly stipulated that he joined in it and the mortgage, solely that the Homestead should be security for the loan to D., and that the bond and warrant accompanying the same were to be inoperative as to all other property. Subsequently D. and H. conveyed the property described in the mortgage to a trustee to sell and pay liens "in the order of their priority." The trustee sold several parcels of the land and as he did so, B. released the lien of this mortgage thereon, and allowed the proceeds of the sales to be paid in satisfaction of other liens, none of which were prior to the lien of the mortgage. Afterwards B. entered up his bond and warrant of attorney. A rule to open the judgment was then obtained by D. and H., their petition alleging the above facts and further that the trustee who had never accounted, had realized enough by the sales to pay B.'s lien as well as the others which stood upon an equal footing with it. The Court after depositions had been taken, discharged the rule:

Held, that this was error; that B.'s conduct appeared to be such as to discharge the land of H. from the obligation due him, and that the question should properly be submitted to a jury.

Appeal of Daniel N. Kemmerer and Henry Kemmerer from a decree of the Common Pleas of Berks County, refusing to open a judgment.

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The facts of the case, as they appeared from the depositions taken in support of the rule to open the judgment, were as follows:—

On or about May 12, 1882, Daniel N. Kemmerer was the individual owner of a large quantity of real estate in the county of Berks. He, together with his brother Henry, also owned a messuage and tract of land situated in Alsace Township, known as the "Homestead Tract," containing about eighty-two acres. On that date Daniel obtained a loan of $30,000, for which a mortgage was given by him and Henry to George Brooke, Annie M. Brooke, widow of Edward Brooke, and George Brooke, guardian of the minor children of Edward Brooke, securing the payment of the said sum, with interest, in three years, by virtue of three bonds and warrants, as follows: One to Annie M. Brooke, widow, for the payment of $7000; one to George Brooke, guardian, for payment of $15,000, and one to George Brooke individually for payment of $8000. The payment of the said sums was secured on all the real estate owned by Daniel N. Kemmerer, and on the Homestead premises owned by the brothers in common. In the bond and warrant held by George Brooke individually was the following proviso, reservation, and stipulation:—

> The said Henry Kemmerer joins in this warrant, and in the accompanying bond and mortgage in order that his interest in the Homestead of 82 acres, 114 perches, in Alsace Township, may be liable for the payment of the aforesaid principal sum of $8000, but it is understood that this warrant is to be inoperative as to the other estate of the said Henry Kemmerer.

This mortgage was duly recorded. Upon May 30, 1884, the mortgagors conveyed all their real estate mentioned and described in the mortgage, including the said Homestead premises and all their personal estate, to Joseph V. Kendall for a nominal consideration, *inter alia*, to sell and dispose of the same, and to pay the liens in the order of their priority.

Kendall sold the whole of the estate thus conveyed to him; especially one portion for the nominal sum of $21,950 to one George W. Harrison, without, however, any part of said purchase-money being paid. As Kendall sold each portion thereof to different purchasers, the mortgagee, George Brooke, released the lien of his mortgage on the land so sold, thus enabling Kendall to secure the full purchase-money which, with the consent of Brooke, he appropriated to the payment of lien creditors not superior to Brooke's lien. Kendall has never filed an account. On September 13, 1886, at which time, the petitioners alleged, Kendall had sold sufficient real estate to pay the amount of Brooke's claim, and all other liens standing upon an equal footing with it, the latter entered up his bond and warrant in the amount of $8000, with interest, which judgment constituted a lien against all the real estate owned by Daniel N. Kemmerer and Henry Kemmerer. At the time said warrant was filed the bond of $7000 held by Annie M. Brooke, widow, had been fully paid, and the greater part of the other bond, held by George Brooke, guardian. A fi. fa. and vend. ex. issued on the judgment, and the Homestead property was sold, the Court refusing an application to set these writs aside.

The mortgagors then obtained a rule to have the judgment opened. This rule the Court discharged, in an opinion by Ermentrout, J. Whereupon the mortgagors took this appeal, assigning for error the action of the Court as above.

D. E. Schroeder (*B. Y. Shearer* with him), for appellants.

Jeff. Snyder (*Geo. F. Baer* with him), for appellee, presented no paper-book.

April 8, 1889. The Court. The facts set forth in the petition of appellants imperatively required that the execution should be stayed and the judgment opened.

As to Henry Kemmerer the case is so plain that it is difficult to state any reasons more forcible than the uncontested facts as they stand on the record. Henry mortgaged his interest in a certain tract of land called the Homestead, as security for a debt of his brother Daniel to the plaintiff, Brooke. The mortgage was a joint mortgage by Daniel and Henry covering several tracts belonging to Daniel, and, as already said, the Homestead of Henry. But Henry personally owed nothing to Brooke, and the bond to Brooke, which accompanied the mortgage, expressly stipulated that Henry joined in it and the mortgage, solely that the Homestead should be security for the loan to Daniel. Subsequently Henry and Daniel conveyed their property to a trustee to sell, and pay liens. The trustee sold several parcels of Daniel's land, and as he did so, the plaintiff Brooke released the lien of his mortgage, and allowed the proceeds of the sales to be paid to the other liens, none of which was prior to his, and one at least was admittedly posterior. By this conduct he discharged the land of Henry from its obligation to him.

But on the facts averred in the petition Daniel was equally entitled to relief. As already said, he and Henry had conveyed all their real estate to one Kendall, in trust, to sell. Whether the instrument was technically an assignment for the benefit of creditors is not material at present to inquire. It was a trust to sell, "*pay the liens in the order of their priority*," settle other liabilities and pay over any balance remaining to the grantors. Under it Kendall was a trustee for the Kemmerers, and his duty under the very terms of the instrument, was to pay the liens in

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the order of their priority. Instead of doing so, he sold from time to time, paid liens out of their order, and plaintiff not only permitted but actively assisted him in so doing, by releasing his first lien on the lands sold, and yet allowing the proceeds to go to other liens, none of which were superior to his, and at least one inferior. It is alleged in the petition, and the depositions seem to sustain the allegation, that without touching Henry's Homestead, and also leaving untouched portions of Daniel's land, enough money had been realized by sales of other parts to pay plaintiff's lien as well as the others which stood upon an equal footing with it, and that upon an accounting by Kendall it would appear that plaintiff had been paid in full. Kendall did not account, nor does he seem to have given any information. On the contrary, he made a fraudulent and colorable sale to one Harrison, with a nominal consideration of $21,950, but in reality without the passage of a cent of money, for the very purpose of preventing the owners of the land from learning what he, their trustee, was doing with it.

In all this the plaintiff, not only acquiesced, but actively assisted by release of his lien upon parcels of the land from time to time, without which the scheme could not have been carried out.

It is said that Kemmerer (meaning as I understand it, Daniel), was troublesome and impeded the transactions, and that the scheme was the only way to facilitate a settlement. It may be that the actions of Kendall, and the participation of Brooke in them, are susceptible of an honest explanation, but if so, it ought to be made to a jury, for as the case now appears explanation is badly needed.

The order discharging the rule to open judgment is reversed, the rule to open judgment made absolute, and the record remitted for further proceedings, so much of the fund in Court as may be applicable to this judgment to abide the final judgment.

Opinion by MITCHELL, J.

Subsequently the appellee moved for a re-argument.

May 27, 1889. THE COURT. On the case as presented we see no reason to change the views heretofore expressed.

Should the appellant fail to substantiate his version of the transactions, or should the facts appear in any way materially different from what they are now presented, the result may be different. All we now decide is that appellant has made out such a *prima facie* case as entitles him to a hearing.

Re-argument refused.

Opinion by MITCHELL, J. S. H. T.

Common Pleas.

C. P. No. 1. May 1889.

The Commonwealth ex rel. Taylor v. Louis Wagner, Director, etc.

Municipal claim—Water pipe—The City has a right to refuse permit for water until the cost of laying the pipe is paid—There is no presumption of payment from lapse of time, because the City cannot enforce the claim until a demand is made for the water—It is the duty of the owner of land to show that pipes have been paid for—Ordinance of January 29, 1855.

This was a petition for an alternative mandamus.

The petition set forth the petitioner's ownership of a lot in Germantown having a front on Penn Street of two hundred feet. That water-pipe had been laid along Penn Street more than twenty-one years ago; that no lien had been filed against the lot for the pipe; that for many years water was supplied to a house upon a portion of said land; that relator had applied to respondent for a permit to connect with the pipe in front, which had been refused unless the sum of $354.33 was first paid for the said pipe.

The prayer of the petition was for a mandamus commanding respondent to issue a permit for the introduction of the water upon payment of the cost of same, without including the claim for laying the pipe.

The answer of respondent set forth that the pipe in front of the relator's lot was laid in 1856 by a company known as the Germantown Water Company; that in 1866 the city became the purchaser of this pipe, and of all the franchises and plant of the company; that no lien was ever filed by the city against relator's lot, because the city had no right to do so. That the books of the Germantown Water Company, which are in possession of the city, show that no payment for the pipe laid on Penn Street in front of the relator's lot was made to the company, nor has any since 1866 been made to the city; that permit to make connection with the pipe was refused under the ordinance of January 29, 1855, as follows:—

"No permit for the use of water shall be issued unless at the time of application the person or persons applying shall exhibit the receipt of the proper office for the amount of the assessment, or other satisfactory evidence of the payment thereof for the expense of laying the water-pipe on the premises for which the permit is requested."

That at the time relator purchased the lot the Water Department were, and had been for some

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time, issuing water-pipe claim searches, and had such a search been ordered it would have shown that the claim for the frontage pipe of relator's lot had not been paid.

The case was argued on the petition and return.

Thomas Leaming (*Henry C. Thompson* with him), for relator.

There is nothing to show that there ever was a promise to pay for the frontage pipe. *Non constat*, the pipe was laid by the Germantown Water Co. gratuitously to obtain consumers of the water. The city purchased the entire plant, subject to all its contracts express or implied.

The fact that the pipe was laid in 1856, and no attempt made to collect the charge, and no assertion made of any claim until 1888, is sufficient presumption of payment to entitle relator to a permit.

Abraham M. Beitler, assistant city solicitor, for respondent.

The city in supplying water, acts as a private individual.

Saving Fund Soc. *v.* City, 7 Casey, 175.
Lehigh Water Co.'s Appeal, 6 Out. 515.

Introducing water is not a contract, but a license which is paid for.

Smith *v.* Phila., 31 Smith, 38.
Girard Co. *v.* Phila , 4 WEEKLY NOTES, 557.

There is a broad distinction between the lien for water-pipe collectible as a tax from the property, and the debt due for the pipe, payment of which can be demanded as a condition precedent to the furnishing of water.

City *v.* Cooke, 6 Casey, 56.

Lawrence *v.* City (14 WEEKLY NOTES, 421), and City *v.* Matchett (20 Id. 57), rested on the principle that the city was estopped from asserting that the debt was unpaid.

THE COURT. It is admitted in this case that the water-pipe in question was laid more than twenty-one years ago, and that no claim for the pipe has been presented to the owner of this lot. But this is explained by the fact that the city could make no claim until the relator asked for a permit to connect with the main. The city not having laid the pipe could not file a lien. There is no adverse possession upon which any presumption can be raised in a case of this sort. We see nothing therefore to require the city to show that the pipe has not been paid for—it is for the relator to show that it has.

Mandamus refused.

Opinion by BIDDLE, J. W. W. W., JR.

Orphans' Court.

Vance's Estate.

Decedent's estate—Election of widow to take against the will—Effect of on pecuniary legacies—Rights of residuary legatees—Period of distribution not accelerated by election of widow.

The decedent left his estate in trust, after the payment of a small annuity, to pay the balance of the entire income to his widow for life; and on her death, after the payment of certain pecuniary legacies, to divide the remainder among residuary legatees. The widow elected to take against the will:

Held, that the pecuniary legacies did not abate in amount but that the time of their payment was not accelerated by the determination of the widow to take her statutory interest, and the principal amount of said legacies was ordered to be held in trust, the income to be paid to the residuary legatees until the death of the widow—the period of distribution provided in the will of decedent.

Sur exception to adjudication.

The decedent, James Vance, by his last will and testament, after certain small bequests, devised his entire estate in trust to pay the income thereof to his wife for life, and after her death to pay out of the principal certain pecuniary legacies, and divide the residue among certain residuary legatees. The widow elected to take her statutory share against the terms of the will which (as the decedent did not leave children) amounted to one-half the estate.

Before the Auditing Judge (FERGUSON, J.), it was claimed on behalf of the residuary legatees that as by the election of the widow the residuary estate was diminished one-half in amount the pecuniary legacies should abate in like proportion.

The Auditing Judge sustained this conclusion of the residuary legatees, and ordered a distribution in which the amount of the pecuniary legacies was reduced one-half. To this finding of the Auditing Judge exceptions were filed on behalf of the specific legatees.

Edward F. Hoffman, *J. Rodman Paul*, and *A. Sydney Biddle* (*William C. Hannis* and *Joseph T. Bunting* with them, and *Alexander Simpson, Jr.*, for the executors), for exceptants.

There is no case decided by the Supreme Court which goes the length of holding that the amount of the pecuniary legacy will be reduced if there is sufficient funds in the residuary estate to pay the pecuniary legacies in full. Taylor's Estate, (5 Phila. 218) is directly in conflict with Cascaden's Estate (8 Id. 582).

The residuary legatees would be benefited un-

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duly if the doctrine of Young's Appeal (12 Out. 17) should be applied in this case.

Edward W. Magill, contra.

It is undecided by the Supreme Court that the death of the widow does not accelerate the period of distribution so far as the pecuniary legatees are concerned. The amount of the pecuniary legacies should be held in trust the interest to be paid to the residuary legatees till the time of distribution provided by the will—the death of the widow.

Young's Appeal, 12 Out. 17.

March 2, 1889. THE COURT. Though much can be said in favor of the view taken by the Auditing Judge, supported as it is by the opinion of so able a jurist as Judge OSWALD THOMPSON, in Taylor's Estate (5 Phila. 218), we are not convinced that the general legacies can be called upon to abate while there is any personal estate applicable to their payment, especially where, as here, the residuary legatees are also residuary devisees, and as such are benefited by the election of the widow to take against the will, and the consequent acceleration of their estate in one-half of the lands, with no lessening of their right to the other half at her death. Even as between legacies of the same class, abatement does not take place as against those in favor of whom the will discloses an intention to give a preference (see Bard's Estate, 8 Sm. 393); and a gift of a residue implies, *ex vi termini*, a preference in favor of those to whom specific amounts are bequeathed. The residue is that which is left after all previous demands have been fully satisfied; and all losses or diminution, arising from unexpected claims or shrinkage of values, must, logically, fall upon it. Such contingencies are supposed to present themselves to the mind of the testator, and in the absence of evidence of an intention to the contrary, their consequences cannot be permitted to be visited upon pecuniary legatees in relief of those to whom nothing is given until the former have been paid in full. It is not easy to see why the result should be different where the change of circumstances arises from the election of a widow to take against the will of her husband, a right secured to her by Act of Assembly, and more naturally, therefore, in the contemplation of the testator than either of the contingencies above referred to. It is true that in the somewhat, but not altogether similar case of a loss arising from the *devastavit* of an executor, Lord COWPER, in Dyose *v.* Dyose (1 P. Wms. 305), held that the residuary legatees were entitled to share with the pecuniary legatees according to the proportions existing at the death of the testator; but this case has been condemned by Lord THURLOW, in Fonnereau *v.* Poyntz (1 Bro. C. C. 478), and Humphreys *v.* Humphreys (2 Cox, 186), and by Sir WILLIAM GRANT, in Page *v.* Leapingwell (18 Vesey, 466); see also Willmott *v.* Jenkins (1 B. 401); Baker *v.* Farmer (L. R. 3 Ch. 537). There may, of course, be cases, as in *Ex parte* Chadwin (3 Swanst. 380), where by reason of the act of the pecuniary legatee in becoming party to the *devastavit* he may be reduced to a mere footing of equality with the residuary legatee; but such cases are exceptional (Theobald on Wills, 461).

But does the question of abatement now arise? The election of the widow to take against the will only changes its provisions to the extent that they interfere, or are inconsistent with such election; in all other respects the rights of the parties taking under the will are unaffected. Residuary legatees are entitled to any benefit that may accrue by reason of lapse of legacies or failure to become operative of any of the provisions, just as, on the other hand, they must bear any loss arising from a changed state of circumstances. *Qui sentit onus, sentire debet et commodum.* When the residuary legatee is nominated generally (Williams on Executors, 1458), he is entitled in that character to whatever may fall into the residue after the making of the will, by lapse, invalid disposition, or other accident. "It has long been settled," said Sir WILLIAM GRANT, in Cambridge *v.* Rous (8 Vesey, 25), "that a residuary bequest of personal estate (it is otherwise as to real) carries not only everything not disposed of, but everything that in the event turns out not to be disposed of." (See also James *v.* James, 4 Paige, 115; Van Kleeck *v.* Reformed Dutch Church, 6 Paige, 600.)

Here the will gives the income of the entire estate to the testator's widow for life, and by reason of her election to take against it, the one-half of the life estate so given, being undisposed of until her death, goes necessarily under the principles referred to, to the residuary legatees, for the specified period. This was the precise point decided by Chancellor WALWORTH, in James *v.* James, *supra.* The pecuniary legacies do not become payable until the widow's death, and the legatees have no right, as against the residuary legatees, to call for present payment. It is true where the estate is given to a widow for life with remainder to children (as in Rogers's Estate, 16 WEEKLY NOTES, 228), or other persons, the remainder is accelerated, as a matter of course, where the former takes against the will, to the extent that it is not defeated by such election; but this principle has no application to the case of pecuniary legacies given at a future date, though there may be an intervening estate which fails. Such a case is in all respects analogous to that of legacies given after a provision for accumulation which contravenes the statute, which

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are not accelerated by the failure, thus caused, of the particular estate. (Green *v.* Gascoyne, 4 D. J. & S. 565; Ellis *v.* Maxwell, 3 B. 587; Attorney-General *v.* Poulden, 3 Ha. 555; Grim's Estate, 12 WEEKLY NOTES, 354; Grim's Appeal, 13 Out. 391.)

It is at least well settled that where the provisions of a will are interfered with by the election of one having a paramount right to take against it, equity will sequester the testamentary gift to the person so taking, in order to secure compensation to those whom such election disappoints (Story's Eq., sections 1082, 1083, etc.; Gretton *v.* Haward, 1 Swanst. 441). In such case "Courts of Equity will treat the substituted devise, not as an extinguished title, but as a trust in the devisee for the benefit of the disappointed claimants, to the amount of their interest therein." The doctrine has been fully applied in Pennsylvania for the benefit of persons disappointed by the election of the widow of the testator to take against the husband's will (Sandoe's Appeal, 15 Smith, 314; Brubaker's Appeal, Id. 317; Young's Appeal, 12 Out. 17, etc.).

Of course the first inquiry is, who are the disappointed persons; for the sequestering is only for the purpose of securing compensation to them; and here, assuming that the pecuniary legatees cannot be made to abate with the residuary legatees, it is clear that the former, if payment at the widow's death is secured to them, are not affected at all by her election to take against the will. In the meantime the income will go to the residuary legatees towards compensation for the loss of one-half of the principal of the personal estate which such election has taken from them. The case of Young's Appeal, *supra*, is, in principle, identical with that now before us. There present payment was refused to the pecuniary legatees, and the income of the sum set apart for their payment at the widow's death, was applied to the payment of annuities, instead of throwing such payment upon the residuary legatees. This, it was said by Judge STERRETT, in affirming the decree, worked no injury to any of the complaining legatees. "By the terms of the will their legacies are not payable until the death of the widow, and what right have they to demand payment in advance of the time, so long as there are disappointed beneficiaries who in equity should be compensated?" In the opinion of the Court below this was stated somewhat more fully by Judge HAWKINS: "Their amount is not reduced, and the legatees and devisees are not injured by the widow's election. They are not therefore disappointed legatees, do not require compensation, and have no equitable right to have the benefit intended for the widow sequestered for them. Moreover, even if the whole income arising from the legacies and devise during the widow's lifetime should be sequestered to secure compensation to disappointed legatees, it would but carry into effect the intention of the testator that their enjoyment should be postponed until after her death. Whilst it is evident that the amount which it was intended the residuary legatees should receive is largely reduced, that they are the disappointed legatees, and if the annuity is charged upon their legacies it would to a still greater extent defeat the intention of the testator."

It may be under the Act of Assembly which permits possession to be given to tenants for life of personal property upon the entry of security for the protection of future interests, that the residuary legatees are entitled to demand possession upon the entry of such security; but without passing upon this question, we now direct that there be retained in the hands of the executors a sum sufficient to pay in full the pecuniary legacies given at the widow's death; the amount to be duly invested, and the income, until the time at which the legacies become so payable, paid to the residuary legatees according to their respective interests.

It was suggested that the entire personal estate passing under the will should be thus held in trust while the widow lives; but as residuary legatees are entitled to all except what is given specifically, and as they are all *sui juris*, or duly represented, a trust, except to the extent required for the protection of the pecuniary legatees, would be inoperative.

We see no reason for differing with the Auditing Judge with regard to the subject of commissions. For services such as have been required on the part of these executors, covering a period of less than eighteen months, an allowance of $12,426.19—in addition to $1053.77 upon income—cannot be considered illiberal; more especially as the question as to the compensation to be allowed for services rendered in the collection of the outstanding asset, as to which it is said there has been more than the usual amount of trouble, is left for determination upon the settlement of a future account. The exceptions upon this point are dismissed.

The adjudication will be modified in conformity with this opinion.

Let the necessary decree be prepared by counsel.

Opinion by PENROSE, J. E. F. H.

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April, 1889.

Murray's Estate.

Decedent's estate—Claim for services rendered to decedent presented after death—Evidence necessary to sustain—Promise of compensation therefor must be definite.

Claims against dead men's estates, resting entirely in parol, based largely upon loose declarations, presented generally years after the services were rendered, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done.

Testatrix divided her estate into two parts, one of which she devised to her daughter M. and the other half to her daughter E. or her issue in case of her death, and provided that if E., who had been absent and unheard of for several years, should not be found within two years of the death of testatrix, "diligent inquiry having been made by my executors, who are to be allowed a reasonable sum for their expenses therein," then her share should go to M :

Held, that the expenses provided for were to be paid out of the share devised to E. and not to be allowed out of the estate.

Sur exceptions to adjudication.

At the audit of the account of the executors of testatrix a claim was presented for nursing and housework rendered to the decedent for four separate periods, covering several weeks during as many years, which claim was disallowed by the Auditing Judge, FERGUSON, J., whereupon exceptions were filed.

The facts are set forth in the opinion of the Court.

James B. McCarren, for claimant.
Albert D. Wilson, for accountant.
Walter George Smith, for legatee.

April 27, 1889. THE COURT. The Auditing Judge correctly characterized the claim in this case as one against whose integrity every presumption arises, because it was not presented until after the death of the party charged, and because the services upon which it was based are such as are customarily paid for at stated intervals. It was for nursing and housework, for four separate periods, one of 60 weeks, beginning August 1, 1883, another of 30 weeks, from March 1, 1885, another of 15 weeks, from April 1, 1886, and another of 26 weeks, from March 1, 1887. These dates were fixed by a son of the claimant, who was a lad of thirteen when the services began, and whose testimony was so manifestly, and even grotesquely false, that no jury, except one chosen from a panel of lunatics, would seriously consider it for a moment. This view was taken by the Auditing Judge, who declared that he would have felt more confidence in the honesty of the claim if this particular witness had not been produced. The labors which, in the joint capacity of nurse and housekeeper, the claimant is alleged to have performed, could not have consumed her whole time, because they did not prevent her from attending to her own house and her own family. It was testified that she kept the house of the decedent in order and prepared her food. How onerous these duties were may be conjectured from the fact that the house contained only three rooms, whose sole occupant was the decedent, and that the meals, according to the statement of the single witness who described them, consisted of a cup of tea and a boiled egg. It was also said by the witnesses that the claimant nursed the decedent, but no hint was given of the character or extent of that service, and the truth seems to have been that the testatrix required no nursing. She was old and feeble, but she was never bed-ridden, was able to walk about and seldom or never consulted a doctor. It was conceded that during the intervals between the dates assigned to claimant's services she lived with one or another of her own children and that she died in the home of a daughter. It is not, of course, incredible that the services covering the apochryphal periods of the claim, and which were spread over five years, were rendered without any compensation and with the vague expectation of payment after the death of the party whom they benefited; but it is highly improbable. It is improbable, in the first place, that after caring for the decedent for more than a year, without pay, the claimant would soon afterwards resume her labors and continue them gratuitously for six months longer and then repeat the process for two succeeding years. Similar instances of child-like trust in a future reward may actually exist but they are never disclosed until death, as in this case, has taken away the beneficiary, and with her the opportunity for denying the service. These considerations led to the rejection of a claim of this character in Voldemar's Estate (45 Legal Intell. 4). There was, moreover, strong presumptive proof that the labor was paid for in the lifetime of the decedent. The latter owned, besides her own dwellings, two adjoining houses, in one of which the claimant resided as her tenant. No proof was offered that any rent was paid for this house; on the contrary the agent of the decedent testified that he collected the rent of the third house only. Whether the claimant paid rent or not, however, is immaterial, the presumption against her demand being in either case equally strong. She would hardly continue to pay rent during a term of five years to a landlady who was steadily becoming more and more her debtor; and if she paid no rent it was because her services had been accepted as an equivalent. The decedent,

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it is true, said to one or two persons that the claimant would be paid after her death; but these declarations were made in the absence of the claimant and they specified no particular service and no amount of compensation. On this point it may be well to cite the language of GREEN, J., in Wall's Appeal (1 Amer. 471): "Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations, presented generally years after the services in question were rendered and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done. We cannot too often repeat the cautions we have so frequently uttered upon this subject and we feel that the present occasion is one which demands both their repetition and their application." Observations to the same effect and equally strong were made by the same Judge in Ulrich *v.* Arnold (5 Crum. 170). See further, as to the force of such declarations, Candor's Appeal (5 W. & S. 513); Leidig *v.* Coover (11 Wr. 534); Graham *v.* Graham's Executors (10 Cas. 475); Pollock *v.* Ray (4 Nor. 428). We think that the claim should be rejected.

The testatrix, after dividing her residuary estate into halves, provided by will as follows: "The one of which equal parts I give and bequeath to my daughter Ellen or Helen, or her issue in event of the death of said Ellen, and provided that as said Ellen has been absent and unheard of for a number of years, if the said Ellen or her issue be not found before the expiration of two years from the time of my death (diligent inquiry having been made by my executors, who are to be allowed a reasonable sum for their expenses therein), then, in such case, the said share so hereby given shall go to and be given to my daughter Mrs. Mary Furey," to whom she bequeathed and devised the remaining half. She died October 8, 1887. Here was a present gift to Mrs. Furey, of one-half of the existing residue. That it was not to be burdened with any part of the expenses of the inquiry for the missing daughter would seem to be clear, because those expenses could not well be ascertained in advance, and because they were justly payable by the party in whose interest they were to be incurred. The distribution, ordered by the adjudication, by which one moiety was awarded to Mrs. Furey, and publication was directed as to the other, at the cost of the second legatee, was therefore correct. The exceptions to the allowance of the claim of Mrs. Lane are sustained, and the other exceptions are dismissed.

Opinion by ASHMAN, J. W. C. S.

March, 1889.

Bond's Estate.

Wills—Bequest to married woman for her sole and separate use—Held, to create a trust, valid during coverture, and to render necessary the appointment of a trustee.

Sur exceptions to adjudication.

Before the Auditing Judge, HANNA, P. J., the following facts appeared: The testatrix, Mary A. Bond, died December 19, 1886, leaving a will duly proved after her decease, wherein she directed her executor to pay and distribute her residuary estate, *inter alia*, as follows: "To Mary Bond, wife of my son Thomas Bond, one-fifth part for her sole and separate use."

In making distribution of the estate, the Auditing Judge awarded the said one-fifth "to a trustee to be appointed for Mary Bond, wife of Thomas Bond," saying in the adjudication: "The award to a trustee for Mary Bond of the one-fifth share bequeathed to her is for the reason that it was the intention of the testatrix to protect it from the use and control of her husband. She is a married woman, and it can only thus be preserved for 'her sole and separate use.' The trust, of course, is only during coverture. If the testatrix intended her son to have this one-fifth share the bequest would be to him and not to his wife."

Exceptions to this distribution were filed on behalf of the said Mary Bond.

Joseph L. Tull, for exceptant.

Kinley J. Tener, contra.

March 30, 1889. THE COURT. That the gift of an entire estate may be fettered with a trust which shall take from the owner its control during life or some less period, is well settled. The protection of the beneficiary from his own acts or the acts of another, of which cases a spendthrift son and a woman married or contemplating marriage are instances, may justify the interposition of a trust which would otherwise be obnoxious to the principle that a less estate will merge into a greater, in the same person. In Warden *v.* Lyons (3 Crum. 396), a trust for the separate use of a married woman was held good, although it had for its sole purpose a temporary immunity against incumbrances during the passage of the title to the grantee in fee. In the will now under review, the testatrix directed the executor to pay a share of the residuary estate to the legatee, a married woman, for her sole and separate use. The Auditing Judge properly held that this created a trust which was valid during the continuance of the coverture, and he was sustained, among other cases, by Sheets's Estate (2 P. F. S. 257); Lightner's Appeal (11 WEEKLY NOTES, 181), and Ward's Estate (13 Id. 282).

The exception is dismissed.

Opinion by ASHMAN, J. C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JULY 5, 1889.* [NO. 10.

Supreme Court.

July '89, 97, 98, 99. June 5, 1889

In re Application of Prospect Brewing Company.

Wholesale liquor licenses—Act of May 24, 1887—Construction of—Powers of Courts of Quarter Sessions—Discretion—Certiorari—Mandamus—Practice—Sufficiency of return—Evidence.

The Court of Quarter Sessions in granting licenses to wholesale liquor dealers, bottlers, and brewers under the Act of May 24, 1887 (P. L. 194), has not the large discretion conferred upon it by the Act of May 13, 1887 (P. L. 108), relating to licenses for the sale of liquors at retail. The discretion conferred by the former Act is a qualified limited discretion and must be confined to the inquiry whether the applicant for a wholesale license possesses the necessary qualifications for a license required by the laws previously in force as to the granting of such licenses, viz., whether he is a citizen of the United States, of temperate habits, and of good moral character. When no remonstrance or objection is made alleging that the petitioner is disqualified for either of the reasons above stated the Court is bound to grant a license, and if in such case the application is refused the Supreme Court will direct by mandamus the license to be granted.

Where upon the filing of an application for a wholesale license as aforesaid no remonstrance or objection is made upon the record, there is no issue before the Court, and the Court has no power to proceed upon the hearing of the case with an inquiry as to matters of fact not at issue.

A return to a writ of alternative mandamus must be framed with certainty to the greatest possible intent, inasmuch as it cannot be traversed. It will therefore invariably be strictly construed.

The Judges of the Court of Quarter Sessions having refused an application for a wholesale liquor license under the Act of May 24, 1887 (P. L. 194), to which no remonstrance or objection had been made, a writ of alternative mandamus was issued by the Supreme Court directed to them, to which they made return that they had considered whether the applicants were citizens of the United States, of temperate habits, of good moral character, and fit persons to receive a license:

Held, that the Court had no right to inquire as to the fitness of the persons to receive the license, and that in that respect the return was insufficient.

In the above case the relators set forth certain evidence adduced before the Court relative to the sale by them of a certain form of beer called "*ambrosia*," containing a very small percentage of alcohol. The return of the Judges set forth that, "the statement of testimony made in the petition of the relators was incompetent, inaccurate, and misleading," and further set forth that "the Court had found that said parties had brewed said 'ambrosia' and sold the same to numerous unlicensed dealers who had been induced to purchase the same by false representations of the relators as to the character of the article:"

Held, that the return was clearly insufficient inasmuch as it did not set forth in what respect the evidence contained in the petition was inaccurate and misleading, and also because the company was, under the license which it held, entitled to sell to any one willing to buy, licensed or unlicensed; and also because said return failed to state what false representations were made as to the character of the beer.

In the above case the Judges of the Court of Quarter Sessions made return generally (a) that the company applicant had conducted its business in violation of law; (b) that it was not a fit person to receive a license; (c) that in so far as it was possible for a corporation to possess any moral character it did not possess a good moral character:

Held, that the return was insufficient, inasmuch as it did not state in what respect the company had violated the law, inasmuch as the question of the fitness of the applicant was not in the discretion of the Court, and because the return in that regard was evasive, and inasmuch as it is impossible for a corporation to possess moral character, and no averment was made that the officers and stockholders thereof were not of good moral character.

In the Supreme Court.

Mandamus, at the relation of the Prospect Brewing Company and the stockholders thereof, directed to the Judges of the Quarter Sessions of Philadelphia County.

The petition and suggestion of the Prospect Brewing Company and the stockholders thereof for a writ of mandamus, as above, was filed May 24, 1889, and set forth an application by the company to the Court of Quarter Sessions of the county of Philadelphia for the renewal of a wholesale brewer's license under the provisions of the Act of May 24, 1887 (P. L. 194). The petition set forth in substance that an application had been presented in due form and that no objection or remonstrance had been made thereto; that the officers of the said company were citizens of the United States, of good moral character and temperate habits, and that they had not offended against any license law of the Commonwealth; that notwithstanding the above the Court had refused to grant to petitioners a license as applied for, without asigning any reasons for such refusal. The prayer was for a writ of alternative mandamus directed to the Judges of the Court of Quarter Sessions to show cause why the license should not be granted. The Court, on May 27, 1889, granted a writ of alternative mandamus.

The Judges of the Court of Quarter Sessions filed a return, the substance of which is set out at length in the opinion of the Supreme Court. The relators demurred to the return as insufficient in law.

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Furman Sheppard and *George W. Biddle*, for the relators.

John G. Johnson, for the Judges of the Court of Quarter Sessions.

June 28, 1889. THE COURT. This was a writ of alternative mandamus directed to the Judges of the Court of Quarter Sessions of Philadelphia holding the License Court, commanding them to show cause why they should not grant the petitioner a brewer's license. The petition upon which the alternative writ was allowed sets forth, *inter alia*, that the Prospect Brewing Company is a corporation duly chartered under the laws of this State for the purpose of the brewing of all kinds of malt liquors and the sale thereof; that the capital stock of said corporation is $200,000, which has been fully paid up; that its business plant, consisting of real estate, apparatus, utensils, and other property, is of the value of $630,000; that "the annual product of the brewery of the petitioner, the said company, is very considerable, consisting of about thirty-five thousand four hundred barrels, of which quantity about two million bottles are bottled for domestic consumption and export, the same being distributed by exportation to Canada, Mexico, Porto Rico, Rio Janeiro, Buenos Ayres, Montevideo, and through the United States by means of agents in San Francisco, California; Savannah, Ga.; Charleston, S. C.; Charlotte, Raleigh, N. C.; Jacksonville, Fla.; Norfolk, Richmond, Va.; Baltimore, Md.; Camden, Newark, Sea Isle, Atlantic City, N. J.; Boston, Mass.; and somewhat less than one-third of the whole product is sold and consumed in the city of Philadelphia. The said company employs seventy workmen and employés, with an annual wage-list of $54,000; that for several years last past it has been licensed as a brewer, including the year 1888; that the petitioner filed its application to the Court of Quarter Sessions of the county of Philadelphia for the renewal of its license for the year beginning the first day of June, 1889, under the provisions of the Act of May 24, 1887, entitled 'An Act providing for the licensing of wholesale dealers in intoxicating liquors;' . . . that upon the seventh, eighth, and ninth days of May, 1889, a hearing was had upon the said petition, and no remonstrance or objection, so far as is known to your petitioners, or as appears by entries and records of the said Court, was presented or made by any one to the granting of the said license." The petition then proceeds to narrate at some length an inquiry which occurred in Court upon the hearing as to one of the petitioner's employés having sold an article of drink called ambrosia, which appears to have been a light form of beer. We need not give this at length as it is of very little importance, and is referred to hereafter in connection with the return to the writ.

The underlying principle of this case, that is, the right of a brewer or wholesale dealer to a license, has been fully considered and decided *In re* Application of Mary E. Pollard for a wholesale license. That was a certiorari to the Quarter Sessions of Allegheny County, and the opinion is now filed with this case. I do not propose to reargue the questions there decided. I shall refer to them merely to state the points and rulings involved. We there held that in granting license to wholesale dealers, bottlers, and brewers under the Act of May 24, 1887 (P. L. 194), the Court of Quarter Sessions has not the large discretion conferred upon it by the retail Act of May 13, 1887 (P. L. 108); that the discretion conferred by the wholesale Act is a qualified, limited discretion, and is confined to the inquiry whether the applicant for a wholesale license is a citizen of the United States, of temperate habits, and of good moral character. As no remonstrance or objection appeared upon the record of that case, alleging that the petitioner was disqualified for either of the reasons above stated, we reversed the order of the Court below refusing a license, as we also did a number of other like cases, submitted at the same time. It scarcely needs an argument to show the propriety of this ruling. If the record does not disclose the reason for the refusal it would be impossible to review the action of the Court below, either upon a writ of certiorari or other process, no matter how illegal or even arbitrary the action of the Court might be, or how vast the interests which are thus stricken down. As to such matters a Quarter Sessions Judge would sit as absolute a despot as the Emperor of China. In the case in hand the value of the brewery, with its stock, fixtures, etc., was, as before stated, $630,000. The refusal of a license leaves the plant and stock comparatively worthless. The former is of little use for any other purpose. Under such circumstances it is but reasonable that the action of the Court should be in such shape as to be reviewable here, and to show that the refusal of the license was the exercise of a sound judicial discretion expressly authorized by law. It follows from what has been said that had this case been brought here upon a writ of certiorari it would necessarily have been reversed. In this respect it differs widely from an application for a retail license, and the reason is, that in the latter instance the discretionary powers of the Court are much broader; the license may be refused not only because the Court regards the applicant as an unfit person to sell liquor, or, if fit, that his house is not needed in the particular neighborhood for the accommodation of strangers and travellers. The present case, however, is here upon an application for a mandamus, which involves considerations not referred to in Pollard's Case.

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It is perhaps unfortunate that in cases of so much magnitude, involving very large pecuniary interests, no orderly mode of practice has been prescribed by the Act of Assembly or adopted by the Courts. The licensing of wholesale dealers has heretofore been regarded so much as a matter of course, that but very few cases have reached this Court under prior Acts of Assembly. In the meagre reports of the one or two cases which have reached us it is difficult to gather the facts, and the Per Curiam opinions fail to show that the distinction between wholesale and retail dealers has ever been called to our attention. We do not find anywhere any allusion to the proper mode of procedure in the matter of applications for a wholesale license. This is the first case that has come up under the Act of May 24, 1887, and a careful examination of said Act leads us to the conclusion, as we have decided in Pollard's Case, that in the absence of any remonstrance or objection upon the record, it is the duty of the Court to grant a wholesale license, and the objection must be limited to the three disqualifications already alluded to. As a matter of practice such remonstrance or objection should be in writing and placed upon the record. In such case the action of the Court below can be reviewed here in an orderly manner. When a remonstrance is filed, it forms, with the petition, the pleadings in the case. There is then an issue of facts before the Court, to be decided as in other cases upon the evidence. If the evidence sustains the remonstrance it is the plain duty of the Court to refuse license. That would be the exercise of a lawful judicial discretion with which this Court would hesitate to interfere. When the application of the petitioner came up for consideration in the Court below, there was neither remonstrance nor objection upon the record against the granting of the license. There was no issue before the Court. There was no disputed question of fact for it to decide, and the Act of May 24, 1887, does not confer upon the Court of Quarter Sessions the powers of a roving commission to inquire as to matters not properly before the Court, and in no way connected with the petitioner's right to a brewer's license. As there was no issue before the Court, it follows necessarily that there could have been no legal trial, and as there were no disputed questions of fact, there could have been no valid findings of fact. We might well, therefore, without more, discard the entire return of the learned Judges of the Quarter Sessions to the writ of alternative mandamus. That we may not seem wanting in respect to them, I will proceed to its consideration. And, first, I will refer briefly to the principles of law which govern the return to such writs.

There is no form of pleading known to the law in which greater certainty is required than in a return to a writ of mandamus. It requires not only the greatest possible certainty; not merely certainty to a common intent, or certainty to a certain intent in general, but certainty to the greatest possible intent; or, as it is sometimes called, certainty to a certain intent in every particular. (King *v.* Mayor, 1 Lord Raym. 559; Bacon's Abridg't, Mandamus, 1 K.; Rex *v.* Liverpool, 2 Burr. 731; Tapping on Mandamus, 393; Harwood *v.* Marshall, 10 Md. 452; Reichenbach *v.* Ruddach, 121 Pa. 18; Commonwealth *v.* Commissioners, 37 Id. 237; Rex *v.* Malden, 2 Salk. 431.) The reason for this strictness is, that at the common law the return could not be traversed. However that may be now in some cases, the rule is practically the same in the present instance. We all agree that we are bound by the return to the writ, and that if it discloses a sufficient ground to refuse the license we can go no further. It follows that the common law rule as to the certainty of the return must be applied.

Keeping this in view, and also the fact that the objections to the petitioner's application must be confined to the questions of (1) citizenship, (2) temperate habits, and (3) good moral character, I will briefly consider this return.

As preliminary the Judges say:—

"Before deciding said application said Court deemed it to be its duty to determine whether the applicants were citizens of the United States, of temperate habits, of good moral character, and *fit persons to receive a license.*"

The first three matters were proper subjects of inquiry; if there was objection made upon either of these grounds, it was the plain duty of the Court to hear the evidence and decide. As to the part of the return I have italicized it was a matter with which the Court had nothing to do in the case of an applicant for a wholesale license.

They have nothing to do with it because the Act of 24 May confers no such power upon them. It is incorporating into the wholesale Act a provision of the retail Act. The key to the whole difficulty may perhaps be found in this assumption of a discretion in wholesale license which is not found in the law, and is applicable only to the case of retailers. The fitness of a man to have a wholesale license depends upon his possessing the three qualifications before mentioned, not upon the opinion of the Court upon other matters outside of them.

It appears that at the hearing in the Court below the main question was as to the manufacture and sale of a mild form of beer called ambrosia, and upon the petition for the writ of alternative mandamus, the petitioner sets out at some length the testimony that was given in regard to it, with the names of the witnesses, from which it appeared that the alcholic strength of the said beer was from one and a quarter to one

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and three-quarters per cent. only; that Dr. Henry Leffmann was then called as a witness by the Court, who testified to having examined ambrosia chemically and corroborated the evidence of the petitioner as to its alcholic strength. Much more was alleged in the petition to which it is unnecessary to refer. To this matter the Court below makes return:—

"The statement of testimony made in the petition of the relators is incompetent, inaccurate and misleading."

This return under all the authorities is clearly insufficient. (See Reichenbach *v.* Ruddach, *supra.*) In what respect was it inaccurate or misleading? Conceding that the respondents were not required to return the evidence, yet if they attempt to negative an averment in the petition by their return, it must be done with the certainty required in this form of pleading. The return then further states:—

"The Court did find from the evidence, that during the year of its license then about to expire the said company, through its chief executive officers, who had been charged with the conduct of its business, had caused to be brewed an intoxicating malt liquor for the purpose of selling the same to unlicensed dealers in the city of Philadelphia, to be by the latter again sold in this city in violation of the laws of the Commonwealth; that said intoxicating malt liquor thus brewed by said company had been sold by it to numerous unlicensed dealers in the expectation that the same would be sold by them in this city in violation of law; that through its said officers said company, by false representations as to the character of said liquor, had induced divers unlicensed dealers to purchase the same from it; and that said liquor thus purchased had been sold in the city of Philadelphia by said unlicensed dealers."

It is to be observed that this return is entirely outside of the case. It has no bearing upon either of the three qualifications required for a wholesale dealer and at best refers to a rambling inquiry not properly before the Court. The license which the company held authorized them to manufacture and sell beer to any person who was willing to buy, licensed or unlicensed, and it must not be forgotten that the particular beer referred to was ambrosia, which as appears by the averments in the petition, and not specifically contradicted in the return, contains only a little over one per cent. of alcohol. The return is, moreover, vague and uncertain; we are not told what false representations were made by the company in regard to the character of the beer, and mere adjectives are entirely out of place in a return to a writ of alternative mandamus. Nor does this portion of the return allege a violation of any law of this Commonwealth. I have dwelt upon it at greater length than was necessary for the reason that it had evidently much to do with the action of the Court below.

The return then proceeds:—

"The Court did find (a) that the said company had conducted its business during the year then expiring in violation of law. It did further find (b) that said company was not a fit person to receive the license applied for; and (c) that so far as it was possible for a corporation to possess any moral character, it did not possess a good moral character."

There are three subjects referred to in this portion of the return, and for convenience I have divided them. As to the first, (a) what law has the company violated in the conduct of its business? The return does not inform us. Instead of facts we are given a mere conclusion of law. The averment is so vague that it has no force whatever. In regard to the second branch, (b) I have already said that the fitness of the company to receive a license is not in the discretion of the Court below, unless from one of the three causes of disqualification before mentioned. A return generally that the applicant is not a fit person to receive a brewer's license, without specifying for what cause, is bad for uncertainty, and is, moreover, evasive. The return does say, however, (c) that "so far as it was possible for a corporation to possess any moral character, it did not possess a good moral character."

It is difficult to treat this proposition seriously, yet it is the only matter in this return which even gives color of legality to the refusal of this license. That a corporation—an invisible, intangible thing, an artificial being created by the law—can have a character of any kind, is a novel proposition. That the learned Judges below so regarded it is evident by the qualification in their return. But the corporation has officials and a board of directors. If the Court below had found upon evidence and so returned that said officers and directors were not of good moral character, I apprehend the return would have been sufficient. At the same time, I doubt whether any one of the learned Judges of the Court below would have been willing to put his name to a return that the officers and directors of this corporation were respectively men of bad moral character. The return that the corporation has not a good moral character is insensible.

There is nothing else in the return which requires comment; our conclusion is that it sets forth no valid reason why the petitioner should not be licensed.

The former writ was alternative. The writ of peremptory mandamus is now awarded. It will probably be found unnecessary to issue it.

Opinion by PAXSON, C. J. L. L., JR.

[See next case].

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Oct. '89, 105–123. May 23, 1889.

In re Applications of Pollard et al.

Wholesale liquor licenses—Act of May 24, 1887—Construction of powers of Court of Quarter Sessions—Discretion—Certiorari—Right of review by Supreme Court.

The Court of Quarter Sessions in granting licenses to wholesale liquor dealers, bottlers, and brewers under the Act of May 24, 1887 (P. L. 194), has not the large discretion conferred upon it by the Act of May 13, 1887 (P. L. 108), relating to licenses for the sale of liquors at retail. The discretion conferred by the former Act is a qualified limited discretion, and is confined to the inquiry, whether the applicant for wholesale license is a citizen of the United States, of temperate habits and of good moral character. Where no remonstrance or objection is made, alleging that the petitioner is disqualified for either of the reasons above stated, the Court is bound to grant a license. And if in such case the application is refused the Supreme Court will upon a certiorari reverse the order of the Quarter Sessions.

The provision of § 2 of the Act of May 24, 1887 (P. L. 194), that "licenses shall be granted . . . in such manner as is provided by existing laws," does not by implication vest in the Court of Quarter Sessions any of the powers vested in them by the Act of May 13, 1887 (P. L. 108), relative to licenses for the sale of liquor by retail. By "existing laws" is meant the existing laws in regard to wholesale licenses. In Allegheny County the law referred to is the special or local law of April 3, 1872 (P. L. 843). The discretion of the Court is limited to the determination of the question, whether the applicant possesses the necessary qualifications for a license required by the latter Act, viz: whether he is a citizen of the United States, of temperate habits and of good moral character.

Where an application for a wholesale license is filed under the Act of May 24, 1887, the Court has no power to exercise a discretion as to whether the granting of the license is necessary for the public accommodation in that locality. The wholesale liquor business has no necessary connection with the precise locality in which it is carried on, and there is, therefore, no ground for the conclusion that such a discretion was intended to be vested in the Court.

The Supreme Court possesses and exercises the powers of the Court of King's Bench upon certiorari to the Courts of Quarter Sessions, and may inquire into and determine the extent and limits of the powers of the Courts of Quarter Sessions and the regularity of the exercise of such powers under the Act of May 13, 1887 (P. L. 108).

Writs of certiorari to the Quarter Sessions of Allegheny County.

These were fourteen writs of certiorari issued to bring up the records in the cases of fourteen applications to the Quarter Sessions of Allegheny County for licenses to sell liquors by wholesale, and for bottlers' licenses.

The facts of these cases, appeared to be as follows: Mary E. Pollard presented a petition for a wholesale license on February 5, 1889, together with a bond as required by the rules of Court. No objections were filed to the application. In April, 1889, the case came on for a hearing. On April 22, 1889, the Court refused the application, and subsequently on May 9, 1889, refused an application for a rehearing. Three other applications for wholesale licenses were presented by the L. H. Harris Drug Co., Joseph Fleming & Son, and T. D. Casey & Co. Ten applications for bottlers' licenses were presented by Joseph Einstein & Co. *et al.* All the above applications were accompanied with bonds in due form, and no objections were filed to any of them. They were all refused by the Court, and an application for a rehearing in each case also refused.

The petitions in all of the above cases set forth that the applicants were citizens of the United States. In none of the cases did it appear that any objections or remonstrances were made to the applications at the time of hearing.

The applicants respectively took these writs of certiorari, assigning for error the refusal of the Court to grant the licenses as aforesaid.

James R. Sterrett, *John M. Kennedy*, *James C. Doty*, *Henry R. Ewing*, *Charles F. McKenna*, and *D. T. Watson*, for Pollard, Harris Co., and Fleming & Son.

John S. Ferguson, *Josiah Cohen*, and *A. V. D. Watterson*, for Casey & Co.

John S. Robb and *James Fitzsimmons*, for Einstein *et al.*

IN RE APPLICATION OF MARY E. POLLARD.

June 28, 1889. THE COURT. The plaintiff in error presented her petition to the Court of Quarter Sessions of Allegheny County, praying for a license to sell liquors at wholesale at No. 1044 Penn Avenue in said city. The petition was in proper form, and it was not denied that she had complied with all the requirements of the law. Upon the hearing of her petition there was no remonstrance or objection to the granting of her license, or to the form of her petition or bond. The Court below refused her application, and also declined to grant a rehearing. The record, which has been brought up by the writ of certiorari, fails to disclose any remonstrances filed, or objection made, to her application. Under such circumstances is the case reviewable here?

We decided in Raudenbusch's Petition (120 Pa. 328), that the granting of a license to sell liquor at retail, under the Act of May 13, 1887 (P. L. 108), was within the discretion of the Quarter Sessions, and not reviewable upon certiorari. The Court below applied the doctrine of that case to applications for licenses, made under the Act of May 24, 1887 (P. L. 194), "Providing for the Licensing of Wholesale Dealers in Intoxicating Liquors." The narrow question presented

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for our consideration is, whether under the Act relating to wholesale licenses the Court has the same discretion to grant or refuse a license as it has under the prior Act relating to retail licenses.

It requires but a glance at the two Acts to see that their object is essentially different. The Retail Act of May 13 was intended to restrain the sale of liquors. This clearly appears in its title which reads: "An Act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtures thereof." This was the construction placed upon this Act in Raudenbusch's Petition (*supra*). The Act of May 24, providing for wholesale licenses was a revenue Act. There is not a word in it to indicate any intention of restraining the sale of liquor. The second and third sections of said Act are as follows:—

SECTION 2. Licenses shall be granted only by the Court of Quarter Sessions of the proper county in such manner as is provided by existing laws, and shall be for one year from a date fixed by rule or standing order of said Court: the said Court shall fix by rule or standing order a time at which application for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance, or counsel; *Provided*, That for the present year licenses may be granted under previous laws at any session fixed by said Court, not later than June 30th. *Provided, further*, That it shall not be lawful for any rectifier, compounder, wholesale dealer, storekeeper, agent, or bottler to sell in less quantities than one quart, and distillers, brewers, and manufacturers shall not sell in less quantities than one gallon.

SECTION 3. That all bottlers within the Commonwealth shall be required to procure license from the Court of Quarter Sessions of the respective counties in which they are located, in the manner provided for in the second section of this Act, for which they shall pay the sum of two hundred dollars in cities of the first, second, and third class, one hundred dollars in all other cities, boroughs, and townships: *Provided*, That no bottler shall be permitted to sell spirituous, vinous, malt, or brewed liquors to be drank upon the premises where sold, nor at any place provided by such seller for such purpose.

There are two things to be noticed in the second section above quoted. They are (a) that licenses thall be granted by the Court of Quarter Sessions in such manner as is provided by existing laws, and (b) that applications for licenses may be heard by evidence, petition, remonstrance, or counsel. From the latter proposition it may be argued with some force that the Court has a discretion in the matter of wholesale licenses. For of what use would it be to hear an application by "evidence, petition, remonstrance, or counsel," unless the Court has the power to decide, that is, to grant or refuse such application. All this is conceded. The Court has a discretion in such cases; it will be our purpose to define the character of that discretion and its extent. As preliminary to the discussion of this point, it is proper to refer to that portion of the second section (a), which provides that licenses shall be granted by the Court "in such manner as is provided by existing laws." What existing laws are here referred to? Clearly, the existing laws in regard to wholesale licenses. I know that the opinion has prevailed in some quarters that the effect of these words is to read in to the Wholesale Act several sections of the previous Retail Act. This construction is so palpably erroneous that it would be a waste of time to discuss it. There is no reference in the one Act to the other. The Act in force in the county of Allegheny in May, 1887, in regard to wholesale licenses, was the special or local law of April 3, 1872 (P. L. 843), applicable to Allegheny County only, which provides, *inter alia*, that "the treasurer of said county shall, annually, upon payment to him of the license fees, and the receiving of the bond hereinafter mentioned, grant the license, hereinafter specified, to citizens of the United States of temperate habits and good moral character," etc. The Act of May 24, 1887, contains no repealing clause. The Act of 1872 is not repealed in express terms or by necessary implication so far as regards wholesale licenses, excepting to the extent that the one Act is supplied by the other. Thus, the Act of 1887 declares that wholesale licenses shall be granted by the Court of Quarter Sessions instead of by the county treasurer; it provides for a hearing by the Court of applications for such licenses; makes a different classification of venders and fixes a different rate to be paid. But it imposes no qualifications upon applicants for wholesale licenses; it does not even require that they shall be citizens of the United States, or that they shall be persons of temperate habits, or of good moral character. Where are we to look for these qualifications? Certainly not in the Retail Act, which has nothing whatever to do with it, but in the existing laws in regard to wholesale licenses, to wit, the Act of 1872. There is nothing in the Act of 1872, which as before observed is a local Act, applicable only to the county of Allegheny, to indicate that any qualification was requisite for a wholesale dealer than those above mentioned; or, that any discretion existed in the Court of Quarter Sessions to refuse such license, except for cause, and such cause must relate to one of three things, viz: citizenship, character, or sobriety. It follows that a citizen of the United States, of temperate habits and good character, who presents his application

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for a wholesale license in due form, and who has complied with the requisites of the law, has *prima facie* a right to such license. In the absence of anything upon the record to impeach such right, it is the duty of the Court to grant it. If a remonstrance is filed setting forth that the applicant is disqualified for either of the three causes above stated, it is the duty of the Court to hear the case, and if the remonstrance is sustained by evidence, to refuse a license. Such case is not reviewable here, for the reason that it would be a proper exercise of the discretion conferred upon the Court by the Act of May 24, 1887. But the discretion goes no further. It does not extend to an arbitrary refusal of a license. I use the word arbitrary in no offensive sense, but to indicate the refusal of a wholesale license for reasons other than those above indicated. The learned Judge below has performed a thankless and most unpleasant duty—and we are satisfied he has done so without fear or favoritism. But we are compelled to differ from him in our construction of the Act of Assembly referred to.

An extended argument is not needed to show that the discretion conferred upon the Court by the Retail Act of 1887, does not extend to the Wholesale Act. A few words upon this subject, however, may be appropriately added. As before observed, the object and leading thought in the former Act was to restrain and regulate the sale of liquor; that is to say, to restrain its sale to the consumer. It was for such reason that a large discretion was conferred upon the Quarter Sessions. If we contrast the second section, above quoted, of the Wholesale Act, with the seventh section of the Retail Act, the difference between them is palpable. The said seventh section is as follows:—

"The said Court of Quarter Sessions shall hear petitions from residents of the ward, borough, or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever in the opinion of the said Court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, entertainment of strangers or travellers, or that the applicant or applicants is or are not fit persons to whom such license should be granted; and, upon sufficient cause being shown or proof being made to the said Court that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license."

We cannot incorporate or read into the Wholesale Act the above section of the Retail Act, for the reason that we are not clothed with legislative powers. Moreover it is inapplicable to wholesale licenses. What has the Court to do with the question whether a particular wholesale license is "necessary for the accommodation of the public, and entertainment of strangers or travellers?" In the case of a retail license the Court may well inquire —indeed it is its duty to do so—whether the public accommodation in the particular ward, street, or block requires that the applicant shall be licensed. The whole theory upon which retailers are licensed—and it is the theory of the law—is that they are needed for the public accommodation, to provide places where strangers and travellers may rest, and procure needed refreshments. Hence it may very well be, as was said in Raudenbusch's Petition (*supra*), that "if a ward has one hundred public houses, where only fifty are required by the public wants, it is plain that fifty houses must be denied license, although every one of the applicants is a worthy man and keeps a respectable house, and although there be neither remonstrance nor objection on the score of want of fitness." None of this reasoning applies to a wholesale license. It is not granted for the convenience of a particular neighborhood, nor for the accommodation of strangers or travellers. Nor does it matter where the place of business is located. If all the wholesale liquor houses in Pittsburgh were in a single block it would make no difference, and would be no objection to their being licensed. Their business is not confined to any particular locality; on the contrary it is general, and we may fairly infer from the knowledge of trade which every intelligent man possesses that but a small portion of the sales of a wholesale house is confined to the city or place in which it is located. How then would it be possible for a Judge to intelligently exercise a discretion as to the need of a wholesale house in a particular location? The power to close up large establishments, such as breweries, distilleries, and wholesale liquor houses, where perhaps hundreds of thousands of dollars are invested therein, is too vast to be exercised by any man or any Court, excepting upon the clearest grant of legislative authority. It cannot be done upon mere implication.

We are in no doubt as to our power to revise the proceedings below upon this writ. This Court possesses and exercises the powers of the King's Bench, and it was said of them by the late Justice SHARSWOOD, in Commissioners of Northamptom County's Appeal (57 Pa. 452): "It is beyond all question that under these extensive powers, this Court is authorized to examine and review the proceedings of the Court of Quarter Sessions in any matter specially committed to it by statute, so far as to inquire and determine the extent and limits of its power and the regularity of its exercise. It is equally clear

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that the proper mode of asserting this jurisdiction is by bringing the record of its proceedings before us for inspection by writ of certiorari." And it was held by the Court of Errors and Appeals of New York, in the People *v.* Citizen's Gas Light Co. (39 N. Y. 81), in speaking of the writ of certiorari: "That its office extends unquestionably to the review of all questions of jurisdiction, power, and authority of the inferior tribunals to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by the well settled principles of the common law."

The granting of wholesale licenses is a matter specially committed by Act of Assembly to the Courts of Quarter Sessions. Upon the writs of certiorari we may review their proceedings so far as to see whether they have kept within the limits of the powers thus conferred, and have exercised them in conformity with law.

We are of opinion that those powers have been exceeded in this instance, and that upon the face of this record the petitioner was entitled to her license. The order of the Court below refusing it is reversed, and a procedendo awarded.

Opinion by PAXSON, C. J.

IN RE APPLICATION OF L. H. HARRIS DRUG COMPANY.

IN RE APPLICATION OF JOSEPH FLEMING & SON.

IN RE PETITION OF T. D. CASEY & CO.

June 28, 1889. THE COURT. These cases are upon all fours with Pollard's Case, just decided. We need not repeat what was there said.

The order refusing a license in each of the above cases is reversed and a procedendo awarded.

Opinion by PAXSON, C. J.

IN RE PETITION OF JOSEPH EINSTEIN & CO., ET AL.

June 28, 1889. THE COURT. These cases were all applications for a bottler's license, under the Act of May 24, 1887. As we are unable to distinguish them in principle from Pollard's Case, just decided, the order refusing such license is reversed in each case, and a procedendo awarded.

Opinion by PAXSON, C. J. L. L., JR.

[See preceding case.]

Oct. '89, 128. June 5, 1889.

Commonwealth ex rel. Kaiser v. Hill.

Constitutional law—Wholesale liquor licenses—Act of April 3, 1872—*Act of May* 24, 1887.

The provisions of the Act of May 24, 1887 (P. L. 194), relative to the granting of wholesale liquor licenses, are constitutional and operate to repeal the Act of April 3, 1872 (P. L. 843), relative to the granting of licenses for the sale of liquor in Allegheny County, so far as the provisions of the Act of 1872 are inconsistent with those of the Act of 1887. The county treasurer has therefore no longer any authority to grant licenses under the latter Act.

Error to the Court of Common Pleas No. 1, of Allegheny County.

Mandamus, by the Commonwealth at the relation of William F. Kaiser, against William Hill, treasurer of Allegheny County, to compel the latter to issue to the relator a wholesale license to sell liquor in pursuance of the provisions of the Act of April 3, 1872 (P. L. 843), and the supplements thereto.

The petition filed by the relator for an alternative mandamus set forth the fact that the relator had applied for the license and tendered the license fee, and had offered to give satisfactory security which had been refused. A writ of alternative mandamus was granted.

The defendant filed an answer setting out that since the passage of the Act of May 24, 1887 (P. L. 194), he had no authority to grant a license. To this answer the relator demurred.

The Court after argument entered judgment for defendant. Whereupon the relator took this writ assigning for error the action of the Court as above.

Morton Hunter, for the plaintiff in error.

The Act of May 24, 1887 (P. L. 194), is not constitutional. It is obnoxious to the provisions of Art. 3, sec. 6, in providing that licenses shall be granted "in such manner as is provided by existing laws," without setting those laws out at length. It is also a local or special law, and as such obnoxious to the provisions of Art. 3, sec. 7. Its title is defective, and it is obnoxious to the provisions of Art. 3, sec. 3. The Act of April 3, 1872 (P. L. 843), is in force.

June 28, 1889. THE COURT. For the reasons given in Pollard's Case, just decided, the judgment is affirmed.

PER CURIAM.

L. L., JR.

[See preceding cases.]

July '88, 200, 201. May 11, 1889.

In re Carlson's License.
In re Tuttle's License.

Liquor license laws—Act of May 13, 1887—*Certiorari—Practice—Revocation of license.*

Upon a writ of certiorari to the Court of Quarter Sessions in a proceeding where a retail license for the sale of liquor has been revoked under the provisions of the Act of May 13, 1887, §7 (P. L. 110), the Supreme

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Court cannot examine the testimony nor the opinion of the Court below inasmuch as they constitute no part of the record. In such case it will be presumed that the Court below had sufficient evidence before it to show that the party whose license has been revoked has violated some law of this Commonwealth in regard to the sale of liquor.

An agreement of counsel in such case that the testimony may be omitted from the paper-book and that the findings of fact contained in the opinion of the Court below shall be considered in lieu thereof is nugatory, as the Supreme Court would have no right to consider the testimony if printed.

In a proceeding to revoke a license to sell liquor at retail granted under the Act of May 13, 1887 (P. L. 110), on the ground that the licensee has sold liquors to minors, it is not a sufficient defence that the parties to whom the liquor was sold appeared to be of full age and informed the licensee in answer to inquiries that they were of such full age.

Writs of certiorari to the Quarter Sessions of Erie County.

Rules to show cause why licenses for the sale of liquor at retail granted by the Court to C. M. Carlson, and A. J. Tuttle respectively, under the provisions of the Act of May 13, 1887 (P. L. 110), should not be revoked. The Court, GUNNISON, P. J., after hearing, made the rules absolute, filing the following opinions:—

CARLSON'S CASE.

"The Act of May 13, 1887, § 7 (P. L. 110), provides that 'upon sufficient cause being shown, or proof being made to the said Court, that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license.'

"Upon the trial of the Commonwealth *v.* Marz and Gehrlein at the May Sessions of the Court, it appearing from the testimony that C. M. Carlson, the respondent in this rule, had sold beer to minors, this rule was entered, notice given him, and a hearing had at which the testimony of witnesses for and against the rule was heard. If that testimony showed a violation of the law on the part of the respondent, the portion of the section quoted makes it mandatory upon the Court to make this rule absolute.

"The respondent was sworn, and admitted in his testimony that he sold beer to the two minors in question. His excuse is that their appearance indicated that they were of full age, and that as a precaution before selling he asked their age and each responded that he was of full age; that he sold to them in good faith, fully believing them to be of full age.

"It may be conceded that the weight of evidence is to the effect that he was ignorant of the fact that the boys were minors, and that he did not wilfully violate the law; and if ignorance of fact or the absence of intention to violate the law will avail as an excuse the rule should be discharged.

"By section 17 of the Act of 1887, it is enacted, 'that it shall not be lawful for any person, with or without license, to furnish by sale, gift, or otherwise' 'any spirituous, vinous, malt, or brewed liquors' 'at any time to a minor,' etc. Under a literal reading of the section there was undoubtedly a violation in this case. The act of selling, irrespective of intention, constitutes an offence under a strict construction of the language used by the Legislature.

"Ignorance of fact is, in many cases, admitted as an excuse, as showing the absence of a criminal intention. In other cases the rule is different. The distinction is thus laid down by Greenleaf: 'The rule' (*i. e.*, that ignorance of fact will excuse) 'would seem to hold good in all cases where the act, if done knowingly, would be *malum in se.* But where a statute commands that an act be done or omitted which in the absence of such statutes might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril.' (3 Greenleaf Ev. sec. 21.)

"Measured by this standard it would seem that ignorance as to the age of the persons to whom the liquor was sold was no excuse. The law is of the class recited by Professor Greenleaf, in which such a rule obtains.

"That the Legislature intended the mere fact of selling to a minor to constitute the offence irrespective of intention or good faith, is, I think, apparent upon a review of its legislation upon this subject.

"The Act of May 8, 1854, § 1 (P. L. 663), enacted, 'that wilfully furnishing intoxicating drinks by sale, gift, or otherwise,' 'to a minor,' 'shall be held and deemed a misdemeanor,' etc.

"By the second section of the Act of 17th April, 1867 (P. L. 89), it was enacted that 'no person shall sell, give away, or dispose of any strong or spirituous liquors, wines, ale, beer, or any intoxicating drinks to' 'any person under

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twenty-one years of age' without the consent of parent or guardian, etc.

"By the eleventh section of the Act of April 12, 1875 (P. L. 42), it was enacted 'that it shall not be lawful for any person, with or without license, to sell,' etc., 'at any time to a minor.'

"And lastly, by sect. 17, of the Act of 13th May, 1887 (P. L. 113), it was enacted, 'That it shall not be lawful for any person, with or without license, to furnish by sale, gift, or otherwise,' 'any spirituous, vinous, malt, or brewed liquors,' 'at any time to a minor.'

"It will be seen by the Act of 1854, a necessary element to constitute the offence, was that the sale should be wilful. By each of the succeeding Acts cited, the sale is made unlawful, the word 'wilfully' being omitted, and no other word of similar import being used. This change must have been intentional. Whether or not the Act of 1854 was, upon experience, found to permit too easy an opportunity for evading the law, it is not necessary to inquire. The succeeding legislation effected a change, by which the question of good faith and criminal intention became unimportant in determining the question as to whether or not there had been a violation of the law. Sales to minors, whether wilfully or ignorantly, are equally prohibited.

"It follows that, the law having been violated, it becomes the clear duty of the Court to revoke the license in this case.

"The rule to show cause is made absolute."

TUTTLE'S CASE.

"The facts in this case are similar to those in the rule to show cause why the license of C. M. Carlson should not be revoked. For the reasons given in the opinion filed in that case, the rule to show cause in this case is made absolute."

Carlson and Tuttle thereupon took these writs, assigning for error the action of the Court as above. It was agreed by counsel that the notes of testimony taken should be omitted from the paper-book, and that the appellants should use instead the findings of fact contained in the opinion of the Court below.

J. Ross Thompson and *E. P. Gould*, for plaintiffs in error.

A. E. Sisson, district attorney, for the Commonwealth.

Ignorance of fact is no defence where the statute makes the offence indictable irrespective of guilty knowledge.

McCutcheon *v.* People, 69 Ill. 601.
Farmer *v.* People, 77 Id. 322.
Commonwealth *v.* Emmons, 98 Mass. 6.
State *v.* Hatfield, 24 Wis. 60.
Crampton *v.* State, 37 Ark. 108.
Redmond *v.* State, 36 Id. 58.
Robinson *v.* State, 38 Id. 641.
Reich *v.* State, 63 Ga. 616.
Ulrich *v.* Commonwealth, 6 Bush (Ky.), 400.
State *v.* Hause, 71 N. C. 518.
State *v.* Cain, 9 W. Va. 572; 38 Am. Rep. 24.
U. S. *v.* Schuler, 6 McLean, 28.
U. S. *v.* Dodge, 1 Deady (U. S.), 186.
Felton *v.* U. S., 96 U. S. 699.
Carroll *v.* State, 7 Crim. Law Mag. 77.

June 28, 1889. THE COURT. We are asked to review the action of the Court of Quarter Sessions in each of the above cases, in revoking the license of the plaintiffs in error to sell liquor. The records have been brought here upon writs of certiorari, and we can only review what appears upon their face. The seventh section of the Act of May 13, 1887 (P. L. 110), provides that "upon sufficient cause being shown, or proof being made to the said Court, that the party holding a license has violated any law of this Commonwealth relating to the sale of liquors, the Court of Quarter Sessions shall, upon notice being given to the person so licensed, revoke the said license." This provision is mandatory, and upon this writ we must presume the Court below had sufficient evidence before it to show that each of the plaintiffs in error had violated some law of this Commonwealth in regard to the sale of liquor. What particular law had been violated the record does not show, as neither the testimony nor the opinion of the Court form any part of it. The agreement of counsel of March 27, 1889, that the testimony may be omitted from the paper-book, and that the findings of fact as contained in the opinion of the Court should be considered in lieu thereof, is nugatory, as we would have no right to consider the testimony if printed. If we look into the opinion of the Court for the facts, however, we find nothing to help the plaintiffs. From it we learn that the offence of which the plaintiffs in error were guilty was that of selling liquor to minors, and that the only excuse offered was that they did not know the persons to whom they sold were minors. This ignorance is not a sufficient excuse or justification under the Act of Assembly. If such a defence could be successfully interposed in such cases there would be few convictions, and the law would be nullified for all practical purposes. Speaking for myself, I regret that the Act of Assembly does not make it a criminal offence for a minor to obtain liquor from a licensed dealer upon the pretence that he is of full age. As the law now stands it is an offence to sell a person a glass of liquor the day before he is twenty-one years of age. Yet it is often difficult for a saloon keeper to know the age of the person who may call for a drink. Some persons are as mature in appearance at twenty as others are at twenty-two. While I would rigidly enforce the license laws, yet the dealer who pays for his license and sells by

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authority of law is entitled to some consideration. I would hold him to a strict compliance with the law; at the same time I would protect him in so far as he honestly attempts to comply with it, and would punish the individual who, by a falsehood, induces him to violate it.

We see no sufficient reason to disturb the action of the Court below.

The proceedings are affirmed in each case.

Opinion by PAXSON, C. J. L. L., JR.

May, '88, 33. June 3, 1889.

Commonwealth v. American Bell Telephone Company.

Telephone company—Taxes and taxation—Tax upon capital stock of foreign corporation doing business or having capital employed in this Commonwealth—Act of June 7, 1879 (P. L. 112)—What "doing business" consists in.

A telephone company incorporated under the laws of Massachusetts, having its principal office in Boston, and having no office, agent, or place of business in this State, leased to certain Pennsylvania corporations the use of telephones, manufactured by it under letters patent, and furnished them with the instruments which remained the property of the Massachusetts corporation and were to be paid for whether used or not. The telephone company has no part of its capital or property here except said instruments. The contracts for rent and royalty on the telephones and the payments thereunder, were made in Boston. The Pennsylvania corporations carry on the business in this State; construct and own the lines of wires, switches, switchboards and other apparatus, maintain their own offices and employ and pay their officers and agents. The telephone company reserved a certain power of control over the leased telephones, and might upon certain breeches of the contracts, take possession of the instruments and operate them:

Held, that the capital stock of said telephone company was not liable to the tax imposed by section 2 of the Act of June 7, 1879 (P. L. 112), upon the stock of companies "doing business" or "having capital employed" in this Commonwealth; although the instruments themselves might be liable to taxation as such.

Semble, that should the telephone company take possession of and operate the instruments upon breach of contract, the capital stock would be liable to taxation under said Act.

Commonwealth *v.* Standard Oil Company (101 Pa. 119), followed.

Error to the Common Pleas of Dauphin County.

In the Court below this case was an appeal by the American Bell Telephone Company from the settlement of an account by the auditor-general and State treasurer for a tax upon capital stock under the Act of June 7, 1879.

The case was tried, without a jury, before SIMONTON, P. J., who found as follows:—

"The settlement appealed from is for tax on capital stock for the tax year ending the first Monday of November, 1884.

"We find the facts as follows:—

"1. The American Bell Telephone Company, defendant, is a corporation created in 1880, by the laws of the State of Massachusetts. Its principal office and place of business is in the city of Boston. It is authorized by its charter to carry on the business of manufacturing, owning, selling, using and licensing others to use electric speaking telephones and other apparatus pertaining to the transmission of intelligence by electricity.

"2. Defendant had no office, agent, or place of business in Pennsylvania during the period embraced in this settlement. The business of telephoning was carried on in this State by Pennsylvania corporations, which were licensed by defendant to operate telephones, for which it holds letters patent granted by the United States; and it had also leased to said corporations the telephones used in said business, which it manufactured in the State of Massachusetts, and delivered to the licensees and lessees there, retaining the ownership of the telephones so leased.

"3. The lessee corporations constructed and owned the necessary lines of wire, switches, switch-boards and other apparatus necessary to carry on said business, and they maintained their own offices, and employed the officers and agents needful to carry on said business; and furnished telephones and received the pay therefor from those who used them.

"4. Defendant received from these Pennsylvania corporations, for the license under said letters patent, and the lease of the telephones, in most instances a fixed rent and royalty upon and for each telephone furnished: which was charged and paid, whether the telephone was in actual use or not; in come cases the compensation was, intead of a fixed sum, a percentage on the gross receipts of the lessee. All the contracts for rent and royalties were made in Boston, and the payments therefor were made there.

"5. The settlement appealed from charges defendant with a tax on that part of its capital stock which bears the same proportion to its whole capital stock that the number of telephones used in Pennsylvania, in the manner detailed above, during the period embraced in the settlement, bore to the whole number of its telephones anywhere in use.

"The Commonwealth claims that on these facts, defendant is liable to the tax on capital stock imposed by section two of the Act of June 7, 1879 (P. L. 112), which enacts that 'every company . . . . doing business in this Commonwealth, or having capital employed in this Commonwealth, in the name of any other company or corporation, association or associations, person or

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persons, or in any other manner,' shall be subject to a tax on its capital stock.

"It is conceded on behalf of the defendant that if the facts bring it within the terms of the Act, it is liable to the tax, but it is contended that they show that it is not 'doing business' in this State, nor 'having capital employed' in any of the ways which by the terms of the Act create a liability to taxation.

"There have heretofore been two cases before this Court which have called for a consideration of the scope of the part of the Act of 1879, above quoted. The first of these is Commonwealth *v.* Standard Oil Company (101 Pa. St. 119). It is there said (p. 132), 'the Act of May 1, 1868, seems to use the phrase "go into operation" as a synonym for "doing business," and this must mean more than purchasing supplies in the State through agents (P. L. 1868, p. 108). So the Act of June 7, 1879, the Act now in question, enacts that no corporation chartered, by this or any other State and doing business in this Commonwealth, shall go into operation without first making certain reports; thus doing business is equivalent to going into operation; and in section 16 (p. 120) foreign corporations which do not invest and use their capital in this State are required to obtain and pay for a license, thus making "invest and use its capital" another equivalent for "doing business."' This judgment, based on this reasoning, was, in that case, affirmed by the Supreme Court.

"The second case was Commonwealth *v.* Conglomerate Mining Company, decided in 1884, and not reported. In that case this Court held that a foreign mining company, which owned a lot of ground in the city of Philadelphia, not used for corporate purposes, for which it had paid $1500, was not subject to the tax on capital stock imposed by the Act of 1879, because it did not come within the scope of the language of section 2, which we have quoted above, and under which the tax is claimed in this case. It was said in that case: 'It by no means follows that because a foreign corporation owns property here, it is *merely* for that reason, doing business here, or investing money or employing its capital here, in the sense intended by the Act. . . . The Legislature did not intend to tax upon their capital stock foreign corporations who exercise no corporate activity in this State, who do not, in some degree, or in some manner, direct or indirect, carry out here the purposes for which they were created.' This was the only point in the case, and it was affirmed by the Supreme Court.

"We think the authority of these precedents requires us to hold that defendant is not liable to the tax claimed in this case. We cannot say that it was doing business in this State, or had capital employed in any manner here, during the period embraced in this settlement merely because it had leased telephones, the legal title to which it retained, and charged royalties for the use of its patents, the rent and royalties being either a fixed sum, or a proportion of the gross receipts received by the lessees, and being payable and actually paid to defendant in Boston. It may be proper to say that defendant claims that it retains the ownership of the telephones in order to have it in its power more effectually to prevent infringement of its rights under its patents. We have not found this as a fact, because it is a pure question of motive; nor do we regard it as a material element in the case. The mere ownership of property in the State, by a foreign corporation, does not render it liable to the tax on capital stock; it must be 'doing business,' or 'having capital employed' in some manner; or it must 'invest and use its capital' within the State. As said in the case last above recited, 'it must be, in some manner and degree, exercising its corporate powers within the State.'

"The view we have taken above was held in the Federal Court in Ohio, in United States *v.* American Bell Telephone Company (this defendant). (29 Fed. Rep. 17.)

"For these reasons we have reached the following

"CONCLUSIONS OF LAW.

"1. Defendant was not during the period embraced in the settlement appealed from, doing business or having its capital employed in any manner in this Commonwealth.

"2. Defendant is not liable to the tax claimed in this case, and cannot be held therefor, but is entitled to judgment in its favor in this case.

"We, therefore, direct judgment to be entered in favor of defendant, unless exceptions be filed within the time limited by law."

Exceptions filed by the Commonwealth were dismissed, and judgment entered for defendant, whereupon the Commonwealth took this writ, assigning for error the conclusions of law, *supra*, and the entry of judgment for defendant.

William S. Kirkpatrick, attorney-general, and *John F. Sanderson*, deputy attorney-general, for the Commonwealth, plaintiff in error.

Wayne Mac Veagh, *Samuel B. Huey*, and *M. E. Olmsted*, for defendant in error.

June 28, 1889. THE COURT. This was an attempt on the part of the Commonwealth to tax the capital stock of the American Bell Telephone Company, to the extent that its capital was employed in "doing business within this Commonwealth." Under the facts as found by the Court below, we are very clear the Commonwealth is not entitled to collect such tax. The company is a corporation created by the laws of the State of

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Massachusetts. It principal office or place of business is in the city of Boston. It had no office, agent, or place of business in this State. All the contracts for rent and royalty of telephones were made in Boston, and the payments therefor were made there. It leases to certain Pennsylvania corporations the use of the telephone, and furnishes the instruments, which remain the property of the company, and are to be paid for whether used or not. The Pennsylvania corporations carry on the business here; they construct and own the necessary lines of wires, switches, switch boards, and other apparatus necessary to carry on the business; they maintain their own offices, and employ and pay the officers and agents needed to carry it on. The telephone company transacts no business here, it has no part of its capital or property here, except the instruments in question, which, as before observed, are leased to Pennsylvania corporations, with a license to use the same. Under such state of facts it would seem clear that the telephone company could not be taxed as doing business within this State. It was contended, however, on the part of the Commonwealth that, because the company had in its contract with the Pennsylvania corporations, reserved a certain power of control over telephones leased to them, and might, upon certain breaches of said contracts, enter upon, take possession of, and operate said telephones, the said company was doing business here, and became liable to the tax. There is a wide distinction, however, between the right to do business and actually doing it. It may be that should said company proceed to enforce their rights under these contracts, and after taking possession of the telephones, operate them, it would be doing business here. But that contingency has not arrived. It is to be observed that this was not a tax upon the instruments owned by the company, and operated here under license. The instruments as such are perhaps within the taxing power of the Commonwealth, for the reason that they are here and within her jurisdiction. It matters not to the State to whom they belong. But the State has not laid such tax; on the contrary, it is a tax upon capital stock, and as the company transacts no business within the State, no portion of its capital is here in point of fact, or by construction of law. Authorities are scarcely needed for so plain a proposition. It is sufficient to refer to Commonwealth *v.* Standard Oil Company (101 Pa. 119).

Judgment affirmed.

Opinion by PAXSON, C. J. H. C. O.

May, '89, 23 and 24. June 4, 1889.

Lehigh Valley Railroad Company v. The Commonwealth.

Taxation — Transportation companies — Gross receipts — Foreign corporations — Inter-state commerce — Act of June 7, 1879.

The seventh section of the Act of June 7, 1879, imposing a tax upon gross receipts derived from "tolls and transportation, telegraph business, and express business," is not valid so far as it applies to receipts derived from commerce between points within, and points without, the State. But the Act is valid as to all receipts derived from commerce, which is wholly confined within the limits of the State.

Receipts from transportation by continuous carriage between points both of which are in Pennsylvania are subject to taxation by said State, although while in transit the freight and passengers are carried out of the State and in again. In reality and substance, such transportation is purely internal commerce.

Com. *v.* Lehigh Valley R. R. Co., 22 WEEKLY NOTES, 525, followed.

Error to the Common Pleas of Dauphin County.

In the Court below these cases were appeals by the Lehigh Valley Railroad Company from the settlement of accounts against it by the auditor-general and State treasurer.

The facts in No. 23 were found by the Court (SIMONTON, P. J.) as follows:—

"This case was tried without a jury, under the Act of 1874. We find the facts to be as follows:—

"1. The defendant is a railroad company doing business in this Commonwealth. Its own railway is partly within, and partly without the State of Pennsylvania, and it connects also with other lines in other States.

"2. For the six months ending June 30, 1886, its gross receipts for transportation were $3,925,552.14. Of this amount $1,084,781.40 was received for transportation beginning and ending in Pennsylvania without passing out of the State in course of transit; $122,833.05 was received for transportation, by continuous carriage, of freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit. [So far as the defendant is concerned, the transportation was from Mauch Chunk, Pennsylvania, to Phillipsburg, New Jersey, and the receipts named were for that particular transportation. But the freight and passengers were there delivered upon the railroad of another company, to wit, the Belvidere Delaware Railroad Co., a line operated

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by the Pennsylvania Railroad Company, upon which railroad it was carried to Trenton, and thence, by other lines of the Pennsylvania Railroad Company's system, to Philadelphia. By running arrangements between these companies the transportation was continuous, and the freight and passengers were, when their transportation commenced at Mauch Chunk, destined for Philadelphia, and were actually there delivered. The transportation of passengers was upon tickets, a form of which is hereby referred to. . . . The transportation of freight was upon the joint way-bill of the Lehigh Valley and Pennsylvania Railroad Companies, and this way-bill covered the whole transportation. . . . The total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment, and the remainder by the Pennsylvania Railroad Company at point of destination, were apportioned between the companies upon a mileage basis; that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried. One-twentieth of the said receipts were derived from passenger transportation.] $43,026.82 was received for transportation from points in foreign States to other points in foreign States not touching Pennsylvania; $39,599.44 was received for transportation from points in a foreign State to other points in the same State, passing through the State of Pennsylvania in course of transit; $227,304.50 was received for transportation from points in other States to points in Pennsylvania; $2,203,347.87 was received for transportation from points in Pennsylvania to points in other States; and $204,659.06 was received for transportation from points in a foreign State to points in a third State, passing through the State of Pennsylvania in course of transit. In the last four classes and the second class, the transportation was continuous from the point of beginning to the point of ending, and passengers were carried for a single sum or charge, and upon a single way-bill or ticket.

"(3) This settlement taxes $\frac{26069}{32681}$ of the entire sum of $3,925,552.14 (that fraction representing defendant's mileage within the State) for the six months ending June 30, 1886, and is made under section 7 of the Act of 1879 (P. L. 116).

"(4) On August 14, 1888, the defendant paid to the Commonwealth the sum of $7500.

"CONCLUSIONS OF LAW.

"The questions raised here have been discussed in Commonwealth *v.* Delaware and Hudson Canal Company (21 WEEKLY NOTES, 406), and Commonwealth *v.* New York, Lake Erie, and Western Railroad Company (21 Id. 410). [Affirmed by the Supreme Court in Commonwealth *v.* Lehigh Valley Railroad Company, etc. (22 Id. 525)]. For the reasons there given, we hold that the Commonwealth can recover tax only upon the sums of $1,084,781.40 and $122,833.05.

"The sum due the Commonwealth is as follows:—

Tax $\frac{4}{10}$ of one per cent. upon $1,207,614.45	$9,660 92
Upon which there has been paid the sum of	7,500 00
Leaving a balance of	$2,160 92
Interest from November 15, 1886, to October 10, 1888	493 41
Attorney-General's commission	483 05
Total	$3,137 38

for which amount we direct judgment to be entered if exceptions are not filed according to law."

Defendant filed exceptions as follows:—

(1) The Court erred in including in the judgment directed to be entered in favor of the Commonwealth, a tax upon the item of $122,833.05, being the receipts of the Lehigh Valley Railroad Company for transportation of freight and passengers from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, said freight and passengers having been carried by the Pennsylvania Railroad Company from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, as stated in finding of fact No. 2, the taxation of receipts so derived being in violation of that clause of the Constitution of the United States which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

(2) The Court erred in deciding, relative to the item of $122,833.05, receipts of the Lehigh Valley Railroad Company for the transportation from Mauch Chunk, Pennsylvania, to Phillipsburgh, New Jersey, of freight and passengers carried by the Pennsylvania Railroad Company, from Phillipsburgh, through the State of New Jersey, by way of Trenton, to Philadelphia, that "in principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be."

(3) Having found concerning the item of $122-833.05 the facts inclosed in brackets in the finding of the Court, the Court erred in not deciding that the transportation, by the Lehigh Valley Railroad Company, for which the said receipts were derived, was inter-state transportation, and that the taxation of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares

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that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

(4) The Court erred in directing judgment to be entered in favor of the Commonwealth for $3,137.38.

The Court having overruled the exceptions, and entered judgment in favor of the Commonwealth, defendant took this writ, and restated its exceptions as assignments of error.

In No. 24 the facts were substantially the same.

M. E. Olmsted, for plaintiff in error.

William S. Kirkpatrick, attorney-general, and *John F. Sanderson*, deputy attorney-general, for the Commonwealth.

June 28, 1889. THE COURT. There is no essential difference in the facts of these two cases. They present the single question whether transportation from one point to another point in the same State is inter-state commerce, for the reason that in the course of such transportation the property in question passes the boundaries of the State. The same point was before us last year in a proceeding between the same parties, and we determined it in favor of the Commonwealth. We adhere to the same ruling now, which will enable the cases to be reviewed by the Supreme Court of the United States, and our decision corrected, if erroneous.

The judgment in each case is affirmed.

PER CURIAM. H. C. O.

May '89, 48 & 49. June 6, 1889.

Appeal of the Commonwealth. Appeal of the Lackawanna Iron and Coal Company.

Taxes — Taxation — Corporations — Act of June 30, 1885 — Manufacturing companies — Taxable upon property owned and used by them, but not legally incident to the business of manufacturing.

Language which relieves from taxation will be strictly construed.

Section 20 of the Act of June 30, 1885, which exempts the capital of manufacturing corporations from State taxation was intended to operate solely upon capital actually employed in manufacturing, and not upon capital of a manufacturing company employed in any other business or pursuit.

The fact that an iron manufacturing company is authorized by its charter to hold and operate coal and iron mines, is no reason why so much of its capital as is invested in such mining operations should enjoy the benefit of exemption from State tax under the Act of June 30, 1885. The business of mining and supplying raw materials is not legally or necessarily incident to a strictly manufacturing franchise.

A manufacturing company, which is authorized by its charter to own and work coal and iron ores, does not, by exercising such rights, deprive itself of the exemption from State tax on so much of its capital as is employed in exclusively manufacturing operations.

Appeals from a judgment of the Common Pleas of Dauphin County.

Two appeals, by the Commonwealth and by the Lackawanna Iron and Coal Company, respectively, from a judgment entered on exceptions filed to the settlement of the account of the auditor-general and State treasurer, for tax upon the capital stock of said Lackawanna Iron and Coal Company.

The case was tried without a jury under the Act of April 22, 1874, and the facts as found by the Court (MCPHERSON, J.), sufficiently appear in the opinion of the Supreme Court, *infra*.

The Court held that the Lackawanna Iron and Coal Company was not taxable on so much of its capital as was invested in its manufacturing plant, and also in coal and ore property which was reasonably necessary in the prosecution of its principal business as a manufacturing company, but that it was taxable on the bonds and mortgages, city lots, and store-goods held by it, and entered judgment accordingly.

From this judgment the Commonwealth appealed, specifying for error, *inter alia*:—

The learned Court erred (6) in not holding that the 20th section of the Act of 1885 exempted from taxation such, and only such, corporations as are exclusively organized for and engaged in the business of manufacturing. (7) In not holding that the capital invested in the coal property, mentioned in the third finding of fact, was subject to taxation. (8) In not holding that the capital invested in the ore property, mentioned in the third finding of fact, was subject to taxation. (9) In not entering judgment for the Commonwealth for the full amount of the tax claimed.

The Lackawanna Iron and Coal Company also appealed, specifying for error, *inter alia*, the refusal of the Court to exempt it entirely from taxation on capital stock.

John F. Sanderson, deputy attorney-general, and *William S. Kirkpatrick*, attorney-general, for the Commonwealth.

M. E. Olmsted, for the Lackawanna Iron and Coal Company.

COMMONWEALTH'S APPEAL.

June 28, 1889. THE COURT. The Lackawanna Iron and Coal Company, appellee in this

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case, is a domestic corporation, chartered by the Act of April 5, 1853, and supplements of May 2, 1855, and April 27, 1864.

Section 4, of the original Act, authorizes the company to hold "lands not exceeding, at any one time, three thousand acres, with power to mortgage, sell, lease or otherwise dispose of the same or any part thereof;" and provides that its capital "may be employed in mining iron ore, making and manufacturing iron, mining coal and limestone, and transporting and carrying the same, and for such other objects as are necessary in the prosecution of said business."

Section 5 requires the company to report annually the amount of capital paid in, the number of acres of land held by it, the quantity of coal mined, and of iron manufactured and sold, etc.

Section 2, of the first supplement, authorizes the company to acquire, hold and enjoy certain timber and iron ore lands, in Luzerne County, not exceeding five thousand acres; and also ore lands in the State of New York, not exceeding one thousand acres at any one time, and to mine, obtain and use the ores, timber and other products of said lands.

Section 2, of second supplement, authorizes the company to purchase, hold and dispose of such mineral lands in the State of New Jersey, and such limestone lands, not exceeding two hundred acres, in the counties of Monroe and Northampton, in this state, as the directors may deem advisable, with the right to mine, quarry, remove and dispose of said minerals and limestone.

During the tax years ending first Monday of November, 1887 and 1888, respectively, the company, exercising the corporate powers with which it is invested by the Acts aforesaid, mined coal and iron ore, quarried limestone, manufactured iron and steel, transported the same, etc. Its reports for some years show a full paid capital of $3,000,000, on which dividends were declared, as follows: for 1887, fifteen per cent., amounting to $450,000, and for 1888, ten per cent., amounting to $300,000. In stating its tax account with the Commonwealth for those years, the proper accounting officers charged the company for each year, respectively, one-half mill for each one per cent. of dividend, aggregating $37,500. From that settlement the company appealed, alleging that under section 20 of the Act of 1885, it was wholly relieved from the payment of capital stock tax. That section provides, "That the taxes laid upon manufacturing corporations by and under the revenue laws of this Commonwealth be and the same are hereby abolished as to such corporations, and the laws, under which such taxes are laid and collected, be and the same are hereby repealed, so far, and so far only, as they apply to and affect manufacturing corporations."

This case was tried by the Court, without a jury, under the Act of 1874. The findings of the learned Judge are not as full and specific as they should have been or as the evidence would have warranted; but in connection with other facts, about which there is no dispute, we have sufficient data to enable us to dispose of the main questions. Indeed, there was no conflict of testimony. In the main, the oral evidence was that of Charles F. Mattes, called by the company. Among other things, it was clearly shown that a considerable portion of the coal mined by the company during the two years in question,—about 450,000 tons, alleged to be too small for its own use, was sold at the mines for not less than seven hundred and twenty-one thousand dollars.

In addition to the facts above stated, relating to the incorporation of the company, amount of its capital stock, dividends declared for the years 1887 and 1888, etc., the learned Judge found as follows:

"2. . . . . Its principal business is the manufacture of steel rails: incident thereto it mines a considerable quantity of coal and iron ore."

"3. Its capital stock represented the following property, all of which was reasonably necessary for the prosecution of its business: Manufacturing plant, including building, real estate, machinery, etc., the value of which was $1,500,000
Coal property, the value of which was 500,000
Ore property, the value of which was 400,000

"$2,400,000."

"It also represented the following property, which has not been shown to be reasonably necessary in the prosecution of its principal business:—
United States bonds, the value of which was $500,000
Other bonds and mortgages, . . 200,000
City lots, the value of which was . 1,000,000
Store goods, the value of which was 80,000

"Total valuation, . . $4,180,000."

Having found that the capital stock was represented by the several items of property above, specified and valued in the aggregate at $4,180,000, the learned Judge rightly concluded that the company was not taxable, in any event, on so much of its capital as was invested in United States bonds (Bank *v.* Com'th, 9 U. S. 359). He also held it was not taxable on so much of its capital as was invested in its manufacturing plant, and also in coal and ore property which he considered reasonably necessary in the prosecution of its principal business as a manufacturing company; but, he refused to further sustain the company's contention, and held that, as to the last three items, consisting of bonds and mortgages, city lots and store goods, aggregating $1,280,000, it was taxable. He accordingly found that the proportion of the capital invested

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in those three items was $888,038.00, and entered judgment for the taxes on that amount, with interest and attorney-general's commissions.

As stated by the learned Judge himself, the ground upon which the company was thus held liable was, that the section above quoted "was intended to operate simply on capital employed in manufacturing, the purpose being to free such capital from the burden believed to be hampering our own industries in the struggle for a market. It was hardly intended to relieve from taxation capital, although belonging to manufacturing companies, which was not actually used in manufacturing, but invested, as in the case before us, in interest-bearing securities, in unnecessary real estate, or in a business not reasonably required by the principal corporate purpose. Language which relieves from taxation is to be strictly construed (Academy *v.* Philadelphia, 22 Pa. 496; Miller *v.* Kirkpatrick, 29 Id. 226; Crawford *v.* Burrell Twp., 53 Id. 219). We, therefore, hold . . . . that the defendant is a manufacturing corporation, within the provisions of the Act of 1885, only as to so much of its capital stock as it has shown to be thus employed. The burden is upon it to make out its claim to the relief set up; if it fails, the capital stock tax of 1879 is properly collectible. It has failed with respect to the last three items of paragraph 3, and we must therefore decide a due proportion of its capital stock to be taxable."

As we understand it, a proper application of the principle of construction, above stated, should also subject to taxation that portion of the capital invested in the "coal property" and "ore property." Strictly speaking, both of these pertain to mining rather than manufacturing corporations. Neither of them has any necessary connection with the latter. True, they are sources from which corporations engaged in manufacturing iron necessarily draw their chief supply of raw materials, but those materials always may be and frequently are obtained from parties or corporations independently engaged in mining and supplying same to manufacturers of iron and others. It is, doubtless, a great convenience and advantage for an iron manufacturing company to own and operate its own coal and iron ore mines, but the fact that such corporation is also specially authorized to do so, is no reason why so much of its capital as is invested in such mining operations should enjoy the benefit of exemption from State tax, designed to relieve manufacturing, as contradistinguished from mining corporations, from a burden they were supposed to be illy able to bear.

A company incorporated for the exclusive purpose of manufacturing steel rails, for example, is not authorized by its charter to own and operate coal mines, iron ore mines, or limestone quarries; and would, of course, be obliged to procure its supplies of raw materials from outside sources. Such mining and quarrying operations are not legally incident to the business of manufacturing; that is to say, they do not necessarily depend upon it, although, as a matter of fact, the supply of raw materials is, in one sense, incident to the process of manufacturing. If the business of mining and supplying such raw materials is not necessarily incident to a strictly manufacturing franchise, it cannot become so because that franchise is exercised concurrently with the separate franchises of mining and quarrying. As we have seen, the corporation appellee is of a fourfold character. It is a coal mining company, a quarrying company, an iron ore mining company, and a manufacturing company, specifically invested with the distinct rights and privileges pertaining to each, and exercises all of them. In the exercise of its manufacturing franchise, it finds it convenient and profitable to become, in the main, the consumer of products resulting from the exercise of the other three. In other words, the mining and quarrying departments, so to speak, find a convenient customer in the manufacturing department. But, how can it be inferred from this, that the capital employed in the mining and quarrying departments of the business is relieved from State tax, because capital employed in manufacturing happens to be exempt? Such a conclusion would be as unjust as it is illogical. It relieves from taxation capital which the Legislature never intended to exempt, merely because it happens to belong to a corporation which owns and controls other capital which, for a special reason, the Legislature has seen fit to exempt.

The case in hand is a striking illustration of the injustice of any construction that would relieve the company from the payment of State tax on so much of its capital as is employed in its mining and quarrying operations: and we know of no rule of law that even favors, much less demands any such construction. The spirit of the exemption clause under consideration does not require it; nor is it demanded by the necessities of the company. A corporation that makes a net annual profit of from ten to fifteen per cent. on its entire capital is not an object of State charity, and should not, under a strained construction of the exemption clause be permitted to evade payment of its share of the public burden. Corporations engaged in mining coal, etc., but not authorized to engage in manufacturing, are subject to the payment of State tax. Under a fair, if not a very liberal construction of the Act of 1885, section 20, we think all that the company can reasonably claim is exemption from tax on so much of its capital stock as has been found to be employed in strictly manufacturing operations, as contradistinguished from the mining operations in

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which by its charter it was also authorized to engage at the same time. That accords to it all the advantages, in the way of relief from taxation, that it would have had in case it had been an exclusively manufacturing corporation.

The contention of the Commonwealth that the exemption clause of the Act of 1885 does not apply to any corporation except those engaged exclusively in manufacturing, has been very forcibly presented by the attorney-general, but upon a full consideration of the subject we are of opinion that the spirit if not the letter of the Act entitled the company appellee to exemption from State tax on so much of its capital as was employed in exclusively manufacturing operations, in the sense above expressed.

It therefore follows that in ascertaining the proportion of the company's capital that is taxable, we should add the two items, "coal property" and "ore property," in paragraph three of the learned Judge's findings of facts, to the last three items in same paragraph which aggregate $1,280,000
"Coal property," valued at . . 500,000
"Ore property," " . . 400,000

$2,180,000

Then taking $4,180,000 valuation of property representing capital stock and we have this fraction, viz: $\frac{2,180,000}{4,180,000} = \frac{109}{209}$ of $3,000,000, capital, as the correct proportion thereof that is taxable, $1,665,114.65.

Tax, 7½ mills on that sum for 1887	$11,738.36
Tax, 5 mills on that sum for 1888	7,825.57
Atterney-general's commissions	978.19
Int. at 12 per cent. from March 9th	684.73
Amt. for which judg. sh'ld be entered	$21,226.85

June 28, 1889. Judgment reversed and judgment is now entered in favor of Commonwealth and against the Lackawanna Iron and Coal Company appellee for twenty-one thousand two hundred and twenty-six dollars and eighty-five cents, and costs.

LACKAWANNA IRON AND COAL CO.'S APPEAL.

June 28, 1889. THE COURT. This and Commonwealth's Appeal, No. 48, of this term, in which an opinion has just been filed, are cross appeals from the same judgment. The facts, on which appellants' contention in this case is based, are fully set forth in that opinion. For reasons there stated, neither of the specifications of error, on which the company appellant relies, is sustained.

Appeal dismissed, with costs to be paid by appellant.

Opinions by STERRETT, J. W. M. S., JR.

[See next case.]

May, '88, 40. June 6, 1889.

Commonwealth v. Mahoning Rolling Mill Company.

Taxes and taxation—Act of June 30, 1885—Manufacturing companies—Capital invested in dwelling houses for employés not exempt.

An investment of a part of a manufacturing company's capital in dwelling houses for its employés, does not differ from any other investment that might be made outside of its business as a manufacturing company, and the portion of the capital thus invested is not exempt from State tax.

Error to the Common Pleas of Dauphin County.

This was an appeal by the Mahoning Rolling Mill Company from the settlement of the auditor-general in regard to the tax on the capital stock of said company.

The case was tried without a jury under the Act of April 22, 1874, and the facts, as found by McPHERSON, J., are sufficiently stated in the opinion of the Supreme Court, *infra*.

Judgment was entered for the defendant, the Court saying, *inter alia:* "Each case must stand upon its own facts, but we think the Act of 1874 allows a portion of the capital stock of a manufacturing corporation to be put into dwellings which are reasonably necessary for the use of its employés, and that such an investment is carrying out the purpose of its organization. While thus invested, the Act of 1885 relieves this portion also from the tax now claimed."

From this judgment the Commonwealth took this writ, specifying for error (1) the above quotation from the opinion, (2) the refusal to hold that the exemption clause of the Act of 1885 applied only to such corporations as invested and used their whole capital stock in manufacturing, and (3) in entering judgment for the defendant.

John F. Sanderson, deputy attorney-general, and *William S. Kirkpatrick*, attorney-general, for the Commonwealth.

M. E. Olmsted, for defendant in error.

June 28, 1889. THE COURT. The tax account of defendant company with the Commonwealth, per Act of June 7, 1879, for the fiscal year ending first Monday of November, 1887, was stated by the Auditor-General, December 1 of that year, as follows, to wit:—

"Dividend, 15 per cent. on $50,000 capital stock. Tax, 7½ mills (one-half mill for each one per cent. of dividend), . . . $375.00

"Interest of 12 per centum from 60 days after date of settlement."

The company appealed from that settlement, and contended that, as a manufacturing corporation, its capital stock was wholly exempted from

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taxation by the following section of the supplement, June 30, 1885, viz:

"Sect, 20. That the taxes laid upon manufacturing corporations, by and under the revenue laws of this Commonwealth, be and they are hereby abolished as to such corporations, and the laws under which such taxes are laid and collected be and the same are hereby repealed, so far, and so far only, as they apply to and affect manufacturing corporations: *Provided*, that the provisions of this Act shall not apply to corporations engaged in the manufacture of malt, spirituous and vinous liquors, or in the manufacture of gas," etc.

It appears from the record that the company was chartered under the General Corporation Act of 1874, with an authorized capital of $50,000, three-fourths of which was paid in: that on June 1, 1887, it declared a dividend of 15 per centum on its paid-up capital. The settlement appealed from was based on that dividend.

The learned Judge also found that the business of the company, with an unimportant exception, is converting pig-iron, old rails, and scrap into a form of wrought-iron known as skelp, adapted to the manufacture of pipes: that about one-thirteenth, or $\frac{21}{271}$ parts "of its capital is invested in dwellings which are reasonably necessary for the use of its employés."

The findings of fact are not as full and specific as the undisputed evidence would have warranted. While the tenant-houses, in which about $2900 of the company's capital is invested, are in a certain sense "reasonably necessary for the use of its employés," the evidence clearly shows they are not a necessary part of its manufacturing plant, and have no necessary connection with the business for which the company was incorporated. They are a convenience and advantage both to the company and its employés, and doubtless a profitable investment for the former; but, in principle, the employment of its capital in building houses, for the purpose of leasing the same to its employés, does not differ materially from any other investment that might be made outside of its business as a manufacturing corporation. The only question is whether capital thus employed or invested is within the exemption of the section above quoted. We are of opinion that it is not. In some respects the question is similar to one that was presented in Commonwealth's Appeal, No. 48, of May Term, 1889, in which opinion has just been filed. In that case we held that the section in question was intended to operate solely on capital actually employed in manufacturing and not on capital employed in any other business or pursuit.

In West Chester Gas Co. *v.* Chester County (30 Pa. 232), the question was whether houses erected by the company for its workmen were a part of the plant, and as such, exempt from taxation. Mr. Justice PORTER, speaking for this Court, said: "The gas works are clearly exempted, but the houses do not appear necessary to the performance of the company's proper work. On the other hand they are said to have been erected for the accommodation of their workmen. This is a convenience; not a necessity. For anything that appears, these workmen might be able to discharge their duties as satisfactorily if they lived somewhere else."

It may be difficult in some cases to determine just where necessity ends and mere convenience begins. In the case before us, however, it appears to be quite clear that the investment of part of the company's capital in dwelling-houses for the use of its employés was a measure of mutual convenience and advantage, and not of necessity. We think the learned Judge erred in holding that the portion of capital thus invested is exempt from State tax. To that extent the specifications of error are sustained.

It follows that the judgment complained of must be reversed, and judgment entered in favor of the Commonwealth for amount of tax on $2900 of the company's capital, with interest, commissions, and costs as follows:—

Tax, 7½ mills on $2900, for year 1887,	$21 75
Interest from March 1, 1888, at 12 per ct.	3 40
Atterney-General's commissions	1 09
Total	$26 24

Judgment reversed, and judgment is now entered against defendant in favor of the Commonwealth for $26.24, and costs.

Opinion by STERRETT, J. W. M. S., JR.

[See preceding case.]

Jan. '88, 249. February 21, 1889.

Freiler et ux. v. Kear et al.

Husband and wife—Suit by wife against a firm of which her husband is a member—When recovery may be had—Power of husband to confess judgment to his wife against firm of which he is a member—Practice—Entering judgment non obstante veredicto while a motion or rule for new trial is undisposed of.

F. and wife brought suit, in right of the wife, against a firm of which F. was a member, to recover for damages to premises owned by the wife of F., and leased to the firm. The husband and wife were living together. F. did not appear nor plead as a defendant. The remaining partner pleaded *non assumpsit*, and payment:

Held, that the wife of F. could maintain her action

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notwithstanding the fact that her husband was a member of the firm against which the suit was brought.

A husband may confess a judgment directly to his wife for a debt he owes her, and allow her to have execution on such judgment, and to sell his property; and there is nothing in this consent or default of the husband, if there is no taint of fraud in it, of which third parties can complain.

A judgment confessed by a husband to his wife cannot be set aside or impeached by his creditors on the ground of the legal unity of the parties to it.

As a partner, a husband may confess a judgment for a firm debt, and on such judgment the property of the firm may be sold. His authority in this respect is not abridged by the fact that his wife is the creditor. Although he may object to a suit by his wife against himself, and perhaps to her suit against the partnership of which he is a member, upon the ground of the legal unity created by the marriage, his partners cannot.

A husband is under no legal or moral duty to interpose a technical defence which he alone can make, to defeat or postpone an honest claim of his wife against the firm simply because he is a member of it.

The practice of entering a judgment *non obstante veredicto* while a motion or rule for a new trial is undisposed of, disapproved. The case of Harper *v.* Keely (17 Pa. 234) does not establish a rule of practice on this subject.

Error to the Common Pleas of Schuylkill County.

Case, by Daniel Freiler and Barbara Freiler his wife, in right of said Barbara, against F. G. Kear and Daniel Freiler, trading under the firm name of F. G. Kear & Co., to recover for injuries to property of Barbara Freiler occupied by defendants under a parol lease from her. Kear pleaded *non assumpsit*, payment with leave, etc. Freiler did not appear or plead.

The facts are fully set forth in the opinion of the Supreme Court.

Upon the trial, before PERSHING, P. J., defendant Kear submitted the following point:—

(1) The evidence being undisputed, that Barbara A. Freiler, in whose right this action has been brought, is the wife of Daniel Freiler, a defendant (and who is also made plaintiff with said Barbara), no separation being alleged, or in fact having at any time existed betweem them, this action cannot be maintained, and the verdict must be for the defendant.

Answer. This raises a square question of law, and an important question. We will answer it in the negative for the present, and reserve it for consideration hereafter on motion in arrest of judgment, for new trial, or on rule for judgment *non obstante veredicto.*

Verdict for plaintiff for $1272.73 subject to the point reserved. The Court subsequently entered judgment for the defendant upon the point reserved, *non obstante veredicto*, PERSHING, P. J., saying, *inter alia*, as follows:—

"This is a very different case from that class of cases, of which Rose and Wife *v.* Latshaw *et al.* (90 Pa. 238), stands on the verge, and in which it has been held that a husband honestly indebted to his wife may, without the intervention of a trustee, confess a judgment in her favor and suffer an execution to issue thereon. The proceeding in the present case has been adversary throughout. Daniel Freiler was brought into Court by a summons, and on the trial was called by his wife as a witness under the Act of 1869, as for cross-examination. No statute authorizes this suit, nor can I find a case which has gone to the extreme length necessary to sustain it. In the Act of April 11, 1856, which is a supplement to the married woman's Act of 1848, which gives to a married woman a separate action to protect her reputation or recover her separate earnings and property in three cases, viz: Where her husband deserts or separates himself from her; when he neglects or refuses to support her: and when she has been divorced from bed and board, there is a proviso that if in either case her husband is the defendant, her suit must be brought in the name of a next friend. That this statute can have no application to the case in hand will be seen by a reference to some of the decisions of the Supreme Court. Thus, in Ritter *v.* Ritter (31 Pa. 396), it was held that a married woman, even by her next friend, could not maintain an action of debt against her husband on a note given for money borrowed from her during coverture; that such an action was not authorized by the Act of April 11, 1848, or any of its supplements. Kutz's Appeal (40 Pa. 90), was the case where a married woman lent her money to a firm, one of the members of which was her husband, and received their note for the amount. The firm made an assignment and the wife was permitted to participate in the distribution of the assets. Justice STRONG said: 'It is clear that at law the appellant (the wife) could have maintained no suit against the promissors in the note. Even since the Act of 1848, a married woman cannot maintain an action against her husband on a contract made during coverture, even though she sues by her next friend.' Citing Ritter *v.* Ritter (*supra*). In Miller *v.* Miller (44 Pa. 170), the wife, in the name of her next friend, brought an action of covenant against her husband to recover damages for permitting waste and destruction of her real estate. Notwithstanding the contract was an ante-nuptial one, 'of course valid and binding between the parties,' said the Court, and the further fact that her husband had separated himself from her prior to the suit, it was held that she could not recover.

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It was also expressly decided in that case that an action for unliquidated damages merely, for breach of covenant, is not an action for the recovery of property within the meaning of the Act of 1848, or of the Act of April 11th, 1856. 'It could scarcely be pretended,' said Judge PEARSON, whose opinion was adopted by the Supreme Court, 'that she (the wife) could recover damages from her husband on account of a battery of her person, under the provisions of this Act, or that she could sue him for stoning her house, or diverting a watercourse on her farm. The Legislature has undertaken to enumerate the cases in which she may sue, and all others are omitted.'

"Subsequent decisions have not shaken these cases, and they are decisive of the question before us. Public policy, which is said to be but another name for the public good, the foundation of all law, has ever been invoked against litigation between husband and wife. To the extent that statute law authorizes such litigation, it must be obeyed, but beyond that we are unwilling to go."

Plaintiffs then took this writ, assigning this action of the Court for error.

George J. Wadlinger (*John A. Nash* and *Charles N. Brumm* with him), for plaintiffs in error.

David A. Jones (*Seth W. Geer* with him), for defendants in error.

May 20, 1889. THE COURT. Barbara Freiler, wife of Daniel Freiler, leased a brewery building with the appurtenances and fixtures to F. G. Kear and Daniel Freiler, partners under the firm name of F. G. Kear & Co., upon their agreement to pay her an annual rent of $800, keep the premises in good repair, use the same in a proper manner during the tenancy, and at the end of it deliver to her the premises and fixtures in the same condition they were in when taken, "natural wear and tear only excepted." When the tenancy was determined by the act of the parties, she complained that the lessees had failed to comply with their agreement respecting the use, care, and surrender of the demised property, and brought this action to recover the damages she had sustained by reason of their breach of it. Both partners were summoned, a declaration was filed, and a rule to plead was entered and served upon them, but there was no appearance or plea by or for Daniel Freiler. We copy from the record the only pleas filed in the case, to wit: "F. G. Kear, one of the defendants, pleads non assumpsit and payment, payment with leave, etc." Upon the issue thus made the case was tried and when the evidence was closed defendant Kear, by his counsel, submitted the following point: "The evidence being undisputed that Barbara A. Freiler, in whose right this action has been brought, is the wife of Daniel Freiler, a defendant (and who is also made plaintiff with said Barbara), no separation being alleged, or in fact having at any time existed between them, this action cannot be maintained and the verdict must be for the defendant." The question raised by this point was reserved; the case was referred to the jury on its merits and there was a verdict "in favor of the plaintiff and against the defendant for $1272.73." The Court upon consideration of the question reserved entered judgment for the defendants *non obstante veredicto.*

The question presented for our determination is whether a wife with her husband's consent can maintain an action against a firm of which he is a member, upon a lease by that firm of her separate real estate. We notice, first, the cases cited and relied on by the learned Judge of the Court below, to support his conclusion. Ritter *v.* Ritter (31 Pa. 396) decided that a married woman cannot by her next friend maintain an action of debt against her husband, on a contract made during coverture; and that such an action is not authorized by the Act of April 11, 1848, or its supplements. Miller *v.* Miller (44 Pa. 170) admitted the validity of the contract sued upon but decided that the right of action upon it was suspended during coverture. In these cases there was an appearance by the husband and a plea of coverture. In Kutz's Appeal (40 Pa. 90) a married woman lent to a firm of which her husband was a member $5000 upon the firm note dated Nov. 25, 1845, and payable to her in one year with interest. On the 8th of August, 1857, the firm made an assignment for the benefit of its creditors. On distribution of the fund arising from the assigned estate the wife claimed the amount of the note with interest and the claim was allowed. It was objected that her claim was barred by the Statute of Limitations, but this Court held that the disability of coverture under which she was from the date of the note to the assignment prevented the running of the statute, and that she was not barred of her claim in equity. This was an application, to a claim by a wife against a firm of which her husband was a member, of the familiar principle that where a wife has a cause of action against her husband the statute does not run against it during coverture. (Somers *v.* Hagner 3 Wharton 48; Marsteller *v.* Marsteller, 93 Pa. 350.)

But these cases differ from the one at bar, in that the elements of consent or default by the husband were not in them. We have departed from the common law rule on this subject to the extent of permitting a husband to confess a judgment directly to his wife for a debt he owes her, and of allowing her with his consent to have execution on such judgment and to sell his property. (Rose *v.* Latshaw, 90 Pa. 238, and Lehr's Appeal, Id. 507.) There is nothing in this consent or default of the husband,

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if there is no taint of fraud in it, of which third parties can complain. A judgment confessed by the husband to his wife cannot be set aside or impeached by his creditors on the ground of the legal unity of the parties to it. That is no concern of theirs. They may attack it for fraud as they may attack a judgment confessed to other parties that is fraudulent as to them. It is only the husband who can object to a suit against him by his wife, and if he chooses to confess or suffer judgment in the suit domestic peace is not disturbed by it, and strangers will not be allowed to object except when such action is in fraud of them. If a husband may confess or wittingly suffer a judgment in favor of his wife against himself for a debt due her from him, why may he not confess or suffer judgment in her favor for a debt due her from a firm of which he is a member? As a partner he may confess a judgment for a firm debt and on such judgment the property of the firm may be sold. (Ross *v.* Howell, 84 Pa. 129.) His authority in this respect is not taken away or abridged by the fact that his wife is the creditor of the firm; and he may exercise it for her protection, with as much reason and propriety as for the security of any other creditor. While he may object to a suit by his wife against himself, and perhaps to her suit against the partnership of which he is a member, upon the ground of the legal unity created by the marriage, his partners cannot. They have acquired no interest in the right of the husband to make this defence; it is as exclusively his right now as before the partnership was formed, and they cannot use it to shield the firm from the just claims of its creditors. It matters not to them whether that creditor be the wife of their co-partner, or a stranger, and the husband is under no legal or moral duty to interpose a technical defence which he alone can make, to defeat or postpone an honest claim of his wife against the firm, simply because he is a member of it. As it is established by the verdict of a jury, in an issue which affected only the merits of the claim, that Kear & Co. are indebted to Mrs. Freiler in the sum of $1272.73 upon their agreement with her by which they obtained the possession and use of her separate real estate, they ought in equity to pay it, and she may, with her husband's consent, have judgment for it.

The judgment is reversed, and now judgment is entered on the verdict in favor of the plaintiff and against the defendant for $1272.73 with interest thereon from October 6, 1887, and costs.

June 7, 1889. THE COURT. Our attention has been called to the fact that a rule for new trial is pending in the Court below, and we are asked to modify the judgment entered on the 20th of May last, to the extent of striking out the judgment against the defendant. This, in order to prevent possible injury and injustice, we have concluded to do. It is proper to say, however, that we do not approve the practice of entering judgment *non obstante veredicto* while a motion or rule for new trial is undisposed of. It is probable that the learned Judge of the Court below pursued this course in the belief that it was authorized by the decision in Harper *v.* Keely (17 Pa. 234); but we do not regard that case as establishing a rule of practice on this subject. In Penna. Salt Mfg. Co. *v.* Neel (54 Pa. 9) it was held that entering judgment on a reserved question substantially overrules a motion for new trial, without distinct action upon it.

We strike out the judgment against the defendant and award a procedendo, so that our judgment shall stand.

Judgment reversed and procedendo awarded.

Opinions by McCOLLUM, J. H. C. O.

Quarter Sessions.

In re Applications for Wholesale, Brewers' and Bottlers' Licenses.

ORDER OF COURT.

And now, July 2, 1889, it is ordered by the Court that the Clerk of the Court shall issue wholesale, brewers' and bottlers' licenses to all the applicants therefor who have not withdrawn their applications and shall present themselves and request the same to be issued, and the clerk shall himself pass upon the sufficiency of the securities offered.

D. NEWLIN FELL.
ROBERT N. WILLSON.
JAMES GAY GORDON.
F. AMEDEE BRÉGY.

With the order there was filed by the Judges the following statement:—

"On Saturday last, in accordance with the opinion which was announced by the Supreme Court, we granted licenses under what is generally called the 'Wholesale Liquor License Act' to the Prospect Brewing Company. Inasmuch, however, as that Court has decided that, in the absence of any remonstrance or formal objection on the record, it was error to refuse to license a wholesale dealer, brewer or bottler, it follows that, under such interpretation of the statute, we should have granted licenses to other applicants to whom they were refused. We therefore

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deem it to be our duty to reconsider our former rulings and now to grant wholesale licenses, as prayed for, to all the applicants therefor whose applications have not been withdrawn, notwithstanding the evidence adduced at the hearing clearly showed in many cases that the applicants were not of temperate habits, or of that good moral character which, even under the doctrine of the Supreme Court as to what constitutes good morals, we would be justified in requiring. Some of these applicants were of notoriously bad character, among them being convicts and common drunkards, who for years had led the most abandoned lives. Others had violated the laws regulating the sale of liquors while holding licenses in 1888, and maintained places of resort that were frequented by degraded women, habitual drunkards, and discharged inmates of the House of Correction. Nevertheless, as no remonstrances, raising an 'issue' as to the moral character or habits of sobriety of these applicants were filed, it becomes our duty under the ruling of the Supreme Court to grant all the licenses applied for.

"Under ordinary circumstances of a reversal by a Court of last resort we should say no more than this. The opinion of the Chief Justice, however, which was permitted to be filed as expressing the views of the entire Court, was so unusual in its tone and manner, as well as in its references to ourselves and our official action, that, as a matter of self respect, we feel bound to take further notice of it.

"In what we have to say we shall aim to use no language which is unbecoming a judicial utterance, or which is not at least courteous towards other Judges to whom we may have occasion to refer.

"We have no grievance arising from the fact that the Supreme Court has interpreted the Act of May 24, 1887, differently from the construction which we put upon it. Whatever may be our views as to the correctness, necessity, or consequences of their decision, we recognize without hesitation or irritation the functions of a Court of last resort in the adjudication of all such questions.

"We do, however, claim that we were entitled to have a decorous and courteous consideration given to the case, and that, personally, we had the right to expect that no studied effort would be made by our Court of Errors to discredit either ourselves or the work which we had done. It is certainly a rare event that any cause should arise for which an Appellate Court should be subjected to public comment and criticism for its offensive treatment of another Court whose proceedings were under review.

"We were put in charge of the work of granting or refusing licenses in this county, not of our own choice. The task is essentially delicate, difficult, and disagreeable. To a large degree, while it has to be discharged by Judges, it is not judicial. This was clearly recognized by the Supreme Court in the case of Raudenbusch, where it was held that the discretion of the lower Court could be exercised of their own motion and without any remonstrance or objection on the record. That case arose under the Retail Act of 1887, which by its very title is shown to be *restrictive* in its intended operation. We gave that effect to it, with results as to which we perhaps are not best qualified to express an opinion, except to the extent that we have observed the diminution of crime and pauperism. Not supposing that the same Legislature which passed the restrictive Retail Act had enacted a wholesale law intended to counteract the results of the retail, we thought that, in the interpretation of the wholesale statute, we were not only justified in following, but bound to follow what we believe to have been the general practice throughout the State, under the law as it stood before the law of 1887 was passed, in which practice more than one of the Judges of the Supreme Court has participated, and which was sanctioned by published decisions of that and other Courts: namely, to exercise a wise discretion in granting wholesale licenses, having regard to the moral fitness of the applicant, as well as his citizenship and habits of temperance. We now understand that we have given too much weight to the opinions of the Supreme Court upon this subject, and that that Court failed to discover, in the consideration of the cases which they decided, the important and critical elements which they now emphasize.

"For thirty-one years, without a break or dissent, so far as reported, cases throw light on the question. The Judges of the Courts of Quarter Sessions in this State have exercised the same discretion in the granting of wholesale licenses that we exercised in the case of the Prospect Brewing Company—the same in practice and principle—and in this they have been sustained by the Supreme Court, the last case, Conway's Petition, having been decided as late as October 5, 1885.

"Unless we are entirely mistaken, from the information we have received, it has not been the practice in the State generally, or in any part of it, to require remonstrances or objections in all cases to be filed of record. We did not require it either in the case of retail or wholesale licenses. This course was approved as to retail licenses by the Supreme Court in the Raudenbusch Case, and it would never have occurred to us but for the recent opinion of that Court, that any difference in the necessity for filing remonstrances would exist between the two classes of licenses merely because in one of those classes there was a wider range of discretion than in the

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other. The language of the respective statutes does not suggest any such distinction. On the contrary, both statutes are identical in those portions that give the right to make objection or file remonstrances. Persons objecting may be heard by 'evidence, remonstrance, *or* counsel.'

"Endeavoring to follow what we believed, and still believe, to be the well settled practice in the State, approved by its highest Court, we granted wholesale licenses in the year 1888 to all persons applying who had been in the business theretofore. In the year 1889, we pursued the same course as to those who had been in the business prior to 1888, with the exception of a few who, in our judgment, had proved themselves morally unfit for the privilege. We also refused licenses in the latter year to others who had not been in the wholesale business, in the exercise of the discretion which we regarded to have been established by practice and judicial decision, and for good cause shown. We learn, however, from the opinion in the case of the Prospect Brewing Company, that we were in error, and that, notwithstanding the language of the Act, 'all persons applying or making objection to applications for license may be heard by evidence, petition, remonstrance, or counsel,' nothing *can* be heard by the Court unless it appears of record by remonstrances filed, and that a Court charged with the duty of granting licenses only to persons who are citizens of good moral character and temperate habits is 'exercising a roving commission' to 'inquire as to matters not properly before it' in acting upon competent testimony regularly produced at the time of hearing.

"We learn also that, though it may be known to the Court, admitted by the petitioner or established by uncontradicted evidence, that the applicant is not a citizen, that he is an habitual drunkard, or the most abandoned and dangerous criminal, he is still entitled, as a matter of course, to a privilege which is made to depend, by the Act, upon citizenship, sobriety, and good moral character, unless some one has taken the interest and trouble to file a remonstrance—that the right depends not on the requirements named in the Act, but is absolute in the absence of a formal remonstrance; in other words, that the Act itself is subordinate to a rule of practice.

"It is, moreover, to be noticed that in the cases recently decided by the Supreme Court the petitions on which we acted and which were presumably before the Supreme Court when it decided upon them, do not aver that the petitioners were of temperate habits and good moral character. As to these necessary qualifications of an applicant we made inquiry by evidence regularly presented at our Bar. This is said to have been error by the higher Court, which decides that we had no right to inquire as to these qualifications, because some citizen had not denied them by writing filed, even though the applicant had not ventured to aver in writing that he possessed them.

We have thus stated some of the many matters which might be set out, not for the purpose of arguing the points decided by the Supreme Court, but simply to show that, in our action upon the subject referred to, we were not wantonly or arbitrarily forcing a novel or unnatural construction of the statute, and, therefore, that there was nothing before the Supreme Court which justified the rude and discourteous treatment to which they subjected our tribunal, which ought to have been presumed to act with a disposition to discharge its duties according to law.

"Our return to the alternative writ of mandamus was intentionally made frank, full, and untechnical, in order that the higher Court might have the case fairly before it. We do not propose to discuss the criticisms which that Court passed upon it, being content to leave them to any skilled lawyer who will examine the question, bearing in mind that there was no demurrer filed alleging any insufficiency or informality in the return. We did not set out the evidence which we alleged the petition did not contain, or wherein we alleged it was misleading, for the reason that we claimed, as a matter of law in the return, that we were not bound to set out the evidence at all, but of this claim, which was the main point raised in that connection, the opinion takes no notice. That opinion contains much that is entirely distinct from the statement of any principle of law or rule of practice, and which we would regret to regard as the utterance or judgment of the Court. It contains matter entirely unessential to the proper decision of the cause, and announces propositions in morals and logic which, being *obiter dicta*, we are not obliged to accept as the law of this Commonwealth.

"In closing this statement we desire to say that we greatly regret that we have felt compelled to adopt the unusual course of taking any public notice of the action of the Supreme Court in this connection, but we have had unusual—unprecedented—provocation. We know of no principles of ethics, professional or judicial, which requires any Judge to be silent when he is placed by the Judges of even a higher Court in a false and distorted position.

"D. NEWLIN FELL,
"ROBERT N. WILLSON,
"JAMES GAY GORDON,
"F. AMEDEE BRÉGY."

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JULY 12, 1889.* [NO. 11.

Supreme Court.

Jan. '89, 126. March 29, 1889.

Wentz's Appeal.

Conversion—Application of rule—Partition—Sales in—Proceeds of—When realty and when personalty.

Conversion is altogether a doctrine of equity and is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit æquitas* has redoubled force in application to it. It follows of necessity that the doctrine is limited to its end. When the purpose of convenience is attained conversion ends.

It is error to assume that the proceeds of the sale of real estate in partition are real estate, and require a positive act of reconversion to get them back into their character as money. The money never is real estate, in law any more than in fact, but for certain purposes, and within certain limits it is treated as if it was real estate. The purpose is to preserve the inheritable quality of the estate, so that the title may not be diverted from the previous owner, and the limit to which the principle is confined is the first devolution of title.

The share of the purchase-money of real estate sold in proceedings in partition which is charged upon the real estate sold in lieu of the widow's dower is to be considered as real estate, so far as to vest in the person who would have been entitled to it, had it remained unconverted. But after it has so vested in the person entitled, it is to be considered as money in his hands, and in case of his subsequent death it goes to his personal representatives as personal estate.

Hay's Appeal, 52 Pa. St. 449, approved and followed.

A. died intestate, leaving a widow and children. By proceedings in partition his real estate was sold, and part of the purchase-money left charged upon the land for the widow in lieu of dower. The rest was paid to the children or their guardians. B., a minor child, subsequently married, gave birth to a child, and died still a minor. The child died a minor, and subsequently B.'s husband also died in the lifetime of A.'s widow. On the death of A.'s widow the sum charged on the said real estate in lieu of her dower was paid; in making distribution thereof:

Held, that the share of B. in said fund became personal estate as soon as the right to said fund became vested in B. and the other children, that it was distributable as the personal estate of B., and therefore passed to the administrator of B.'s husband to the exclusion of B.'s brothers and sisters.

Appeal of Catharine A. Wentz, Augustus K. Emerick, and Annie E. Emerick, from a decree of the Orphans' Court of Philadelphia County, distributing a part of a dower fund derived from the partition of the estate of Peter K. Emerick, deceased, and in the hands of J. L. Hutchinson, administrator of Wilhelmina E. Bladen, deceased, a minor child of said Peter K. Emerick.

The facts of the case are set forth at length in the adjudication of the Auditing Judge (ASHMAN, J.), which was as follows:—

"Peter K. Emerick was the father of Wilhelmina E. Bladen, the decedent. He died in March, 1843, intestate, leaving a widow, Ann Emerick, and four children, Edgar, Augustus K., Catharine A., and Wilhelmina, the three last being minors. His real estate, in several parcels, was afterwards sold under proceedings in partition, and the interest of the widow, as to two of said parcels, was secured by the mortgage of the purchaser, and as to the remaining parcels was charged upon the land. The widow died December 11, 1886, and the principal of the sum set apart for her interest, was thereupon divisible among the parties by law entitled. The principal, amounting to a little over $8000, was collected by Daniel M. Bowen, Esq., who had been appointed their attorney in fact for that purpose by the surviving children of Peter K. Emerick. He paid to these children three-fourths of the sum so collected, and the remaining fourth to the administrator of the estate of Wilhelmina, the deceased child. The children of Peter K. Emerick claim that the money thus paid to the administrator was real estate, and belongs to them as heirs-at-law of the said Wilhelmina.

"Wilhelmina, at seventeen years of age, married Washington L. Bladen, and died still in her minority, leaving surviving her husband and one child, William E. Bladen. William E., the son, died January 14, 1869, a minor, and Washington L. Bladen, the father, died August 7, 1880.

"Of the children of Peter K. Emerick, claiming the fund, two, Augustus K. Emerick and Catharine A. (now Wentz) survive. Edgar Emerick, another child, recently died, leaving a widow, Annie E. Emerick, who is also his sole devisee.

"Counsel on behalf of the estate of Washington L. Bladen appeared before the Auditing Judge and claimed that the property was personalty, and that under the intestate laws of the Commonwealth it should be awarded to the estate of the deceased husband of Wilhelmina E. Bladen, and father of William E. Bladen, one-half from his wife, under the Act of 1848, and the other half from his child, under the Act of 1833.

"The argument which was submitted on behalf of the heirs is most elaborate and able, and perhaps leaves nothing unsaid which, either from principle or authority, could tend to support

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their claim that the fund still bears the impress of the real estate from which it accrued. But it contains an admission which the Auditing Judge believes is self-destructive. It concedes that the proceeds of sale of these properties became cash in the hands of the distributees, to whom they were paid, and that only the fund retained to secure the widow, which was indivisible until set free by her death, was insusceptible of possession, and therefore could not be distinguished from the real estate whose place it took. A fallacy hides somewhere in the proposition which admits that the price of real estate sold after the owner's death belongs to the same persons to whom the owner gave the real estate, or who took it from him by descent, but asserts that if any part of that price is withheld in order to secure the accidental interest of a life tenant, which latter may fall in in a day or a month thereafter, such part is liable to be diverted from those persons or some of them and to go in a totally different direction. The error is in the assumption that the cash proceeds and the secured moneys do not together constitute one fund, each part of which retains its character of real estate or drops it at the same moment with every other part. It is not answering this to say that the reserved fund cannot be reduced into manual possession; neither can the money represented by a promissory note which is not yet due; yet in both cases the interest of the owner has a present value, which is as absolute and almost as ascertainable as if it were in cash, and in both cases that interest may be the subject of a valid sale.

"If the Auditing Judge is correct here the question is disposed of. The cash produced by the realty sale passed to the guardian of the decedent as real estate, but became money in his hands on the same principle that money impressed with the character of realty is reconverted when received by a party who is *sui juris* and has its absolute control; or, to put it into other words, when the fund and its use are united in the same person. This principle was established by McCune's Appeal (15 P. F. S. 450) and Kann's Estate (19 Id. 219). It is objected that the interest of the widow is *quasi* real estate. But the character which for her protection the property may bear as to her ought not to determine the character it sustains towards the heirs. The capital of her interest vested in the heirs along with the rest of the purchase-money, and it vested in them as the cash did in possession, only its enjoyment being postponed. As was said in Reish *v.* Commonwealth (10 Out. 526), 'the enjoyment of real estate is not the exact equivalent of possession;' in other words a man may be entitled to the possession of property without its present enjoyment. The share of the minor daughter so far vested in her guardian that it could have been sold under an order of the Court, and by the same authority the interest of the widow could have been commuted for money by the guardian, if for any reason that had been desirable. The guardian would then have received the principal of the fund which had been set apart for the widow's security. Assume that this is not so, and that the character of the interest in the hands of the widow fixed the character in which the fund went to the heirs, a conversion nevertheless was worked when the right to the fund passed by a second transmission to the child of this decedent. There must be a point at which the identity of moneys or of securities representing moneys, which by a legal fiction are characterized as real estate, is to be deemed lost; and the cases have marked that point, at a second transmission of the fund, or the right to the fund, which is the same thing. It does not matter that the fund has not been touched by the owner, as by reason of his incapacity from non-age; the law converts it as fully as he might himself have converted it, if capable. If the cases hitherto have treated only of a fund of actual cash and not of securities representing cash, or of a vested right to cash payable in the future, it has been, no doubt, because it was never supposed that any distinction existed between these species of property.

"These views seem to the Auditing Judge conclusive against the claims set up by the heirs, and are based upon authorities which were collected in Eckert's Estate (12 Phila. 93), and need not be discussed anew. But it will not be fair, nor perhaps safe, to dismiss summarily an argument so careful and ingenious as that which counsel presented at the hearing. The point of the argument was that the fund in hand was real estate up to the death of the grandchild, because neither the daughter nor the grandson had the power to transmute it, and it vested as real estate in the present claimants as heirs. It could so vest only because it had originally vested in Wilhelmina Bladen, the daughter from whom they derive title. She was the heir also to the cash proceeds, which came to her as real estate. If the guardian could use those proceeds for her benefit, and if the right to such user made them money, why could he not use for the same purpose, if necessary, the reserve fund by selling or mortgaging her share therein, and why would not his right to do so make that interest money? Suppose that the cash proceeds had been exhausted in the support of the minor; would the Court have permitted her to starve, by prohibiting the guardian from raising money upon the mortgage, which was expressly payable to the minor after the widow's death, on the ground that until she reached her majority the mortgage

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was real estate? Or would it assign as another reason for its prohibition that the heirs were interested in its continuing as real estate? The argument of the heirs practically puts the title to the fund in abeyance for twenty-four years, by vesting it in possession only after the death of the second minor. The precise question involved was met and answered in Hay's Appeal (2 P. F. S. 449). There the title to the proceeds of sale passed as real estate to the two children, but without possession, because the father had the income for life. The children died in the lifetime of the father, and their interest was held to pass as personalty. The two cases are parallel. The principal of a fund comes as real estate to children, but the possession in enjoyment is deferred, and before the time for enjoyment is reached the children die. Yet the opinion in the case cited is that the fund becomes personal estate while in the technical ownership of the children. The same case answers another question which was propounded by the heirs. In the mortgage given by one of the purchasers, the mortgagor agreed that after the widow's death to pay 'the principal sum to the parties legally entitled to receive the same, being the heirs and legal representatives of Peter K. Emerick, deceased.' The Court, in Hay's Appeal, say: 'Who are the heirs? They are those upon whom the law casts the inheritance *at the death of the ancestor*.' The ancestor here was Peter K. Emerick, and his heir at his death was Wilhelmina Bladen. The principal of the mortgage was payable therefore to her, and at her death to her personal representatives. But it was urged, this mortgage fund must have continued to be real estate, because the guardian was not obliged to account for it, and because in McCune's Appeal and Kann's Estate (*supra*), he did not charge himself with such a fund. A fund is therefore either real estate or personalty, as the guardian happens to be a good or indifferent bookkeeper.

"The whole controversy is cleared up by the remarks of LEWIS, J., in Pennell's Appeal (8 Harris, 517): 'If land be sold for a specific purpose the surplus proceeds shall . . . . be considered as land, so far as to vest in the persons who would have been entitled to it had it remained unconverted.' (That person was Wilhelmina Bladen.) 'But after it has so vested in the person entitled, it is to be treated as money in his hands, and in case of his subsequent death it goes to his personal representatives as personal estate. It cannot retain its original character forever. . . . The distribution of the estate of a decedent among persons who never gave value for it, and who have no title to it whatever, except that which is founded upon the law and its policy, involves no principle of justice, and stands entirely uninfluenced by its dictates. The necessity of a perfect conversion at some period being apparent, and neither justice nor policy requiring that a fiction should be substituted for the fact, the proper time for it is when the money has vested in the party entitled to it, after the actual conversion.' This case was cited by the heirs apparently to show that the conversion could not take place before the widow's death, and, therefore, only those who were heirs at her death could take the fund.

"Exactly what Judge LEWIS meant when he said that the time for conversion is 'when the money has vested in the party entitled to it *after* the actual conversion' is not perhaps clear; but it certainly cannot help these claimants, for they rest their title on the ground that no conversion has yet taken place, and they are therefore not a 'party entitled after conversion.' The thing decided was clear; it was that the proceeds of sale went to the minor as realty, and in his hands became money; and the proper time, therefore, for conversion was when the money vested in the party who was entitled *before* the conversion. The decision says in so many words, that a sale works an actual conversion, although the proceeds may be distributable as realty; and that legal conversion takes place when the proceeds have vested in the heir as land. This criterion the Auditing Judge has attempted to apply to this case. At the risk of a second repetition he holds that an actual, as distinguished from a legal conversion, was effected as to *all* the lands of the original decedent when the lands were sold. This must have been so, because the legal title to the lands was taken by the purchasers subject only to a lien represented in two of the purchases by a mortgage to secure the widow. All the proceeds immediately vested in the heirs, subject to the life-interest of the widow in one-third. Of course that one-third could not be used by the heirs until her death, but it did not cease to be money, because it had been set apart temporarily, and it was not prevented from vesting, because it could not be presently enjoyed. The Auditing Judge thinks that the fund should be awarded as personalty, and he so decrees."

Exceptions to this adjudication were dismissed by the Court in an opinion by HANNA, P. J., and the report confirmed: whereupon the said Catharine A. Wentz, Augustus K. Emerick, and Annie E. Emerick, took this appeal, assigning for error, *inter alia*, the conclusion of law that the fund for distribution should be considered as personalty, and the decree of the Court based thereon.

John M. Collins and *F. Carroll Brewster* (*Ernest L. Tustin* with them), for the appellants.

M. Hampton Todd (*James R. Booth* with him), for the appellee.

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May 27, 1889. THE COURT. If we confined ourselves rigidly to the question raised by the actual record, this case would lie in a very small compass. The account is the account of the administrator of Wilhelmina Bladen; the money was received by him as money due to his intestate; was put in his account as money, and now must necessarily be distributed as money, and that is the end of the case.

But as the administrator filed his account in its present form, under the order of the Orphans' Court, for the very purpose of raising the real question in controversy between these parties, and it has been fully discussed here, as well as in the Court below, we shall express our opinion upon that question, so as to make an end of the litigation.

One Emerick died intestate, leaving a widow and children. By proceedings in partition his real estate was sold, and part of the purchase-money left charged upon the land for the widow in lieu of dower. The rest was paid to the heirs or their guardians, and is not involved in this case. Among the heirs, however, was Wilhelmina Emerick, a minor, who subsequently to the sale, married Washington L. Bladen, gave birth to one child, and died, still a minor. The child, William Emerick Bladen, died a minor, and subsequently Washington L. Bladen, the father, died, in the lifetime of the widow Emerick. On the death of the latter, the question arose whether the share of Wilhelmina in the fund set apart to her mother in lieu of dower, was real estate or personalty. Appellants, who are brother and sisters of Wilhelmina, claim it as real estate, as heirs of their nephew, William E. Bladen, and the other parties in interest claim it from the administrator, as personalty which comes to them through Washington L. Bladen, the father of William.

The claim of the appellants rests upon the contention that the sale in partition did not convert the real estate into personalty, but that the purchase-money, taking its place, became realty, and must remain so until the title and the possession should unite in a person *sui juris*, and thus capable of reconverting it into money; and that as both Wilhelmina and her son died during minority, and before the death of the widow, the reconversion never took place in their behalf, and the money retained its character as realty until the death of the widow, upon which the title of appellants intervened as heirs-at-law of William Bladen.

The contention is ingenious, and has been supported with great learning and earnestness, but it is not sound or tenable. The question is really no longer open, being clearly and authoritatively ruled by Hay's Appeal (52 Pa. 449); McCune's Appeal (65 Id. 450), and Kann's Estate (69 Id. 219). Hay's Appeal arose upon the distribution of the proceeds of the sale of real estate which had descended to a wife. Under the Act of 29 March, 1832, sect. 48, the money was paid to the husband on his giving security that it should be forthcoming at his death. The wife died, leaving children, and two of these died during the lifetime of the father. The money never was in their possession, any more than the money in the present case was in the possession of Wilhelmina Bladen. The cases are identical, except that the intervening interest that prevented present possession there, was the use by the father of the money in lieu of curtesy, and here it is the use by the mother in lieu of dower. Yet the Court held that the money became personalty on the passage of the right to it to the children, and on their death it passed as personalty to the father. "On the death of Mrs. Hay," says STRONG, J., "the right to the money became vested in her three children, though the time of enjoyment was postponed until the death of their father. Two of these having died in the lifetime of their father, in their minority, and without issue, their shares descended to their father. For it descended as personalty, which it actually was. The provision in the Act of Assembly extended no further than to regulate the first descent."

McCune's Appeal, and Kann's Estate (*supra*,) are equally clear, and equally in point. The exceptionally able argument of the learned counsel for appellants, has failed to convince us, as it failed to convince the Court below, that there is any difference in principle between those cases and the present. It is not necessary that we should go over the argument in detail, as that has been very satisfactorily done in the opinion of the learned Auditing Judge, to which we refer for the answer to the several points made.

To that opinion I will only add that the general error of the argument is in assuming that the proceeds of the sale in partition are real estate, and require a positive act of reconversion to get them back into their character as money. It is not uncommon to say that the proceeds of real estate remain realty, etc., but the expression is not accurate. The money never is real estate, in law any more than in fact, but for certain purposes, and within certain limits, it is treated *as if* it was real estate. The purpose is to preserve the inheritable quality of the estate, so that the title may not be diverted from the previous owner, and the limit is the first devolution. The whole doctrine is the creation of equity for a specific purpose, and when that purpose is accomplished the rule ceases to operate. So far therefore from the money actually becoming real estate, and requiring a positive act of reconversion to restore it to its natural character of money, it

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never is real estate, and is only treated as such within a limit, which all the cases agree, is the first transmission. To quote again from Hay's Appeal, "it descended as personalty, *which it actually was*. The provision in the Act of Assembly extended no farther than to regulate the first descent, and prevent the fund from passing directly from the wife to the husband. After it had vested in the heirs" (and it is to be remembered that in that case as in this, it never did vest in possession) "it was no longer real estate for any purpose." And in the language of SHARSWOOD, J., in Foster's Appeal (74 Pa. 397), "conversion is altogether a doctrine of equity. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit æquitas*, has redoubled force in application to it. It follows, of necessity, that it is limited to its end. . . . When the purpose of convenience is attained, conversion ends."

When therefore the real estate of Peter Emerick was sold, Wilhelmina's share of the proceeds passed to her as real estate, but having vested in her, either in possession or in remainder, after her mother's life interest, the purpose of the equitable or constructive conversion was fully accomplished, and the money resumed in law its actual character as personalty, and as such passed to her son, and through him to his father, and then to the father's personal representative.

Decree affirmed.

Opinion by MITCHELL, J. C. K. Z.

July '88, 72. May 20, 1889.

Rice v. Rice.

Ejectment—Insanity—Declarations by testator, or grantor, alleged to be insane—When admissible.

In a contest as to the validity of a will, on account of the incapacity of the testator, or on the ground of fraud, it is proper for the jury to be informed what had been the testator's intentions when his understanding was unquestionable; and the same rule applies to contests as to the sanity of the grantor in a deed.

Irish *v.* Smith (8 S. & R. 573), and Wilkinson *v.* Pearson (23 Pa. 117), followed.

Declarations of the grantor made subsequent to the execution of a deed, are competent evidence on the question of sanity.

No limit of time can be absolutely fixed in regard to declarations admitted for such purpose, although, of course, the more remote they are, the less weight they are entitled to.

In an action of ejectment, defendants relied upon a deed dated July 25, 1882. Plaintiffs showed that an inquest in lunacy on January 19, 1884, found that the grantor was insane, and had been so for one year and nine months preceding, the lunacy of grantor, therefore, antedating the deed about three months. Offers of proof by the defendants of declarations made by the grantor within periods of fifteen months before the alleged insanity began, or eighteen months before the execution of the deed, that he intended to execute "this conveyance," or "a deed" to the defendants, were rejected by the Court, partly on the ground that they were too remote in time:

Held, to be error.

Error to the Common Pleas of Lancaster County.

Ejectment by John Rice, Catharine Stewart, and Charles S. Stewart, her husband, Jacob Rice, Susan Whiteside, and George Whiteside, her husband, Sarah Stewart, and Alexander Stewart, her husband, and Rebecca Pearson, against Daniel E. Rice, Jr. and Joseph S. Rice, to recover six-eighths of a certain tract of land in Lancaster County. All of the parties to the suit were children of Daniel Rice, Sr., who died intestate, April 15, 1884, with the exception of Rebecca Pearson, a grandchild.

Upon the trial, before PATTERSON, J., plaintiffs showed that Daniel Rice, Sr., obtained title to the property in question from Daniel E. Rice, and wife, by deed, dated March 23, 1875 (consideration, $4725); and died intestate, leaving to survive him, a widow, and the parties to the suit as heirs-at-law, and rested.

Defendants offered in evidence a deed from Daniel Rice, Sr., and Mary A., his wife, to them for the property in question, dated July 25, 1882 (consideration, $2250), and rested.

In rebuttal, plaintiffs showed that on December 7, 1883, proceedings in lunacy were instituted against Daniel Rice, Sr., and on January 19, 1884, there was a finding by the inquest that he was of unsound mind, and had been for one year and nine months preceding, his lunacy, therefore, antedating the execution of the deed to defendants about three months. This finding was duly traversed and the trial thereupon is still pending. The Court held that the finding of the inquest was *prima facie* evidence of the lunacy of Rice at the time he executed the deed, and that the burden of proving him sane was upon defendants.

Numerous witnesses were then called by defendants to prove that Rice was sane, and by plaintiffs to prove that he was not.

Defendants made the following offers of proof:—

(1) We propose to ask this witness [Samuel Hughes] to repeat the conversations that he had with Daniel Rice within a period of six months preceding April, 1882, the time of the stroke of paralysis, in which conversations Daniel Rice declared his intention to execute this conveyance to Daniel and Joseph, giving his reasons therefor, namely: that they had done more for him than his other children, and that he had spent enough on the other children, naming them.

(2) To prove by this witness [Henry Girvin],

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that he knew Daniel Rice, Sr., intimately, for many years before his death, and in the year 1881, when Rice was unquestionably of sound mind, repeatedly heard him say, that he, the said Daniel Rice, Sr., intended to execute a deed to the defendants for the property in controversy, giving his reasons for such intention.

(3) To prove by this witness [Ellwood Knox] that he knew Daniel Rice, Sr., intimately, for many years before his death, and in the year 1881, when Rice was unquestionably of sound mind, repeatedly heard him say, that he, the said Daniel Rice, Sr., intended to execute a deed to the defendants for the property in controversy, giving his reason for such intention.

Objected to. Objection sustained. Exceptions.

The jury found for plaintiffs for six-eighths of the land in question. Defendants took this writ, assigning for error the rejection of their offers, as above.

Benjamin F. Davis and *J. Hay Brown*, for plaintiffs in error, cited—

Irish *v.* Smith, 8 S. & R. 579.
Howe *v.* Howe, 99 Mass. 90.
Chess *v.* Chess, 1 P. & W. 32.
Wilkinson *v.* Pearson, 11 Har. 117.
Neel *v.* Potter, 4 Wr. 483.
Norris *v.* Sheppard, 8 Har. 475.

W. M. Franklin and *H. M. North*, for defendants in error.

None of the cases cited by plaintiffs in error are applicable here. All of the Pennsylvania cases arose in contests about wills, and related entirely to gifts, and do not apply to the case of a bargain and sale, and conveyance of real estate.

May 29, 1889. THE COURT. This case is clearly ruled by Irish *v.* Smith (8 S. & R. 573). In regard to the competency of evidence as to the sanity of the maker, there is no difference in principle between a will and a deed, and the authorities have not admitted any.

The case of Irish *v.* Smith arose upon a contest as to a will, but the reasoning of C. J. TILGHMAN is equally applicable to the case of a deed. "The will of 1814, was impeached on two grounds: 1. for incapacity of the testator; 2, because it was obtained by fraud and improper management. In both points of view, it was proper for the jury to be informed what had been the testator's intentions when his understanding was unquestionable." And in Wilkinson *v.* Pearson (23 Pa. 117), similar declarations were admitted in a contest as to the sanity of the grantor in a deed, and KNOX, J., put the admissibility expressly upon the principles of Irish *v.* Smith. In Chess *v.* Chess (1 Pen. & Watts, 32), the same principle was applied to the much more doubtful case of declarations made subsequently to the execution of the deed, the Court holding on the authority of Irish *v.* Smith that the evidence was competent on the question of sanity.

The declarations offered in the present case seem to have been excluded partly on the ground that they were too remote in time, though what period of time the Court fixed is not clearly discoverable from the evidence printed in the paper book. It may be doubted if any limit of time can be absolutely fixed in regard to declarations admitted for the purpose in question, though of course the more remote they are the less weight they will properly be entitled to.

The finding of the inquisition dated the insanity of Rice from the stroke of paralysis in April 1882, and the deed in controversy was made in July of the same year. The declarations offered were made in 1881 and the early part of 1882. None of them therefore was more than fifteen months before the alleged insanity began, or more than eighteen months before the disputed deed. They certainly were not too remote. In Wilkinson *v.* Pearson the interval was more than two years but no question seems to have been raised on that ground.

Nor is the variance between the declarations offered and what Rice subsequently in fact did, of any weight. The first offer was of "an intention to execute this conveyance," and was not open even to this argument. The others were of an intention to execute "a deed." There was not therefore any real variance at all. But even if the declared intention had been to make a gift as it seems to have been regarded by counsel, it would have been an altogether immaterial variance, as the fact that a grantor made a better bargain for himself than he had declared his intention to do when unquestionably sane, was certainly some proof of his competency to know what he was doing when he did make the grant.

The rejection of this evidence was therefore erroneous.

Judgment reversed and a *venire de novo* awarded.

Opinion by MITCHELL, J. H. C. O.

Jan. '89, 291. March 13, 1889.

Emery et al. v. Steckel.

Master and servant—Compensation—Dismissal before expiration of term of employment—Burden on defendant to show that plaintiff might have obtained employment elsewhere.

Where a servant has been discharged without sufficient excuse, he is entitled, *prima facie*, to recover the extent of his wages for the whole term. He is bound, however, to use reasonable efforts to obtain employment

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of the same or a similar character in the same neighborhood; but the burden of showing that he might have found such employment is on the defendant.

Error to the Common Pleas of Northampton County.

Assumpsit by Solomon A. Steckel against J. D. Emery and T. B. Brown, trading as T. B. Brown & Co., to recover for wages.

The facts are fully stated in the opinion of the Supreme Court, *infra*.

The defendants requested the Court to charge, *inter alia*, as follows:—

(2) "That it was incumbent upon Steckel to exercise due diligence to obtain other employment, and if the jury found that he did not exercise such due diligence, there can be no recovery." *Answer.* "This point, as an abstract principle of law might be true, but there is nothing in this case that involves the application of the legal principle, because the defendants, upon whom the burden of proof rests, have not shown that he did not attempt to obtain employment, or that he might have obtained employment and refused it."

The Court, REEDER, J., charged the jury, *inter alia*, as follows: "There is no evidence in this cause which you can take into consideration in mitigation of damages, excepting the testimony showing that Mr. Steckel was employed during a part of these nine months, and for which he received a hundred dollars, I believe the testimony is. You will recollect what the testimony is upon that subject. The burden of proof was upon the defendants to show that he might have received other employment had he sought it."

Verdict for plaintiff for $410.14, and judgment thereon. Defendants took this writ, assigning for error (1), the answers to the point, and (2), the portion of the charge quoted.

Edward J. Fox (*Edward J. Fox, Jr.*, with him), for plaintiffs in error.

Before plaintiff was entitled to recover wages, when a promise for continuing employment is broken, he must establish that he used due diligence in endeavoring to obtain employment, but was not successful.

Beckham *v.* Drake, 2 H. L. Cases, 606.
Emmens *v.* Elderton, 4 Id. 507.
Goodman *v.* Pocock, 15 Ad. & E. 583.
Chamberlin *v.* Morgan, 18 P. F. Smith, 168.

Robert L. Cope, for defendant in error, presented no paper book.

May 6, 1889. THE COURT. The contention of Steckel, the plaintiff below, was that he had been employed by T. B. Brown & Co. to keep their books, etc., for a period of nine months from the fourth day of June, 1887, at the rate of $70 per month; that he remained in defendants' service and was paid at the rate agreed upon until July 25, 1887, when without cause or sufficient legal excuse he was discharged. He avers that he stood ready and willing at all times during the period stated to perform his duty, according to the nature and terms of his employment, but his services were refused; his claim is for damages upon the footing of his contract, that is to say according to the rate of compensation agreed upon. The defendants deny the existence of such a contract; they allege that the plaintiff was employed at the rate of $70 per month, but for no determinate period; that his withdrawal from the defendants' service was voluntary; that Steckel was incompetent, and failed to discharge the duties which he undertook to perform, and that the defendants were justified upon either or all of these grounds in discharging him from their employment. The facts in dispute, however, have been settled by the jury, and in the further consideration of the case here we must proceed upon the plaintiff's theory of the case on the facts.

In anticipation of this finding by the jury the defendants' counsel, in substance, requested the Court to instruct the jurors that it was incumbent upon Steckel after his discharge to exercise due diligence to obtain other employment, and if they should find that he did not exercise a proper degree of diligence to that end he could not recover. The learned Judge of the Court below declined so to instruct the jury, saying that the burden of proof was upon the defendants, and that as it was not shown the plaintiff either failed to seek employment or refused it when offered, or that he might have obtained employment had he made a proper effort, the point of law suggested had no application to the case. "There is no evidence in this cause," said the learned Judge in his general charge, "which you can take into consideration in mitigation of damages, excepting the testimony showing that Mr. Steckel was employed during a part of the nine months and for which he received a hundred dollars," etc. "The burden of proof was upon the defendants to show that he might have received other employment had he sought it," etc. The answer to this point, and this portion of the charge, to the same effect, are the only matters embraced in the several assignments of error.

It is well settled that where a servant has been discharged without sufficient excuse, before the expiration of his term of employment, he may in addition to the wages earned recover the damages actually sustained; *prima facie*, he is entitled to recover to the extent of his wages for the whole term. (Fereira *v.* Sayres, 5 W. & S. 210.) He is bound, however, to use reasonable efforts to obtain employment elsewhere; if he fails to find it of the same or a similar character

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in the same neighborhood he may recover to the extent stated, but the burden of showing that he might by reasonable efforts have found such employment elsewhere is upon the defendant. This would seem to be the doctrine of all the cases. (Costigan *v.* M. & H. R. Co., 2 Denio, 609; Gillis *v.* Space, 63 Barb. 177; Sherman *v.* Transportation Co., 31 Hun, 162; Horn *v.* Land Association, 22 Minn. 233; Wood on Master & Servant, 245–6, and cases there cited.) The same rule is announced in 2 Greenleaf's Ev. 274, citing, among other cases Costigan *v.* M. & H. R. Co. (*supra*), where the cases in this country and England are collected and the question fully discussed. The defendant being the wrongdoer, and as between him and the person wronged, the presumptions are in favor of the latter. It is to relieve himself from the results of his own wrongdoing, by way of mitigation merely, that the defendant may make this defence, and the burden of proof under such circumstances of right should rest with him who asserts the fact and would avail himself of it. What is a reasonable effort is necessarily a question of fact for the jury, dependent upon the circumstances of each case.

Our own cases are to the same effect. In King *v.* Steiren (44 Pa. 99), the rule is stated with much clearness, that in this class of cases the plaintiff is *prima facie* entitled to the stipulated compensation for the whole time. "If so," says the learned Judge delivering the opinion, "the burden of proof in regard to his employment elsewhere, or his ability to obtain employment, must necessarily rest on the defendant. All evidence in mitigation is for a defendant to give. In its nature it is affirmative and hence it is for him to prove who asserts it. But the possibility of obtaining other similar employment, or the fact that other employment was obtained, bears upon the case only in mitigation of damages, and is therefore a part of the defendant's case." This case was followed by Kirk *v.* Hartman (63 Pa. 107), where it is said that the question must be considered as settled in King *v.* Steiren (*supra*), and to the same effect are the cases of Wolf *v.* Studebaker (65 Pa. 459) and Chamberlin *v.* Morgan (68 Id. 168).

The judgment is affirmed.

Opinion by CLARK, J. W. M. S., Jr.

Jan. '89, 175. March 13, 1889.

Shaefer v. Senseman.

Agreement under seal—Construction of, for the Court where no ambiguity exists—Meaning of the words "loses his situation."

A. brought suit against B.'s executrix upon an obligation in the following form:—

"Nazareth, March 29, 1875: Six months after the date when A. loses his situation as teacher at Nazareth Hall I promise to pay the said A. the sum of Three Thousand Dollars without defalcation for value received, provided that the said A. loses said situation at any time after the date of this note and previous to the date of my second marriage. In the event of the decease of my daughter (A.'s wife), before the said A. loses said situation this note shall be null and void.

Witness my hand and seal. B. (Seal.)

Witness: X.

A. introduced evidence to show that at the time this obligation was given A. and his wife were living with B., that the latter was contemplating a second marriage, which was distasteful to them, and that they were about to move to another place, where A. had accepted a more lucrative position; that B. gave the above obligation in consideration of A.'s agreement to continue to live with him. On June 29, 1876, A. resigned his position and accepted a position at a smaller compensation than the one he had previously accepted. On July 11, 1876, B. remarried, and subsequently died, in December, 1887. This suit was then brought against B.'s executrix. The lower Court granted a compulsory nonsuit:

Held, that the nonsuit was properly granted. There was no uncertainty about the terms of the contract, and its construction was for the Court. The expression "loses his situation," does not mean a voluntary resignation. The inducement to B. to give the obligation was that he might enjoy his daughter's society and have the assistance of herself and A. at his home, until such time as he might contract a new marriage.

Error to the Common Pleas of Northampton County.

Assumpsit by Eugene L. Shaefer against Caroline E. Senseman, executrix of Comenius Senseman, deceased, upon an obligation under seal.

The facts of the case are fully given in the opinion of the Supreme Court, *infra*.

The Court, REEDER, J., granted a compulsory nonsuit, saying:—

"This is a suit upon contract brought by the plaintiff in this action, against the executrix of Comenius Senseman, deceased.

"The decedent executed the note in suit upon which the plaintiff seeks to recover. He agrees by this obligation to pay the plaintiff, Eugene Shaefer the sum of three thousand dollars, six months after the said Eugene Shaefer loses his situation as teacher at Nazareth Hall, provided he loses his situation previous to the date of his (Senseman's) second marriage.

"The testimony in the cause is that of the plaintiff's witness. It establishes the fact that prior to the date of the second marriage of Co-

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menius Senseman, Eugene Shaefer voluntarily withdrew from his connection as a teacher at Nazareth Hall. [He claims in this proceeding that such withdrawal under the circumstances was the contingency contemplated by the condition in the note upon which depended the payment of the three thousand dollars. Whether this is so or not depends upon the construction, by the Court, of the words, 'loses his situation as a teacher at Nazareth Hall.' It, therefore, in any event would not be a subject for your consideration, but a question of law for the interpretation and determination by the Court.]

"I am satisfied at this stage of the proceeding that the voluntary withdrawal of Eugene Shaefer as a teacher from Nazareth Hall, was not the condition that all the parties intended to express by the words used in this note, that is, so far as we can derive their manifest intent from the written letter of the contract. [A man loses his situation by his involuntary act. No person loses a place which he withdraws from on his own motion. Where he is forced by circumstances beyond his control to withdraw from the situation], either by the action of the authorities controlling it, or his health is in such condition that his life is endangered, or where his health is imperilled by his continuance in the position, it is not a voluntary withdrawal, but it would be a *loss* of his situation such as is within the letter of this contract.

"But the evidence in this case discloses no such state of facts. It shows that Eugene Shaefer, because of his dissatisfaction with his father-in-law's second marriage withdrew voluntarily from his position as a teacher in Nazareth Hall. That was not the event contemplated by this contract upon the happening of which the payment of the money became due. I therefore propose to make this motion for the entry of a compulsory nonsuit absolute and will discharge you from the further consideration of the case."

The Court having refused to take off the nonsuit, plaintiff took this writ assigning for error (1) The Court erred in entering a compulsory nonsuit against the plaintiff; (2) the Court erred in denying the motion of plaintiff to take off and vacate the compulsory nonsuit.

Henry W. Scott (*W. D. Luckenbach* with him), for plaintiff in error.

Edward J. Fox, Jr., and *Edward J. Fox*, for defendant in error.

April 8, 1889. THE COURT. It is conceded that at the date of the obligation in suit, Eugene L. Shaefer was a teacher in the Moravian School at Nazareth, known as Nazareth Hall, of which Rev. Eugene Leibert was the principal. Shaefer's wife was a daughter of Comenius Senseman, the obligor, who was at the time a widower, and had in contemplation a second marriage with a certain Mrs. Knauss. Mrs. Shaefer, with her husband, lived at home with her father. The effusive character of the courtship, and the contemplated marriage of the father were exceedingly distasteful to Mr. and Mrs. Shaefer, and on that account they were making arrangements to remove from Nazareth to Bethlehem, where Shaefer had succeeded in being elected the Superintendent of the Moravian parochial schools. It was at this particular juncture in the affairs of the family, on the 29 March 1875, the obligation in suit was given, in the form following:

NAZARETH, March 29, 1875.

Six months after the date when Eugene L. Shaefer loses his situation as teacher at Nazareth Hall, I promise to pay to said Eugene L. Shaefer, the sum of three thousand dollars, without defalcation for value received.

Provided, that the said Eugene L. Shaefer loses said situation at any time after the date of this note, and previous to the date of my second marriage.

In the event of the decease of my daughter Jennie Shaefer, before the said Eugene L. Shaefer loses said situation, this note shall be null and void.

Witness my hand and seal,

C. SENSEMAN, (Seal.)

Witness present SOLOMON SHAEFER.

On the 29 June, 1876, Shaefer resigned his situation at Nazareth Hall, where he was receiving $800 per year, and accepted a position at Bethlehem, at a salary of $900; and on the 11 July following, Senseman was re-married. In the month of December, 1887, Senseman died, and on the 12 June, 1888, Shaefer brought this suit, to recover the amount specified in the bond, claiming that by his resignation, under the circumstances, he lost his situation at Nazareth Hall, within the meaning and according to the conditions of the bond. The obligation is certainly unique and original in its provisions, but it contains no words pertaining to art or trade; being written in plain and popular language, and as the facts and circumstances attending its execution and delivery are wholly undisputed, we can see no force in the suggestion, that the interpretation was for the jury. The case turns upon the true and proper construction of the obligation in suit, taken as a whole, in the light of the admitted facts and circumstances under which it was executed. The construction in such case is a question of law with which the jury has nothing to do.

The object of interpretation and construction is, if there be any uncertainty as to the meaning of a contract, to find the intention of the parties. If the contract is clear and unambiguous there is no room for construction. The parties, in the

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absence of fraud, accident or mistake, are bound according to the plain words of the contract.

It is contended, however, on the part of the plaintiff in error, that in the expression "loses his situation," etc., the word "loses" is capable of a variety of shades of meaning, that whether Shaefer abandoned the situation voluntarily or involuntarily he may, in some sense of the word, be said to have lost it. But on a careful study of the various definitions of the word, as found in Webster's Unabridged Dictionary, it will be found that every use of the word implies an inability to retain, or to recover, or an involuntary deprivation of the thing which is said to be lost. In the ordinary and common sense of the word no man can be said to have lost a situation which he, of his own motion and without any reasonably compelling cause, resigns, and the duties of which of his own free will he refuses longer to discharge. Mr. Shaefer might have lost his situation, perhaps, from sickness, or personal injury, by the failure of the principal to re-appoint him, or by his discharge to make way for another, or by the insolvency of his employer or the destruction of the buildings by fire; but he certainly did not *lose* his situation when he voluntarily resigned and abandoned it to take another, which under the circumstances he preferred.

If, however, we take into consideration the entire instrument, and read it as a whole, in the light of the subject-matter, taking into view also the situation of the parties, and the circumstances under which the bond was executed, as to which there is no dispute, the manifest purpose of the parties will be found to be in accordance with the plain expression and meaning of the paper.

Comenius Senseman, as we have said, was a widower; his daughter was his only child, and she and her husband lived with him. They were dissatisfied with Senseman's courtship of Mrs. Knauss, and with the prospect of his re-marriage, and were about to leave their father's home and remove to Bethlehem. Shaefer, however, was induced to decline the superintendency at Bethlehem, and in consideration thereof Senseman executed the bond, as an indemnity in a fixed sum, to Shaefer against the loss of his situation at Nazareth from any cause whatever. The inducement to Senseman undoubtedly was that he might enjoy the society and have the assistance of his daughter and her husband in his own home until such time as he might contract a new marriage, when the purpose of having his daughter with him would be supplied by his wife; hence it is provided that the three thousand dollars was not to be paid unless the situation at Nazareth Hall was lost in the lifetime of Shaefer's wife, and before his re marriage. We take it that the paper means just what it says, and the parties should be bound accordingly. There is no allegation of fraud or mistake, and there is no occasion, therefore, for the introduction of parol evidence to the effect that it was intended to mean something else. Senseman wrote the bond himself; it is certainly written largely in his own interest; it was just such an arrangement as it suited him to make; the meaning and purpose of the paper is simple and obvious, and we are not at liberty to add to, alter, or amend it so as to change the rights and responsibilities of the parties under it.

It is perfectly plain that Senseman did not bind himself in this bond not to re-marry, or fix the amount of the bond as a penalty in the event of his re-marriage.

If he so agreed and gave any paper to Shaefer to that effect, as it is intimated in the testimony he did, it has not been exhibited in this case. On the contrary, it seems clear that a re-marriage was in contemplation, for the occurrence of that event is expressly referred to, and the effect of it upon the bond in suit provided for. The express provision of the bond is that its obligation shall cease and determine at the re-marriage of Senseman, if the event upon which the bond was payable did not before that time occur. How such a bond could be supposed to operate in restraint of marriage it is difficult to see, for without notice to Shaefer, and before his resignation or discharge, the decedent had it in his power by re-marriage, to render the bond of no effect. It is highly improbable, perhaps, that a man might be so influenced, excepting under circumstances otherwise highly favoring the project, but it is sufficient for our present purpose that the existence of the bond was an inducement to, rather than a restraint upon, marriage.

The contract does not assume either that Shaefer will certainly lose his situation, or that Senseman will contract a second marriage. The obligation of the bond is not absolute, it is conditional; it is contingent upon Shaefer's loss of the situation at Nazareth Hall in the lifetime of his wife, and before Senseman's re-marriage, and there is nothing in the bond to indicate that the happening of the latter event is to establish the former.

Nothwithstanding the zeal and ability exhibited by the counsel for plaintiff in error, in the preparation and argument of this case, we are unable to read this bond otherwise than according to its plain letter, and reading it just as it is written, the plaintiff has no case.

Judgment affirmed.

Opinion by CLARK, J. W. M. S., JR.

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Jan. '89, 310. May 10, 1889.

Allen v. First National Bank of Warren.

Banks—Cashier—Acts of, beyond the scope of his authority.

In an action by a bank against the maker of a promissory note, the defendant offered to show that B., who was cashier of plaintiff bank and also a member of the firm of B. & C., informed him that the bank had discounted paper of the firm of B. & C. to an amount more than allowed by the general banking law, and that, if he would sign a note for $5000, payable to their order to replace a like amount of the firm's paper, he would not be held liable on this note; that the object of this proceeding was to satisfy the bank examiner; he also proposed to show that the note in suit was a renewal of similar notes given under a like arrangement for the purpose of showing acquiescence in this arrangement by the bank. The Court rejected these offers and directed a verdict for plaintiff:

Held, that the offers were properly rejected. The bank was not responsible for the acts and declarations of its cashier in the pursuit of his private business. It was no defence to the note in suit that the bank discounted for B. & C. more paper than the law allowed.

Error to the Common Pleas of Warren County.

Assumpsit, by the First National Bank of Warren, against Orren C. Allen, upon a promissory note drawn by defendant.

On the trial, before BROWN, P. J., the plaintiff offered in evidence a promissory note for $5000, dated May 5, 1886, signed by defendant and made payable to the order of Beecher & Copeland, at the First National Bank of Warren, Pa., three months after date. The same was indorsed by Beecher & Copeland. Plaintiff then rested.

Defendant was then called, and his counsel proposed to prove by him "that on the 5th day of November, 1884, Mr. Beecher, the cashier of plaintiff's bank, called on the defendant, at the post-office, in Warren, and informed him in substance that the First National Bank of Warren was carrying for the firm of Beecher & Copeland a quantity of oil certificates, in excess, as he stated, of what they were permitted to carry for one firm, under the laws of the United States, and the bank desired to have the oil divided up among other parties, or carried in the name of other parties, so as to make an appearance of compliance with the law; and that for that purpose he asked the defendant to become the maker of a note for $5000, to be secured by 5000 barrels of the oil that the bank were carrying for Beecher & Copeland, and in compliance with this request and without further consideration, Mr. Allen executed this note and delivered it to Mr. Beecher, and it was placed in the bank, with the oil as its collateral security, with the express agreement that Mr. Allen should not be liable for this note; to be followed by evidence that this note is the second or third renewal of that note, and with the same conditions and considerations, and with the same agreement that there should be no liability on the part of Mr. Allen."

Objected to, "because there is no authority shown or offered to be shown in the cashier to make any such agreement for the bank; and that the agreement proposed to be shown would not be binding upon the bank in any event; that the agreement is not within the ordinary powers of the cashier to make, and no special authority is proposed to be shown; that such an agreement if made by due authority of all the directors would be void as against the stockholders, being in fraud of their rights; and that the whole evidence does not tend to show any legal defence to the note in suit, and is therefore incompetent and irrelevant. Also, that the evidence proposed to be given tends to defeat and destroy a written instrument by verbal testimony and is therefore incompetent."

Defendant's counsel added to the proposition as follows: "To be followed also by evidence that at the date of said agreement, the plaintiff bank held the obligation of Beecher & Copeland for said $5000, secured by said oil certificates, and still holds said obligation and oil certificates."

Plaintiff's counsel objected to the offer as amended "for the reason that the whole evidence offered to be given does not tend to establish a defence on the part of this defendant; the contract or agreement not having been made with the bank by any officer authorized to make it, because there is no authority offered to be shown in the cashier to make such an agreement, and that the same was not within his ordinary power as cashier; that the agreement itself, if made for the bank, and by due authority, would be void under the circumstances stated, and would not avail as a defence to the defendant; and that the evidence is incompetent and tending to contradict the written instrument upon which the suit is brought."

Objection sustained, testimony rejected. Exception. (First assignment of error.)

Defendant further proposed to prove by this witness and others that the note offered in evidence by the plaintiff in the case was given for an antecedent debt of Beecher & Copeland to the said bank, and was without consideration; to be followed by evidence that the plaintiff bank in this case paid no consideration for said note.

Objected to as incompetent and irrelevant in this issue, the proposition itself showing that the note was given upon a good consideration—that is to say, the antecedent debt of Beecher & Copeland.

Objection sustained and testimony rejected. Exception. (Second assignment of error.)

Defendant then proposed to prove by this

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witness and others that the plaintiff bank had, previous to the making by defendant of the note of which the note in this case is a renewal, discounted paper for Beecher & Copeland for an amount of more than one-tenth part of the capital stock of said bank, and had in that manner violated section 5200 of the revised statutes of the United States; and that the original note given by the defendant as well as all the renewals of the same, and including the note offered by the plaintiff in this case, were given without consideration, and for the express purpose of deceiving the bank examiner as to the true condition of said plaintiff bank, and to avoid the consequence of the violation of said United States law. The purpose of the offer being to show that the note in question was given for the purpose of screening the bank from violation of the law which they had committed in that respect, and was illegal and void.

Objected to as incompetent and irrelevant, because the facts stated would not avail as a defence in this case as against the bank.

Objection sustained. Exception. (Third assignment of error.)

Defendant further offered in evidence the propositions above made, as one proposition, to be followed by evidence that the original note was given about November, 1884, and renewed from time to time under the same agreement which the first note, of which the note in question was a renewal, was made, to wit, that it was for the purpose of deceiving the bank examiner as to the violation of said United States law, and with the express agreement that there should be no liability whatever on the part of said defendant, O. C. Allen; this for the purpose of showing acquiescence and ratification in this arrangement by the bank of the agreement.

Objected to, for the reasons given in the objections to the first offer made by the defendant.

Objection sustained. Exception. (Fourth assignment of error.)

The plaintiff requested the Court to charge the jury, "that there is no sufficient evidence that any interest in excess of the legal rate was ever taken, charged, received, or reserved by the plaintiff upon the note in suit, or any previous note of the defendant of which it is a renewal, and the verdict should be for the amount of the note with legal interest from its maturity." *Affirmed.* (Sixth assignment of error.)

The Court instructed the jury to find for the plaintiff for the amount of the note with interest to date.

Verdict for plaintiff for $5500.83, and judgment thereon. Defendant took this writ, assigning for error, 1–4, the refusal to admit his offers of evidence, 5, the instruction to the jury, and 6, the answer to plaintiff's point.

Charles Dinsmoor and *W. W. Wilbur* (*George H. Higgins* with them), for plaintiff in error.

Charles H. Noyes (*Watson D. Hinckley*, *R. Brown*, *Charles W. Stone*, *H. E. Brown*, and *William E. Rice* with him), for defendant in error.

May 27, 1889. THE COURT. We think the offers of evidence in this case were properly rejected. Assuming all the facts covered by the offers to have been proved they would not have amounted to a defence as against the bank. The whole confusion in the case grows out of the fact that the Mr. Beecher mentioned in the offer was at the same time a member of the firm of Beecher & Copeland, and cashier of the First National Bank of Warren, plaintiff below. The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant below at the post-office can only be taken as an effort on his part to procure accommodation paper to the amount of $5000 to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expected soon, and it became necessary for defendant's firm to retire some of its paper. It was equally necessary, perhaps, for the bank; and the defendant, as its cashier, must have been fully aware of the importance of getting the accounts of his own firm in proper condition. He succeeded in procuring from the defendant his note for $5000 to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it. Had he given such assurance in writing it would not have made any difference, as the note was evidently for the accommodation of his firm, and it was as much the duty of the latter to protect it as if a stipulation had been made to that effect in writing. This is all that the offer of evidence amounts to. There is not a word to implicate the bank in any matter, except that it had allowed defendant's firm to exceed its lawful line of discount. There was no offer to show that the bank did anything, either by its board of directors or its officers, acting within the scope of their official duties, or by virtue of an express or implied authority from the bank. Nor was there any error in rejecting the offer to show that the bank had discounted paper for Beecher & Copeland for an amount of more than one-tenth part of its capital. This was no concern of the defendant. That it was no defence to the note is shown by O'Hara *v.* Second National Bank of Titusville (77 Pa. 76)

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and Mapes *v.* The Same Bank (80 Id. 163). There is nothing to show, nor was there any offer to prove, that the plaintiff bank knowingly and wilfully made this loan in excess of the legal limit. Such a matter may often occur by mistake, and when it does it is perfectly proper to correct it. We see no error in affirming the plaintiff's point. The allegation of usury was not sustained by the evidence, and as there was no defence to the note it was not error in the learned Judge to direct a verdict for the plaintiff. The view we take of the case renders a discussion of the authorities cited unnecessary. They have no application.

Judgment affirmed.

Opinion by PAXSON, C. J. W. M. S., JR.

July '87, 149. March 11, 1889.

Stroudsburg Bank's Appeal.

Execution issued to delay creditors—Postponement of creditor's rights—Respective rights of several execution creditors.

An execution issued or kept on foot with intent to hinder, delay, or defraud creditors, and not to make the money, will be postponed to a subsequent writ.

A creditor will not be postponed merely because he issued his writ to prevent other creditors levying on the property, if he does not interfere with the sheriff in the performance of his duty, nor give any directions inconsistent with the exigencies of the writ.

A direction to stay proceedings until further orders, however, or any act evincing an intention not to have a sale of the property, but to hold the writ for purposes of lien, is a waiver of the priority of the execution in favor of another writ coming into the sheriff's hands in the meantime.

Where, however, there is no levy made under the first writ, but the personal property is levied upon and sold under the subsequent execution, the money made belongs to the second execution creditor, leaving the first execution creditor to an action against the sheriff for redress.

Appeal of the Stroudsburg Bank from a decree of the Common Pleas of Monroe County, distributing the proceeds of a sheriff's sale of the personal property of Thomas Miller.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*.

L. M. Burson, Esq., to whom the matter had been referred as Auditor, reported that the fund in the sheriff's hands, after the payment of expenses, should be awarded to the Stroudsburg Bank on account of its judgment. Upon exceptions to this report, SCHUYLER, P. J., of Northampton County, sustained the exceptions and awarded the balance to D. H. Wilson & Co. on account of their judgment. Whereupon appellant took this appeal, assigning for error the action of the Court in holding that the execution of D. H. Wilson & Co. was not postponed to that of the Stroudsburg Bank, and in awarding the fund to D. H. Wilson & Co.

S. Holmes, for appellant.

Charlton Burnett, for appellees.

May 27, 1889. THE COURT. The question in this case arises upon an appeal from the decree of the Court of Common Pleas of Monroe County, distributing the proceeds of the sheriff's sale of the personal property of Thomas Miller. The fi. fa. issued upon the judgment of D. H. Wilson & Co. came into the sheriff's hands October 2, 1886; the writ of the Stroudsburg Bank, October 20, thereafter. The sheriff made no levy under the Wilson writ until the bank writ came into his hands; indeed, it does not appear by the record that a levy was at any time made on the former writ.

The sheriff testified that at the time the Wilson writ was received he had no other business up in that country, and he asked Mr. Burnett, the attorney, if there was anything urgent about the matter, and Burnett replied he did not know that there was, as no one could have any preference; that Burnett afterwards told him he need not be in a hurry, as he thought the matter would be arranged and that he would let him know, etc., but that he received no further instructions from Burnett in the matter. The sheriff, thereupon, without the knowledge of Burnett, made a memorandum upon the writ, in the words following: "To hold till further orders from Burnett, attorney." The sheriff testifies as follows: "I do not know that Mr. Burnett used the word 'hold.' I did not take any memorandum of this conversation. Mr. Burnett called my attention to this indorsement in lead pencil a few days ago; he asked me how I came to make this indorsement on the writ. I think I told him among other things that I thought Thomas Miller had given me instructions to stay the writ; my reason for saying so was that the matter was stale and I did not just think. I do not recollect whether Thomas Miller told me to stay the writ, and I cannot tell where he talked to me about it."

Mr. Burnett testified, that after the writ was issued the sheriff said he could not go up to Miller's at that time, as he had other engagements, and that he told the sheriff he (the sheriff) knew his duty in the premises; that he did not direct the sheriff as set forth in the memorandum; that he did say to him there might be labor claims presented and that Miller would not be entitled to exemption as to them, if they exceeded $50, and he would let him know what was to be done.

When the Stroudsburg Bank issued their writ they gave instructions to the sheriff to proceed at once. A levy was therefore made on the

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latter writ, the personal property sold, and the proceeds brought into Court for distribution. The contention of the Stroudsburg Bank is, that the effect of Mr. Burnett's direction to the sheriff is to postpone the Wilson writ, and to give the bank writ a preference in the distribution.

It is undoubtedly true, that an execution issued or kept on foot with intent to hinder, delay, or defraud creditors, and not to make the money, will be postponed to a subsequent writ (Snyder *v.* Kunkleman, 3 P. & W. 487; Keyser's Appeal, 13 Pa. 409). But a creditor will not be postponed merely because he issued his writ to prevent other creditors levying on the property, if he does not interfere with the sheriff in the performance of his duty, nor give any directions inconsistent with the exigencies of the writ (Brown's Appeal, 26 Pa. 490). A direction to stay proceedings until further orders, however, or any act evincing an intention not to have a sale of the property, but to hold the writ for purposes of lien, is a waiver of the priority of the execution in favor of another writ, coming into the sheriff's hands in the meantime (Eberle *v.* Mayer, 1 Rawle, 366; Lowry *v.* Coulter, 9 Pa. 349; Freeburger's Appeal, 40 Id. 244).

But whether we take the statement of the sheriff or of Burnett, or of both of them, we fail to find enough to justify the finding of the Auditor, that "the sheriff was instructed to hold the writ until further orders from Burnett." The full import of all that is shown is, that the sheriff was not prepared to execute the writ at once, and Burnett being informed of this, and believing that no claim could have precedence of his writ, excepting, perhaps, some labor claims, of which he did not appear to have been fully informed, told the sheriff there was no hurry about it, that the matter might be arranged—that he would let him know. The writ would seem to have been issued not for security, nor to hinder or delay creditors, but to make the money. The delay in the execution of the writ would appear to have originated in the suggestion of the sheriff, and whether Burnett's purpose was to accommodate him, or to facilitate a settlement of the claim, it is clear that his motives were innocent, and that the sheriff was in no way interfered with in the discharge of his duty. The rule of law which governs cases of this character is clearly defined in Landis *v.* Evans (113 Pa. 332).

The writ of D. H. Wilson & Co. waived the benefit of the exemption law; the bank writ did not. The property levied upon and sold consisted wholly of that which had been set aside under a previous writ issued by the bank on their judgment; there were no other judgments, and it does not appear that there were, in fact, any labor claims; there was therefore no motive for any fraudulent action or collusion.

The execution by Wilson & Co. having been first issued would ordinarily, therefore, be first entitled; but, unfortunately, there was no levy made upon that writ. The levy was made upon the writ of the bank only, and upon that writ the personal property was sold. In McClelland *v.* Slingluff (7 W. & S. 134), it was held that in such case the sheriff must apply the money to the writ upon which the levy and sale were made, and not to the first writ, upon which no levy was indorsed or attached. The money made when this is the case, says Mr. Justice ROGERS, belongs to the second execution creditor on whose writ the goods were levied and sold, leaving the first execution creditor to an action against the sheriff for redress. To the same effect is Schuylkill Co.'s Appeal (30 Pa. 358).

The decree of the Common Pleas is reversed and the record remitted, in order that distribution may be made in accordance with this opinion; the appellee to pay the costs of this appeal.

Opinion by CLARK, J. H. S. P. N.

Jan. '88, 263. March 18, 1889.

Homet v. Bacon.

Will—Construction of—Fee simple—Fee tail—Heirs—Issue.

A testator by his will provided as follows: "It is my will also, and I do order and direct that my dear Cynthia [his wife] shall have during her natural life the use, occupancy, and profits of such part of the farm whereon I am now living, as is hereafter described . . . but after my dear wife Cynthia's decease it is my will and desire that my real estate afore-described shall descend to the children issued from my marriage with said Cynthia. . . . And if she should survive them, or any of them, it is further my intention and purpose that the same should, after her death, and after the death of my children by her, without any heirs, revert to the male children issued from my first marriage or from the first bed, and to their heirs." The will was dated in 1831. Annexed to it were certain codicils, executed in 1838. Testator's wife died prior to 1838. In one codicil testator referred to his daughter Lydia, the sole child of his second wife, and "confirmed in Lydia such parts of my estate as I have by my said will of March 16, 1831, disposed of in favor of my wife Cynthia, to revert after her death to her children, if any." Testator died in 1839, leaving said Lydia to survive him, and leaving also male children and the descendants thereof by his first wife. Lydia had issue one daughter, who died before her. In 1852 Lydia conveyed the farm to B., by a deed executed and acknowledged in accordance with the provisions of the Act of January 16, 1799, to bar entails. After Lydia's death the male children of testator by his first wife and their descendants brought ejectment against Lydia's vendee:

Held, that by the terms of the testator's will a life estate was given to the widow for life, with a remainder to Lydia in fee; and that it was only in the event of the widow surviving Lydia, and the latter dying without heirs, that

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the property reverted to testator's male children by his first wife, neither of which events had occurred:

Held further, that the codicil could not be construed to cut down the estate of Lydia to a life interest in the event of her death without children, but that the same operated simply to confirm the estate previously granted to Lydia by the will:

Held therefore, that Lydia took a fee simple, and that her conveyance passed an absolute title to defendant; and that even if the phrase, "without any heirs," were to be construed to mean "without issue," the effect would be only to create an estate tail in Lydia, which was barred by her deed executed in 1852, and that therefore a good title was vested in defendant.

Error to the Common Pleas of Bradford County.

Ejectment by Francis X. Homet *et al.* against R. S. Bacon, for a lot of land situated in the township of Asylum, containing ninety-nine acres and seventy-six perches.

On the trial (before MORROW, P. J.), the following facts appeared: Both plaintiffs and defendant claimed title to the land under Charles Homet, whose will was admitted to probate May 15, 1839. The parts of this will material to the case were as follows:—

"It is my will also, and I do order and direct that my dear Cynthia [his wife] shall have during her natural life the use, occupancy, and profits of such part of the farm whereon I am now living, as is hereafter described, . . . to wit" [then follows a full description]: "but after my dear wife Cynthia Homet's decease it is my will and desire that the real estate afore-described should descend to the children issued from my marriage with said Cynthia, and if she should survive them, or any of them, it is further my intention and purpose that the same should after her death, and after the death of my children by her without any heir, revert to the male children issued from my first marriage or from the first bed, and to their heirs."

Attached to this will were several codicils, in one of which were the following words:—

"Confirming in favor of my daughter Lydia such parts of my real estate as I have by said will of March, 1831, disposed in favor of my wife Cynthia Homet, to revert after her death to her children, if any."

Between the date of the will, in 1831, and that of the codicils, 1838, Cynthia, the second wife of the testator, died. For the purposes of the trial counsel on both sides signed the following agreement as to facts:—

(1) That the land described in the writ of ejectment in the above stated case was owned by Charles Homet in his lifetime; that he died seised of the same; and that the said land is described and devised in his last will and testament, which was duly proved and recorded in the register's office at Towanda, on May 15, 1839.

(2) That the persons named in the aforesaid writ of ejectment as plaintiffs legally represent the male children issued from the first marriage or from the first bed of Charles Homet, the aforesaid testator, and their heirs.

(3) That Lydia Homet was the only child of said Charles Homet by his second wife, Cynthia Homet; that the said Lydia was married to E. T. Fox, February 8, 1847; that she (Lydia) had one daughter, who died before her mother, unmarried and without issue; and that Lydia Homet Fox died on April 19, 1886; that Lydia Homet Fox, with her husband, E. T. Fox, conveyed the land described in the writ to Hiram Gilbert and R. E. Gilbert by deed, dated May 5, 1852, which was duly acknowledged in open Court, in accordance with the Act of January 16, 1799 (3 Sm. L. 338), in order to bar entails; and that Hiram Gilbert *et ux.* conveyed his undivided one-half part thereof to R. E. Gilbert by deed, dated July 13, 1857. That R. E. Gilbert *et ux.* conveyed the same to R. S. Bacon, the defendant in this suit, by deed, dated January 1, 1873. The said conveyance, or the record thereof, to be used in evidence, subject to the plaintiffs' objection that Lydia Homet Fox and E. T. Fox, her husband, could not convey a title to the land described, which is to be determined by the Court. Also, that said grantees of Lydia Homet Fox and E. T. Fox entered into possession of the said land at the dates of their respective deeds, and have continued in possession, claiming ownership ever since.

The plaintiffs claimed that Mrs. Fox took only a life estate with contingent remainder to any child or children who survived her, and that none having survived her the land reverted to the testator's sons by his first marriage in fee. The defendant claimed that Lydia Homet Fox took a fee simple; or if not that she took a fee tail, which was barred by her deed to Gilbert.

Upon these facts the Court directed the jury to find a verdict for the plaintiffs reserving the following point, to wit: Can the plaintiffs recover?

Subsequently the Court entered judgment on the point reserved for the defendant *non obstante veredicto*. Whereupon the plaintiffs took this writ assigning for error the action of the Court, in entering judgment on the point reserved.

Thomas J. Ingham (*Ellery P. Ingham*, *William T. Davies*, and *Lewis M. Hall* with him), for plaintiffs in error.

D'A. Overton (*B. M. Peck* with him), for defendant in error.

May 6, 1889. THE COURT. We are quite unable to discover any difficulty as to the character of Lydia Homet's estate in the land in question under the will of her father. The operative words of the will are: "It is my will also and I do order and direct that my dear Cynthia shall have during her natural life the use and occupancy and profits of such parts of the farm whereon I am now living as is hereafter

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described" (then follows a full description). "But after my dear wife Cynthia Homet's death it is my will and desire that the real estate afore-described should descend to the children issued from my marriage with said Cynthia." It is beyond all question that these words gave a life estate to the wife Cynthia with remainder in fee to the children of the testator and his wife Cynthia. It would be a waste of time to discuss so simple a question. But it is argued for plaintiffs in error that the further words of the will in connection with the facts as they transpired reduced this remainder in fee to a life estate with an ultimate remainder in fee to the testator's male children by his first marriage. These further words follow in immediate connection, "And if she should survive them or any of them it is further my intention and purpose that the same should after her death and after the death of my children by her without any heirs revert to the male children issued from my first marriage or from the first bed and to their heirs." It is claimed that under these words the children of the testator and Cynthia took only a life estate with remainder in fee to the male children of the testator by his first wife. This would certainly be so if the conditions upon which this disposition was based had transpired, but they never did. In point of fact the testator and Cynthia had but one child, Lydia, and she survived both her father and her mother. Cynthia died before the testator. Charles Homet, the testator, died about 1839, and Lydia did not die until 1886. In this state of facts Lydia fulfilled to the letter the conditions upon which the land in question was given to her in fee. She was a child, the only child of the testator and his wife Cynthia. Her mother died and after her father's death the land became hers literally and absolutely unless it was divested by the remaining clause, or some other clause, a part of the will or codicils. The remaining clause alone quoted is principally relied upon to convert Lydia's fee into a life estate. Now the first and most important condition necessary to work this change was that the wife, Cynthia, should survive her child or children. The words are, "and if she should survive them or any of them it is my further intention and purpose," etc. But she did not survive them. She died about fifty years before Lydia died and Lydia was her only child. How then is it possible to take from Lydia the clear estate in fee simple which the will gave her upon the theory that an event happened which never did happen? But again another insuperable obstacle in the way of the male children of the first wife is that before any interest in them could arise it was essential that Lydia should die "without any heirs." In point of fact she did not die without any heirs. She left an abundance of them, not children it is true, but heirs nevertheless. It is idle to discuss the situation in which the word "heirs" may be construed to mean "children" or "issue" or even "devisees" or "distributees." Those are cases where it is necessary in order to give intepretation to doubtful wills, where the meaning is obscure, where the will cannot take effect without attributing another than technical meaning to the word. But here there is no such difficulty, there is absolutely not the least ambiguity, any more than there would be in case of a devise to one "and his heirs;" most certainly the law will not be astute to take away from a child a clear fee simple estate and reduce it to a life estate, by a forced and ingenious and strained process of reasoning, the foundation of which is that where a will can only become operative according to the testator's intent by giving to the word heirs a limited or special meaning such as "children" or "issue," such a construction will be given.

Again in one of the codicils an expression occurs which is invoked in favor of the male heirs by the first wife. The words are, "confirming in favor of my daughter Lydia such parts of my real estate as I have by said will of March, 1831, disposed of in favor of my wife Cynthia Homet to revert after her death to her children if any." It is argued that the words "to revert after her death to her children if any," refer to Lydia and her children and as she had none her estate was a life estate only. It is perhaps enough to say that it is impossible to read these words in that way without doing violence not only to the grammatical structure of the sentence but to the plainest and most obvious meaning of the words. The whole of the clause is at best a mere reference to the previous disposition of the will and does not pretend to be the substitution of new testamentary language creating a new or different estate. But just as it is, the express language and the plain meaning are, to simply confirm the estate of Lydia previously granted by the will, and when in describing that estate, that is Lydia's estate, he says, "disposed of in favor of my wife Cynthia Homet to revert after her death to her children if any," he unquestionably refers to Cynthia Homet's children and Cynthia Homet's death. The antecedent of "her" is Cynthia Homet and in no possible sense Lydia. Again if there were any doubt as to the meaning of the expression "without any heirs" in the will, there is just as much reason for reading it "issue" as "children," and read in that way the estate of Lydia would be at the least an estate tail, which was only barred by the deed of 1852 to the Gilberts.

We are of opinion that Lydia took an estate in fee simple which has duly passed to the defendant, and therefore

The judgment is affirmed.

Opinion by GREEN, J. S. H. T.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JULY 19, 1889.* [No. 12.

Supreme Court.

Jan. '89, 271. February 22, 1889.

Township of Jackson v. Wagner.

Townships—Liability of for defects in roads—Duties of officers—Negligence—Damages.

Negligence is the absence of that measure of care which the circumstances require.

Township officers are bound to anticipate and provide against the ordinary needs of travel, and to remove obstructions and defects which would naturally or probably cause injury to the traveller along the highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate the dangers to which a broken wagon or a frightened horse may expose a driver.

Plaintiff was driving along a public highway, on the side of which there was an irregular pile of stones, about twenty-five feet long, and from one to two feet high; between this pile and the gutter opposite was an unobstructed highway fifteen feet wide; she had passed this pile when her horse took fright at a donkey, and turning suddenly broke the left forward wheel and ran back to the stone heap, which the axle struck, and plaintiff was thrown out and received injuries for which she sued the township. Defendant requested the Court to charge that if the injury was caused by the breaking of plaintiff's wagon and her inability to guide the horse she could not recover. This was refused and a verdict was rendered for the plaintiff:

Held, that this point should have been affirmed, with a qualification that if the injury was due to these accidents, and not to the unsafe condition of the road, the township was not liable. It was the condition of the highway and not the succession of accidents that the attention of the jury should have been directed to. If the road was unsafe for the ordinary purposes of travel, plaintiff was entitled to recover, otherwise not.

Error to the Common Pleas of Lebanon County.

Case, by Ellen T. Wagner against the Township of Jackson, to recover damages for personal injuries received by being thrown out of a buggy on a public road, which road she alleged was not in proper repair.

The facts of the case are fully set out in the opinion of the Supreme Court, *infra*.

Plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) If the injury of the plaintiff was caused by the township authorities not maintaining the road of sufficient breadth, or by improperly allowing excavations in the road, or by permitting dangerous holes to remain in the road, or by all or several of those causes combined, without proof of concurrent negligence on the part of the plaintiff, the plaintiff is entitled to recover. *Answer*. The question of improper excavation in the road is not in the case, and that clause is stricken from the point: Thus modified it is affirmed. (First assignment of error.)

(3) If the plaintiff was in the exercise of ordinary care and prudence and the injury was caused by the insufficiency of the road, combined with some accidental cause, the defendant is liable, and the plaintiff is entitled to recover. *Answer*. This is affirmed, if the insufficiency of the road arises from the defendant's negligence. (Second assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows:—

(1) That if the jury believe that the horse driven by the plaintiff frightened at a donkey on the public highway, after having passed the stone heap on the public road, and turned round and broke the wheel of the buggy in which she was riding, and the horse then ran away and with the buggy thus injured, with the loss of a front wheel, was run against the stone heap and caused her injuries, the township is not liable and the plaintiff cannot recover. *Answer*. This is refused. The jury must decide whether the supervisors were negligent in their care of this road; and if so, whether their negligence was one cause of the injury. If it was one direct cause of the injury the township would be liable, if the plaintiff herself was not guilty of contributory negligence. (Third assignment of error.)

(2) If the jury believe that the horse was frightened by the donkey and in turning around broke the wheel of the buggy, and on account of this broken wheel that side of the front part of the buggy axle was on the ground and prevented the driver from guiding the horse to the right in order to avoid the stone heap, or if they believe that the driver had lost control of the horse, that then the plaintiff cannot recover. *Answer*. This is refused. (Fourth assignment of error.)

(5) If the jury believe that the horse driven by the plaintiff frightened at something on the road not a defect in the highway, and which the supervisors were not bound by law to remove, and the injury resulted from the horse running away through such fright, the plaintiff cannot recover. *Answer*. If this means that the injury resulted *solely* from the horse running away, it is affirmed; but if it means that there could be no recovery, even if the injury was caused *in part* by the negligence of the supervisors, it is refused. (Fifth assignment of error.)

(6) That under all the evidence in the case the plaintiff is not entitled to recover. *Answer*. This is refused. (Sixth assignment of error.)

(7) That the plaintiff, from her own testimony,

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saying that she was perfectly composed, and the horse was slowly trotting away, was guilty of contributory negligence in not stopping the horse or guiding him away from the stone heap, and therefore cannot recover. *Answer*. This is refused. The question of contributory neglect is for the jury. (Seventh assignment of error.)

Verdict for plaintiff for $3000, and judgment thereon. Defendant took this writ, assigning for error the answers to the points as above.

William M. Derr, for plaintiff in error.

A township is not bound to keep the roads in such condition as will prevent accidents to persons driving, either voluntarily or involuntarily, in unroadworthy vehicles and with unmanageable horses.

Gregory *v.* Adams, 14 Gray, 247.
McCormick *v.* Twp. of Washington, 112 Pa. 185.

As the condition of the vehicle and the unmanageable conduct of the horse were in nowise imputable to the township, taken either by themselves or in conjunction with the existence of the stone pile, no obligation was imposed upon the township to pay for her injuries.

Wharton's Negligence, §§ 85–103.
Pittsburgh *v.* Grier, 22 Pa. 54.
Hey *v.* Philadelphia, 81 Id. 44.
Burrell Twp. *v.* Uncapher, 117 Id. 353.

Assuming that it was a fault in the township authorities to permit the pile of stones to lie along the side of the road, yet the injury to the plaintiff below, as it appears from her own testimony, was not a natural, probable, and usual consequence of such fault, but was a result which could not have been foreseen by ordinary forecast, and therefore plaintiff below should not have been permitted to recover.

Monongahela City *v.* Fischer, 117 Pa. 9.
McGrew *v.* Stone, 53 Id. 436.
Hoag *et al.* *v.* R. R. Co., 85 Id. 293.
West Mahanoy Twp. *v.* Watson, 116 Id. 344.

Where it is alleged that an injury arose from negligence, the question of the proximate cause is to be decided by the jury upon all the facts of the case; where the facts are undisputed, and the intervening agency is manifest, it is not error for the Court to withhold the evidence from the jury.

R. R. Co. *v.* Cadow, 120 Pa. 559.

Grant Weidman (*P. S. Keiser* with him), for defendant in error.

This case, as we understand it, is ruled by the case of Burrell Township *v.* Uncapher (117 Pa. 353), which decides, "If in consequence of the negligence of a township to keep and maintain a public highway in a reasonably safe condition, an injury has been sustained by the plaintiff, it is no defence that the injury was caused by the combined effect of the negligence of the township and the negligent act of a third person."

The same principle is decided in the cases of—

Lower Macungie Township *v.* Merkhoffer, 71 Pa. 276.
Hey *v.* Philadelphia, 81 Id. 44.
Norristown *v.* Moyer, 67 Id. 267.
Erie City *v.* Schwingle, 22 Id. 385.

June 4, 1889. THE COURT. This case presents an unusual question, one that is not clearly settled, and one of much more than ordinary importance. The facts upon which it is raised are not involved in any serious controversy. The plaintiff was driving a horse and wagon along a public highway in Jackson Township, Lebanon County. Her sister and three children were in the wagon with her. At one point there was at the side of the road an irregular pile of stones some twenty-five feet long and from one to two feet high, which had been taken out of the road in the immediate vicinity by the supervisors and left there until a convenient time for their removal. Between the stone pile and the gutter, opposite, was an unobstructed roadway fifteen feet wide. The plaintiff drove over this part of the road without noticing that there was a stone pile near the road or any defect in the roadway. When about one hundred and twenty feet beyond the stone pile her horse took fright at two donkeys approaching in the road, stopped, turned suddenly around, broke down the left forward wheel and let the axle fall to the ground. It then started rapidly back drawing the buggy on three wheels and the dragging axle.

The axle acted like a rudder in drawing the horse and wagon to the north side of the road until when the stone heap was reached the axle struck it, the wagon was overturned, and the plaintiff injured. She testifies that at the same time the hind wheel dropped into a depression in the road which aided in overturning the wagon. A recovery was sought and had in the Court below on the theory that it was negligence in the supervisors to leave the stone pile where it was and to suffer the depression in the roadway to remain for several days unfilled.

The defence alleged that the road was in good condition, safe for all the ordinary purposes of travel, and that plaintiff's injury was chargeable to the fright of her horse, the breaking of her wagon, and her consequent inability to guide or control the horse and keep it within the limits of the travelled roadway.

These, it was urged, were circumstances that the township was not bound to anticipate or provide against, and the injury received by means of them was one which was in no sense the natural or probable cause of the acts complained of. This line of defence was presented to the Court in the defendant's points, the third of

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which asked the following instruction: "If the jury believe the horse was frightened by the donkeys and in turning round broke the wheel of the buggy and on account of the broken wheel that part of the buggy axle was on the ground and prevented the driver from guiding the horse to the right in order to avoid the stone heap, or if they believe the driver had lost control of the horse, then the plaintiff cannot recover." In other words this was a request for an instruction that if the injury received was due to the fright of the horse, the broken wheel, and the dragging axle and not to a defect in the highway, the township was not liable. This should have been affirmed with some qualification as to the effect of mere loss of control by the driver; for if the several facts assumed by the point had been found by the jury, the plaintiff was not entitled to a verdict. Township officers are bound to anticipate and provide against the ordinary needs of travel conducted in the ordinary manner and to remove obstructions and defects which would naturally or probably cause injury to the traveller along the highways; but the township is not an insurer against all possible accidents, nor is it bound to anticipate the dangers which a broken wagon or a frightened horse may expose the driver to. Such a burden would be too heavy for any township to bear and the law does not impose it. The general rule is well stated in Hey *v.* Phila. (81 Pa. 44), to be that "roads and bridges are made for ordinary travel; if they fulfil such purpose they are sufficient, and those in charge of them are not responsible for extraordinary accidents occurring on them." Negligence is the absence of that measure of care which the circumstances require. The duty of road officers is to provide for the ordinary needs of travel, but this changes with a change of circumstances. Proximity to a precipice or a railroad track is a visible danger and requires a degree of care in guarding against it not necessary under ordinary circumstances, yet it is only that care which common prudence would dictate in view of an unusual danger as necessary to safety in the ordinary use of the highway at that point. (Lower Macungie Township *v.* Merkhoffer, 71 Pa. 276; Hey *v.* Phila., *supra;* Township of Newlin *v.* Davis, 77 Pa. 317.)

The application of this rule to the case in hand is by no means difficult. The road in question is an ordinary country road passing through an open cultivated region with no unusual dangers or exposures. It was fifteen feet wide at the place where the accident occurred. The testimony tended to show that it was in ordinary repair and safe for the purposes of ordinary travel. It is true there would have been from four to six feet more space over which a horse and wagon could pass if the stone pile had not been there, and it may be conceded that such additional space would have enabled the plaintiff to pass this particular spot safely, but this alone is not enough to settle the defendant's liability. The question is whether this road was obstructed so as to interfere with its ordinary use and whether such obstruction caused the injuries. The horse had passed this part of the road without the slightest inconvenience. There was no railroad crossing, no precipice, or other exposure, but the fright of the horse was at an object for whose presence in the highway the township was not responsible. The wheel was crushed by the sharp turn of the wagon, not by any defect in the highway. The dragging axle drew horse and wagon to one side of the road so that the axle struck the stone pile and the wagon was overturned and the plaintiff hurt. Now the question is not whether a broader road would have enabled the plaintiff to pass along safely with her frightened horse and disabled wagon, but whether the road was broad enough and good enough for the purposes of a highway in that place. Was it safe for the purposes for which it was made, and did it accommodate the traveling public using it in the ordinary manner, with reasonable facilities for travel?

That an accident did happen is clear, but that fact alone does not settle our question. It is necessary to inquire whether the accident was the natural or probable result of any act or omission of the township officers which rendered the highway unsafe for the purposes of travel conducted in the ordinary manner and by the ordinary means of conveyance. If it was, then the plaintiff ought to recover, and the fright of her horse, the breaking of her wagon, and her inability to guide her frightened animal should not stand in the way of recovery. These circumstances do not confer on her any rights she would not have possessed without them, nor give her any higher claim on the care of the township officers.

On the other hand they do not take from her any right to which she in common with other travellers was entitled in the use of the highway. It is the condition of the highway therefore and not the succession of accidents that befell the plaintiff to which the attention of the jury should have been held. Was the road on that day and at that place in a condition that made it a suitable and sufficient road for public travel conducted in the ordinary manner? If the jury had found, as the third point assumed, that the plaintiff's injury was not due to an unsafe condition of the road but to the successive accidents which befell her, which had no connection whatever with the road or with the doings or misdoings of the supervisors, then it is very clear that the township was not liable to pay her. If the jury had

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found against the township on the facts assumed and that her injury was due to the existence of defects in the road which the exercise of common prudence would have required the removal of for the safety of travellers using the public road in the ordinary way, then she would have been entitled to a verdict.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WILLIAMS, J. W. M. S., Jr.

[See next case.]

Jan. '88, 277. February 4, 1889.

Township of Plymouth v. Graver.

Public roads—Supervisors of—Duties of, to put fence between road and parallel railroad—Negligence—Damages.

The duty of the supervisors of a public road is to see that the road affords an easy, convenient, and reasonably safe means of passage for persons travelling thereon. They are not responsible for the condition of the land outside of the limits of the road, but they are liable for injuries to a traveller on the road, caused jointly by a defect in the road and a defect in the adjoining premises; provided, however, that the defect in the road was the proximate cause of the injury.

Whether a fence or barrier between a highway and a parallel railroad is reasonably necessary for the safety of travellers on the road, is a question of fact for a jury, and their verdict is conclusive thereon.

Error to the Common Pleas of Montgomery County.

Case, by Lewis K. Graver against Plymouth Township, to recover damages for the killing of his horse, which he alleged happened on account of a defect in the public road.

The facts of the case were substantially as follows: Plaintiff's carter, while driving a cart along a public road, came to a place where the road ran parallel to a railroad. There was a fence between the road and the farms on one side, but none between the road and railroad. The horse became frightened at a passing train, ran towards the fence, and being pulled back, rushed toward the railroad, where it was struck by a car in about the middle of the train and was killed.

Charles C. Cox, a witness for the plaintiff, was asked the following question, "What was the condition of that road as regards public travel along that point?" Objected to, if the object of the question is to elicit a reply from the witness as to whether it is safe or unsafe. Objection overruled. Exception. (Fourth assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(3) If the accident was caused by the horse taking fright from any cause other than an obstruction or defect in the highway, and he was killed by the locomotive after leaving the public road, the plaintiff cannot recover. *Answer*. This is refused. (First assignment of error.)

(5) It being the admitted fact in this case, that the horse was killed, not on the township road, but on the Plymouth Railroad by a moving locomotive not owned or controlled by the township, which ran upon and killed it, the negligence of the township, if any, was not the proximate but the remote cause of the killing of the horse, and the plaintiff cannot recover in this action. *Answer*. This is refused. (Second assignment of error.)

(11) The evidence shows contributory negligence on the part of the plaintiff's servant, and he cannot therefore recover. *Answer*. This is refused. It is for you to say whether the driver, the plaintiff's servant, showed any negligence in his conduct in the matter. (Third assignment of error.)

The Court, SWARTZ, J., charged the jury, *inter alia*, as follows: "If you find he is entitled to recover the value of his horse, of course you will allow him interest at six per cent. from the time the horse was killed."

Verdict for the plaintiff for $265, and judgment thereon. Defendant took this writ, specifying for error, 1–3, the answers to the points as above, 4, the ruling on evidence as above set forth, and 5, the portion of the charge quoted.

Charles H. Stinson, for plaintiff in error.

Charles Hunsicker, for defendant in error.

March 25, 1889. THE COURT. The duties of the supervisors, in the opening and repair of the public roads, are defined by statute. The 6th section of the Act of 1836 provides that the public roads shall be effectually opened, and constantly kept in repair, and at all seasons shall be kept clear of all impediments to easy and convenient passing and travelling, at the expense of the township, as the law shall direct. For any wilful or wanton failure to discharge these duties, the supervisors are personally liable, and the township is responsible in damages to those who suffer injury from their neglect (Dean *v.* New Milford, 5 W. & S. 545). The liability of the township is commensurate with the duty, and hence in each case the inquiry is as to the extent of the duty enjoined by law.

The degree of care which is required of road supervisors has no exact legal standard; the law does not impose any absolute liability for every insufficiency of a road, or for every impediment to easy and convenient travel; they are required to do what is practicable to be done, and to preserve a reasonable condition of safety, with reference to the kind of road, its peculiar location,

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its adjacency to places of peril, and the amount and kind of travel it accommodates. It may be said, generally, that they are bound for reasonable and ordinary care, according to the circumstances. Where no danger may be anticipated, or the peril is but slight, a less degree of vigilance will suffice than where the danger is manifest (Turnpike Co. *v.* Railroad Co., 54 Pa. 350). The object of a public road is to afford an easy, convenient, and reasonably safe means of passage for persons travelling thereon with horses, wagons, etc., and the duty of the supervisors is, as far as practicable, to do what is reasonably necessary to secure that object.

It is contended that the road in question in this case was, at the time of the occurrence complained of, in good repair; that it was in no way obstructed, and that as the horse took fright at the locomotive, and was killed by the cars, outside of the limits of the road, the township cannot be held for the consequences. But, granting that there was no physical obstruction or defect in the road, was there any other impediment to easy and convenient travel upon it? It is said that the passage over it, with horse and wagon, was not safe, that it was located along, and immediately adjacent to, the track of the railroad, and that the effect of the passage of locomotives and cars on the railroad, at high rates of speed, in such near proximity to the road, was to frighten horses, in many cases to make them unmanageable, and that, in the absence of barriers erected for the protection of the public, the place was so dangerous that travellers were exposed to the utmost peril. It is argued that as there was a fence along the road, on the farther side from the railroad, and none between the road and the railroad, a horse, in attempting to escape from the object of its fright, was liable to turn on to the railroad, and that, anticipating the results likely to ensue, it was the duty of the supervisors to erect suitable barriers between the road and the railroad at this point.

It is certainly true, as a general rule, that the supervisors are in no way responsible for the condition of the surface of the land outside the limits of the road, nor are they bound to fence the road merely to prevent the traveller from straying out of the path; but they are liable for injuries to a traveller on the road, caused jointly by a defect in the road, and a defect in the adjoining premises, provided, of course, the defect in the road was the proximate cause of the injury. (Burrell Tp. *v.* Uncapher, 117 Pa. 353; Sher. & Red. Neg. 347.) It is equally true, that supervisors are not bound to furnish roads upon which it will be safe for horses to run away; they are bound, however, to furnish roads that are reasonably safe; if they do not, and a traveller is injured, in consequence of culpable defects therein, it is no defence that the horse, at the exact time of the injury, was running away, or was beyond his control. (King *v.* Cohoel, 77 N. Y. 83; Sher. & Red. Neg. 346, and cases there cited.)

There may be such a state of things, however, at a particular place, as will require the erection of a barrier, in order to secure a reasonable degree of safety for public travel. In Lower Macungie Tp. *v.* Merkhoffer (71 Pa. 276), there was a precipitous bank in the roadside, caused by an excavation made in mining, and, although the road was wide enough, under ordinary circumstances, and was otherwise in good repair, it was held, as matter of law, to be the duty of the supervisors to guard against danger, by erecting a barrier along the margin of the road, so that persons might not, in the night time or by the fright or shying of a horse be thrown over the bank.

In general, however, whether a dangerous place not within the highway but adjacent to, or near it, is so near as to make travel unsafe, is a matter for the jury. (Warner *v.* Holyoke, 112 Mass. 362.) The question is, whether or not the dangerous place is in such close proximity to the highway, as travelled and used, to render the use of the highway unsafe; the decision of such a question is most appropriately made by submission of it to the practical judgment and experience of a jury upon a consideration of all the proofs respecting it. This rule, as applied to bridges, is illustrated in the case of Newlin Tp. *v.* Davis (77 Pa. 317). In that case the negligence alleged was the failure of the road supervisors to provide barriers, or side-rails, to a bridge across the Brandywine. The bridge formed part of the public road; there were no side rails, and the evidence showed that whilst the horse was being driven across the bridge he frightened at a piece of plank nailed over a hole in the floor, commenced backing, and, before he could be prevented, backed over the bridge into the creek, and the horse, harness, and carriage were injured. The question of negligence was submitted to the jury, under instructions that it was the duty of the township to keep the bridge as safe, considering all the circumstances, as it was reasonably practicable to make it, and that it was for them to decide, whether the bridge was defective or not, in not having been provided with railing; the jury found for the plaintiff, and compensated him for the injury.

In Burrell Tp. *v.* Uncapher (117 Pa. 353), a horse and wagon were being driven down a hill-side road; at the right side of the road coming down the grade was a steep declivity, unguarded by barriers. Arriving at a point near the foot of the hill, the horse suddenly took fright at a steam thresher standing at the road-

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side, and sprung to the right, partly over the declivity; becoming altogether unmanageable, he made a second plunge, and went over the precipice, upturning the wagon, and injuring the persons therein. The opinion of the Court in that case was delivered by our brother GREEN, who said: "The immediately producing cause of the accident, in the present case, was the unguarded condition of the road-side at the place where the accident occurred. If that unguarded condition of the road-side was an act of negligence on the part of the defendant, it follows that the defendant is responsible; whether it was negligence to maintain the road at the place in question without some kind of protection, was a question of pure fact, which it was the province of the jury alone to determine," etc.

The case of Hey *v.* Philadelphia (81 Pa. 44), is, we think, identical in principle with the case now under consideration. The action was brought against the city for negligence in not sufficiently guarding one of the roads in the public park, by reason of which the plaintiff's horse, being frightened at a passing railroad train, fell into the Schuylkill and was drowned. The road was wide and level, and contained no obstruction, the stream was on one side, and a high bank of rocks on the other; the only defect alleged was that there was no guard erected between the road and the river. The Court below submitted the question of negligence to the jury, who found for the plaintiff, but upon a point reserved, judgment was afterwards entered for the defendant, *non obstante veredicto*. The learned Judge below was of opinion that the fright and breaking away of the horse was the immediate cause of the disaster, but this Court took a different view of the case, and held that the negligence of the city in not providing a barrier, as found by the jury, was the proximate cause. "If the road is so dangerous," said Mr. Justice GORDON in the opinion, "by reason of its proximity to a precipice, or any other cause, that common prudence requires extra precaution in order to insure the safety of the travelling public, why shall not the authorities be bound to such precaution?"

When the alleged impediment is a dangerous place outside of the highway limits, the questions for the jury are, first, whether it is in such close proximity to the road as to render the highway unsafe for travel, and, if so, second, whether the road supervisors have done what was reasonable and practicable to guard against the danger. The place of danger if not in the road, must be contiguous to it, or in such proximity as that the danger is practically the same as if it were contiguous.

In the present case, it is conceded that the railroad adjoins the public road; there was no space or barrier between them; the jury has found that it was a place of danger, and that the supervisors were negligent in failing to provide a reasonable protection to travellers against that danger. These, as we understand the case, were proper questions for the jury, and we are concluded by the verdict.

It is contended that, if this be so, the supervisors of roads will be held to erect barriers at all points throughout the State where the public roads are adjacent to, or parallel with, and in close proximity to railroads. There is no such provision in the law, but it certainly is the law, and it has always been so understood, that whenever a public road is from any cause rendered so unsafe as to put the traveller in peril of his life, it is the duty of the supervisors to do what is practicable and reasonable under all the circumstances to render it safe, and the facts in each case should be submitted to the judgment and experience of the jury. It matters not we think whether the danger arises from an imperfection in the road itself, or from an excavation in it outside the travelled route, or from the existence of a declivity or stream of water at the road-side, or from a railroad upon which locomotives and trains of cars are accustomed to pass; if there is a concurrence of circumstances which render the road a place of peril and danger to the traveller, the township is held to do whatever is reasonable and practicable to avert the danger which threatens.

We do not say that they are bound to make the road a safe one; that in many cases would be impracticable; they are bound simply to the exercise of common prudence, and of ordinary care and diligence to that end. The jury upon a consideration of the whole case, has found that the supervisors did not exercise that care and diligence which they should have exercised, under the circumstances, and the question as we have said was for the jury. If the absence of barriers was a defect in the road, that defect was the proximate cause of the injury. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." If the defendant's negligence concurred with some other event, other than the plaintiff's fault to produce the plaintiff's injury so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time. (Shear & Redfield, Neg. 10; see also Burrell Twp. *v.* Uncapher, *supra.*)

The question of contributory negligence was rightly submitted to the jury, and their finding relieves us from any consideration of that question.

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It is true the plaintiff was not entitled to interest as such upon the value of his horse, but on computing the amount of the damages, the jury may consider the time which has elapsed since the injury was received. There is some conflict in the cases (Pittsburgh R. Co. *v.* Taylor, 104 Pa. 306; Allegheny *v.* Campbell, 107 Id. 530), but this we think is the rule generally recognized. The instruction of the Court, in this respect, was perhaps not strictly accurate, but the verdict was small, and the amount of the interest unimportant. We do not feel that we should disturb the judgment on that ground.

Judgment affirmed.

Opinion by CLARK, J.

[See preceding case.]

W. M. S., JR.

Jan. '88, 423. April 17, 1889.

Myers v. Kingston Coal Co.

Requests for charge—Binding instructions to jury—Res adjudicata—Offer of written instrument in evidence—Practice.

Where, upon the whole case, the Judge conceives it his duty to give the jury a binding instruction, the answers to points become mere dissertations on the law, useless to the jury, unnecessarily burdensome to the Judge, and complicating to the record when presented for consideration to the Supreme Court. In such a case it is the better practice to decline to answer points in detail as no longer necessary.

The correctness of the direction to the jury to find in one way or another, depends on the facts admitted or established, and, if the conclusion is right on the facts, no error is committed, though the reasons assigned are insufficient or even incorrect.

The binding effect of a former adjudication depends upon the identity of the rights involved, not of the evidence or of the arguments used.

A point which might have been made at the former adjudication is concluded whether actually made or not.

There is no absolute rule that a party offering a writing can be called upon to state formally the purpose of the offer. Counsel for the other side, in view of the paper, may call for a statement of the purpose for which it is offered, but how formally this statement is to be made, in how much detail, etc., are matters necessarily within the discretion of the presiding Judge, and the Supreme Court will not reverse unless there is a manifest abuse of such discretion.

Error to the Common Pleas of Luzerne County.

Ejectment by Frederick Benham Myers and William Penn Myers against the Kingston Coal Company to recover possession of certain coal lands in Kingston, Luzerne County.

The following facts appeared at the trial, before RICE, P. J.: Madison F. Myers was owner of an undivided half of a certain tract of coal land in Luzerne County, of which tract his wife Harriet owned the other undivided half. On August 2, 1859, Madison F. Myers died seised of his undivided moiety of said tract of land leaving a will by which he devised his real estate to his wife Harriet until his youngest child attained his majority. At the time of their father's death Frederick Benham Myers and William Penn Myers were respectively fourteen and twelve years of age.

After the death of Madison F. Myers, the coal under this land was found to be valuable, and Philip T. Myers, the oldest son, negotiated a lease of the tract to Isaac S. Waterman, Thomas Beaver, and David Morgan. This lease was signed on the part of the lessors by the widow, Harriet Myers, the children who were of age, and by the guardians of the plaintiffs who were then minors. Some doubt having been expressed as to the right of these guardians to execute the lease, a special Act of Assembly was passed on April 15, 1864, authorizing such lease, which Act provides as follows:—

Section 1. Be it enacted, etc.: That George Peck, guardian of Frederick B. Myers, and William Wood, guardian of William Myers, minor children of Madison F. Myers, late of Kingston Township, Luzerne County, Pennsylvania, deceased, or any guardian that may hereafter be appointed for said minors, or either of them, be, and they are hereby authorized and empowered to sell and dispose of from time to time, at public or private sale, in such parcels and upon such terms as they or any guardian hereafter appointed may think proper, all the estate, right, title, and interest of the said minors, or either of them, in any lands, tenements, and hereditaments situate in the said county of Luzerne, and to demise, lease, and to mine-let any coal or other minerals in or under any such lands, tenements, and hereditaments in which said minors have an undivided interest, for such price or prices, or term or terms, and upon such rents as the other owners of the said real estate shall sell or lease at, and to join with the other parties owning the remaining undivided interest in the same, in the execution, acknowledgment, and delivery to the purchaser or purchasers, lessee or lessees, of good and sufficient deeds of conveyance in fee simple, or lease for years for the same, and all such deed or deeds of conveyance, or lease or leases shall be good and effectual to pass the respective estate or any part thereof of the said minors or either of them to the purchaser or purchasers, lessee or lessees, in law, equity, or otherwise, for the estates or term thereby embraced and mentioned, as fully and completely and with the same effect as if the said sale or sales and conveyances, lease or leases had been made under orders of the Orphans' Court of the said county duly authorized to make the same: *Provided*, that before entering upon the execution of the powers hereby granted, the said guardians, or in case of their removal, or the removal of either of them, any guardian that may hereafter be appointed, shall give such security and in such amount as the Orphans' Court for said county of Luzerne shall deem sufficient to insure the faithful application of the portion of purchase-money, or rents belonging to the said minors which may accrue from the said sales or leases.

The lease was dated May 4, 1864, and by its terms all the coal in, under, and upon the said

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tract was "leased" to the lessees, "their heirs, executors, administrators, and assigns, from the first day of this present month for the term and period of twenty years, and for such other and longer time as the party of the second part and their legal representatives shall continue to pay the rent as named in this instrument, unless the term is sooner ended by non-payment of rent, as hereinafter provided for." This lease was afterward duly assigned to the Kingston Coal Company, defendants.

The plaintiffs in this case came of age respectively in 1866 and 1868, and thereafter received their portions of the rents and in other ways ratified the lease. In 1881 they discovered that Philip, the oldest son, who negotiated the lease, had received a bonus of $4000 for securing the lease. They notified the other parties that they repudiated the lease and refused to be bound by it or to receive any rents under it.

To September Term, 1881, plaintiffs filed a bill in equity setting forth the facts as above set forth, alleging that the lease was not made in pursuance of the Act and that their guardians were not authorized to make the lease, and praying the Court to declare the lease void and to order that it be surrendered for cancellation. The answer of defendants to this bill set up the Act of 1864 and the acts of ratification on the part of the plaintiffs after they came of age. The matter was referred to L. H. Bennett, Esq., as Master, who, after evidence produced by both parties, reported that the Act of 1864 was constitutional and conferred full authority upon the guardians to make the lease; that while the lease was not made strictly in pursuance of the Act it was voidable, but the complainants were bound by it by their acts of ratification after they had attained their majority. Exceptions to this report were dismissed and the report confirmed. The complainants took an appeal to the Supreme Court (Myers's Appeal, January Term, 1885, No. 460), alleging error on the part of the Court, *inter alia*, in deciding that the lease was valid and the Act constitutional, and in confirming the Master's report. The decree of the lower Court, however, was confirmed in a short *per curiam* opinion. The plaintiffs then brought this action of ejectment.

At the trial defendants offered in evidence the Act of April 15, 1864. Objected to because it is unconstitutional and void, as it is a direct violation of the right of private property. Objection overruled because the constitutionality of the Act had been decided by the Supreme Court in Myers's Appeal. (First assignment of error.)

Defendants also offered in evidence the lease above mentioned dated May 4, 1864. Plaintiffs objected to the admission of the lease in evidence unless defendants stated the purpose for which it was offered. Objection overruled, and lease admitted; the paper shows for itself and is sufficient for the purpose for which it is offered. (Fifth assignment of error.)

The offer of the lease in evidence was also objected to because on its face it was only valid for a term of twenty years, which term had expired before the bringing of this suit. Objection overruled. (Sixth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"The construction of the Act under which this lease was made is for the Court. [We are at present of opinion that in the use of the term 'lease' and 'demise,' the Legislature intended them not in their strict technical sense but in the sense in which they were understood when applied to any transfer of an interest or right in coal in place. Strictly and technically, this was not a lease, but a sale of the coal in place. But whatever it was, it was a form of conveyance, then, as now, commonly known as a lease, and by any fair construction of the Act must be held to have been within the power of the guardians to make. For while this Act of Assembly must be construed strictly, that does not imply that an unfriendly construction shall be given to it, so as to defeat the very purpose which was had in view when it was passed. Furthermore, the guardians were by the Act of Assembly given the power to sell all the estate, right, title, etc., of the minors, not merely in the surface but in the land. This would include the power to sell the coal separately, or to demise it by a perpetual lease, or its equivalent. If there had been simply given the power to sell, there might have arisen the question whether or not the guardians would have the right to lease the coal, and it was probably in order to remove any doubt upon that question that there was, in addition, given the power to lease the coal. Therefore, the power to lease, technically speaking, although expressly given, did not impair their right to sell, given in the preceding clause of the Act. So that if the case rested here, the defendant's defence would be complete and perfect under this lease pursuant to the Act of Assembly.]

"But in rebuttal of this defence, the plaintiffs set up two grounds upon which they claim the defence is not a good one. In the first place, they contend that there was a conspiracy to defraud the other heirs, entered into between Philip T. Myers, one of the co-owners with the plaintiffs, and David Morgan, one of the lessees, whereby the former was to get a larger sum for his interest than the others were to get for theirs. In other words the plaintiffs undertake to show that this lease is void as to these plaintiffs because of this fraud in fact—actual fraud. We speak of it thus as distinguished from legal fraud, which

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we shall consider hereafter. Whether the result in the preceding case in equity was a conclusive adjudication of this question or not, we take it that the Court, now as then, is compelled to say whether or not there is sufficient evidence of actual fraud to vitiate or invalidate this lease. This is the duty of the Court sitting here in the trial of an action which has many features of a proceeding in equity. If there is not sufficient evidence of actual fraud to warrant the Court in decreeing a cancellation or rescission of that lease, then there would not be sufficient evidence of fraud to warrant a recovery against the defendants as against that lease. [In the case to which we have referred, this question of fraud came up before this Court and before the Supreme Court. And whether or not that question was fairly raised by the pleadings, there was nevertheless an expression of opinion by the Court in that case which is in our opinion to be followed in this case. It was there held that there was not sufficient evidence of actual frand to warrant a cancellation of the lease; and if there was not sufficient evidence there, then, clearly, the same evidence would not justify a recovery against the defendants upon the ground of actual fraud as against this lease.] . . . .

"There is no particular dispute as to these facts from which the defendants claim there was a ratification or affirmance of the lease after the plaintiffs became of age. [But it was not enough to show simply that they had done acts which would be in ratification or affirmance of the lease. It was incumbent to show that these acts were done with knowledge of the essential facts upon which their right to repudiate the lease rested. If these acts were done in ignorance of the essential facts upon which this right rested then they would not amount to a ratification or affirmance of the lease. If, however, they were done with the knowledge of these essential facts, then the plaintiffs were presumed to know their rights under the law to repudiate the lease, and having gone on and received the rents with such knowledge, they would be held to have ratified or affirmed it, to have made it a valid and binding contract upon them. If the case rested right here there would be a question of fact, and, as we think, the only question of fact to be submitted to the jury; namely, whether or not these acts testified to and about which there is no particular dispute, were done by the plaintiffs with knowledge of the essential facts upon which their right to repudiate the lease rested, after they became of age. Upon this question of fact there is a conflict of evidence, and if this were the first case in which it had arisen it would be a question for your decision, under all of the testimony. But it appears that in 1881 the plaintiffs filed a bill on the equity side of this Court for a rescission or cancellation of this lease, upon the ground that it was executed without legal authority; and that case was fully tried, first, before the Master, afterwards before the Court, and afterwards heard in the Supreme Court, and after a full hearing the bill was dismissed. Now the question arises whether or not that was such an adjudication upon this question as to be conclusive upon the party. And we are of opinion that it was. It was not simply an incidental question which arose in the trial of that case. It was a question which was put in issue by the pleadings, and upon which there was precisely the same testimony which has been introduced here."]

The Court further directed a verdict for the defendants, upon which judgment was duly entered. Whereupon plaintiffs took this writ, assigning for error the admission of the above offers of testimony and the portions of the above charge included between brackets.

A. Ricketts and *Alexander Farnham*, for plaintiffs in error.

Henry W. Palmer and *Samuel Dickson* (*Hubbard B. Payne* with them), for defendants in error

May 27, 1889. THE COURT. This is an ejectment by plaintiffs in error who were also plaintiffs below, against defendants in error, who claim to hold possession as lessees of plaintiffs' title. It is admitted that the land was in possession of plaintiff's father, Madison Myers, as owner, at his death in 1859, and that plaintiffs are devisees under his will of undivided interests in the land.

Defendants hold possession under a lease from the devisees of Madison Myers in 1864, all the other devisees being then *sui juris* and joining in the lease, and plaintiffs, then infants, being parties to the lease through their guardians, acting under the authority of a special Act of Assembly approved April 15, 1864, P. L. 433. The defendants also, under the plea of former recovery, gave evidence that the title, as between the present parties, was *res adjudicata*. The learned Judge presiding at the trial sustained this view as to every point in the case except the continuance of the lease beyond twenty years, and as to this, he held the lease still in force, as a matter of law, and therefore peremptorily directed a verdict for the defendants.

Of the fifteen specifications of error, eight are exceptions to the answers to points, and therefore entirely useless. Points, or requests for charge, are statements of the rules or particular portions of the law, which counsel deem applicable to the special facts of the case. Their use is first, to direct the attention of the Judge to the view of the law which the parties desire him to take, and secondly, thereby to have the

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jury instructed upon the principles which they ought to apply in making up their verdict, after they have ascertained the facts. While points may be submitted even in cases like the present, and are often useful as suggestions and condensed arguments, yet where upon the whole case the Judge conceives it his duty to give the jury a binding instruction, the answers to points become mere dissertations on the law, useless to the jury, unnecessarily burdensome to the Judge, and complicating to the record when presented for consideration here. It is frequently satisfactory to the jury as well as the parties, and assists our labor if the case comes here, for the Judge to indicate, in a general way, the grounds of his action, but it is the better practice to decline to answer points in detail as no longer necessary. The correctness of the direction to the jury to find in one way or another, depends on the facts admitted or established, and if the conclusion is right on the facts, no error is committed though the reasons assigned are insufficient or even incorrect.

The remaining specifications of error raise four questions, first, whether the Act of Assembly was constitutional, second, whether the lease was executed in accordance with the directions of the Act, third, whether the lease was within the power granted, and fourth, whether it had by its own terms expired.

The first three questions were correctly disposed of by the learned Judge at the trial, and we might well rest the case on his charge. But it was not necessary to discuss them at all. They were *res adjudicata*.

To September Term, 1881, the plaintiffs filed a bill in equity against the defendants, setting up their title under their father's will; their minority in 1864; the making of the lease now in question; their acceptance of the accumulated royalty under the lease, upon coming of age, in ignorance of the facts and their rights; their information and belief that the lease was not made in pursuance of the Act; an averment that their guardians were not authorized to make the lease; and concluding with a prayer that the lease be declared void, and ordered to be surrendered for cancellation. An answer was filed by defendants, setting up the Act of 1864; maintaining the validity of the lease; and averring acts of ratification by the complainants, for a series of thirteen and sixteen years respectively, after coming of age. Evidence was taken upon both sides, and an elaborate report was made by a Master, finding—

1. That the Act of 1864 was constitutional, and conferred full legal authority upon the guardians to make a lease.

2. That the lease in question was not made strictly in pursuance of the terms imposed by the statute, and had therefore been voidable.

3. But that complainants after arriving at age had fully ratified the lease and were bound by it.

Exceptions to this report were dismissed in a careful and learned opinion by the President Judge of the Common Pleas, covering all of the points discussed by the Master, and a decree was entered dismissing the bill with costs. Complainants then took an appeal to this Court, of January Term, 1885, No. 460, and assigned, among other things, that the Court erred, "3, in deciding that the lease was valid; 4, in declaring the special Act constitutional; and 5, in affirming the Master's report."

The decree was affirmed by this Court, in a brief opinion, Per Curiam, referring to the absence of fraud (which alone could do away with the force of the acts of ratification), and continuing: "the Court, in an able and satisfactory opinion, overrules all exceptions to the report. The reasons in that opinion contained, vindicate the conclusion at which it arrived." The scope of the opinion thus indorsed, has already been noted, and in view of that, and of the errors alleged in it, which were thus held not to be errors, it is impossible to maintain, as is now sought to be done, that the decree of this Court only determined that the bill must fail on technical grounds, for want of jurisdiction in equity.

The learned Judge at the trial held that this former adjudication concluded the plaintiffs in the present action, and I have been thus particular in setting out the proceedings in detail, because of the earnest and determined effort of counsel to get away from the force of this ruling.

The binding effect of a former adjudication depends upon the identity of the rights involved, not of the evidence, or of the arguments used. An examination of the causes of action shows not only that every right involved in the present case was necessarily involved in the former, but even that nearly every point made now in support of those rights was in fact argued and considered then. The only exceptions are the repugnance of the Act of 1864 to the Constitution of the United States, and the termination of the lease.

In regard to the former, it would be sufficient to say that the point might have been made, and therefore is concluded, whether actually made or not. But in fact the constitutionality of the Act was not material then or now, as the complainants, with full knowledge of what had been done in their name, ratified, confirmed, and accepted the benefits of it, for years after coming of age, and whether it was done with or without authority, they were held to be estopped from disputing its validity. We do not think there is the slightest basis for objection to the Act under the Constitutions either of this State or of the United States, but we forbear to discuss this aspect of the case because entirely immaterial.

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With regard to the continuance of the lease, it appears that the term of twenty years for which it was first to run, expired during the pendency of the proceeding in equity, and no doubt the Court might have considered this question, though not specifically set up in the original bill, had application been made by supplemental petition, or even under the prayer for further relief. As it is not clear, however, that the Court did actually have its attention directed to this point, we will add here that the cases of Lewis *v.* Effinger (30 Pa. 281), and Effinger *v.* Lewis (32 Id. 367), settle the validity of a lease for a term certain, and thereafter to continue at the will of the lessee.

The fifth specification of error involves a point of practice which it may be well to notice. Upon defendants offering the lease in evidence, plaintiffs asked the purpose of the offer, and excepted to the ruling of the Court that the paper showed for itself what it was offered for.

There is no absolute rule that a party offering a writing can be called upon to state formally the purpose of the offer. Generally the other party has a right to examine the paper before it is passed upon by the Judge, though there may be exceptional cases where even this right would be suspended for a time, if the peculiar exigency of the case demanded it. On view of the paper, counsel may call for a statement of the purpose for which it is offered, but how formally this statement is to be made, in how much detail, etc., are matters necessarily within the discretion of the presiding Judge, and this Court will not reverse unless there is a manifest abuse of such discretion.

The right to an offer of what a witness is called to prove, stands upon a somewhat different basis There can be no inspection of his testimony beforehand, and it may be not only irrelevant but highly improper, and the opposite party has a right to guard against possible danger in this way. The remarks of BURNSIDE, J., in Milliken *v.* Barr (7 Pa. 24), and of SHARSWOOD, J., in Morgan *v.* Browne (71 Id. 136), were made with reference to witnesses, not documents, and even in regard to witnesses, the rule is intended to aid, not to obstruct the fair and orderly trial of the case, and its practical enforcement depends very largely on the special circumstances at the moment when the question arises, and therefore upon the discretion of the Judge.

The offer in the present case was of the lease which purported to pass the title under which plaintiffs claimed, to the parties under whom defendants claimed. It went directly to the very substance of the issue, and the learned Judge was quite justified in saying "the paper shows for itself, and is sufficient of what it is offered for"

The case being entirely clear of error, the judgment is affirmed.

Opinion by MITCHELL, J. H. S. P. N.

Jan. '89, 285. May 24, 1889.

Feagley v. Norbeck.

Setting aside fieri facias—Act of April 4, 1877—Agreement not to issue execution.

An order setting aside an execution is in the nature of a final judgment to which a writ of error lies. An appeal under the Act of April 4, 1877, P. L. 53, is not the proper remedy in such a case. An appeal under that Act lies only in applications to open judgments entered by warrant of attorney, etc.

Where the lower Court has found as a fact that an execution was issued in direct violation of an express agreement in writing between plaintiff and defendant, that the plaintiff "will not issue execution upon said judgment unless it should become necessary by reason of delay, or on account of judgment being about to be obtained and execution issued by some other party" against defendants, and has set aside the fieri facias, the Supreme Court will not reverse the order unless satisfied of mistake in the Court below.

Error to the Common Pleas of Lancaster County.

Judgment confessed by Jacob H. Norbeck and Jacob Miley, trading as Norbeck & Miley, to John Feagley.

The following facts appear from the opinion of the Court below, PATTERSON, J.

Jacob H. Norbeck and Jacob Miley were copartners in the business of making carriages in the city of Lancaster. John Feagley had accommodated them at various times in business matters by indorsing their promissory notes. To secure Feagley for his liability incurred on such indorsements, Norbeck & Miley on January 5, 1887, executed in his favor a bond with warrant of attorney to confess judgment in the penal sum of $20,000. At the same time Feagley executed the following agreement:—

"Whereas Jacob H. Norbeck and Jacob Miley have executed this day a judgment as collateral security to John Feagley to secure him against all liability as indorser or surety for the said 'Norbeck & Miley,' payable one day after date; now it is agreed for and in consideration of one dollar, that the said John Feagley will not issue execution upon the said judgment unless it should become necessary by reason of delay, or on account of judgment being about to be obtained and execution issued by some other party against said 'Norbeck & Miley.'"

The judgment was duly entered on the day of its date.

The parties, plaintiff and defendant, still transacted business with each other as before, and subsequently the partnership of Norbeck &

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Miley was dissolved, Jacob H. Norbeck succeeding to the business of the late firm.

In November, 1888, the Lancaster County National Bank, who held a note of Norbeck & Miley for $2400 indorsed by Feagley, which would mature on November 28th, informed the parties that the note could not be renewed for its full amount but that $500 must be paid on account, or certain other arrangements made.

Feagley did not comply with the conditions presented by the bank, but on November 19, 1888, issued a *fi. fa.* on the judgment confessed to him by Norbeck & Miley, and assessed his damages at $5000. By subsequent arrangement between plaintiff and defendants on November 21, 1888, this *fi. fa.* was stayed on the order of plaintiff or his attorney and the costs paid by defendant. After the stay of this writ and in the evening of the same day, plaintiff issued an *alias fi. fa.* which was levied on November 25, 1888. On petition of Jacob H. Norbeck the Court then granted a rule to strike off said *alias fi. fa.* and a rule to open said judgment for the purpose of ascertaining how much, if anything, was due on the same. The *fi. fa.* and *alias fi. fa.* were both issued returnable to the same term, the original being returned before the *alias* issued; and it was claimed that the *alias fi. fa.* issued for too much. It appeared that when the original *fi. fa.* was stayed a verbal agreement was made that Norbeck was to pay $500 on account of the note held by the bank. Defendant did not deny this agreement but alleged that he was prevented from fulfilling it by the action of Feagley in levying on his goods and closing up his business.

The foregoing rules were made absolute on condition that defendant pay the $500 referred to in the opinion of the Court. Whereupon plaintiff took this writ assigning for error the action of the Court in making absolute the rule to show cause why the *alias fieri facias* should not be set aside.

William Leaman (*H. M. Houser* with him), for plaintiff in error.

The Court of Common Pleas has power to stay an execution, but it should not be exercised unless the case is plain, and the equity of it free from doubt or difficulty.

Patterson *v.* Patterson, 3 Casey, 40.

The *fi. fa.* and *alias fi. fa.* in this case were issued to the same term, but the original was returned before the *alias* issued, and it had not gone beyond a mere levy before it was disposed of. Under such a state of facts the *alias* may issue to the same term as the original.

Shaffer *v.* Watkins, 7 W. & S. 219.
Ingham *v.* Snyder, 1 Wharton, 116.
Potts's Appeal, 8 Harris, 253.
Missimer *v.* Ebersole, 6 Norris, 109.
Springer *v.* Brown, 9 Barr, 305.
Bole *v.* Bogardis, 5 Norris, 37.
Gibbs *v.* Atkinson, 1 Clark, 476.
Com. *v.* Streamback, 3 Rawle, 344.
Miner *v.* Walter, 8 Phila. 571.

J. Hay Brown and *W. H. Roland* for dedefendants in error.

The opening of the judgment set aside the *alias fi. fa.*; a writ of error does not lie to making this rule absolute; the remedy is by appeal.

Savage *v.* Kelly, 11 Phila. 525.
Act of April 4, 1877, P. L. 53.
Troubat & Haly's Practice, § 809, note 10.
Compher *v.* Anawalt, 2 Watts, 490.
Skidmore *v.* Bradford, 4 Pa. 296.
McKee *v.* Sanford, 25 Id. 105.
Henry *v.* Brothers, 48 Id. 70.
Peoples' Fire Ins. Co. *v.* Hartshorne, 84 Id. 543.

There was no final judgment—this writ is premature.

Citizen's Bldg. Assoc. *v.* Hoagland, 87 Pa. 326.

The Courts have power to strike off or open a judgment; and when their discretion is properly exercised it is not reviewable.

Kellogg *v.* Krauser, 14 S. & R. 137.
Hutchinson *v.* Ledlie, 36 Pa. 112.
Banning *v.* Taylor, 12 H. 289.
Cochran *v.* Eldridge, 49 Pa. 365.
Bunce *v.* Wightman, 29 Id. 335.

The Court will take notice of binding agreements made at the time a judgment is executed or afterward.

Evans *v.* Barr, 2 Luz. L. Reg. 136.

Two successive writs cannot be issued returnable to the same term.

Troubat & Haly's Practice, § 974.
Shaffer *v.* Watkins, 7 W. & S. 219.
Potts's Appeal, 20 Pa. 253.
Missimer *v.* Ebersole, 87 Id. 109.

June 7, 1889. THE COURT. The subject of complaint in the only assignment of error on this record is the order of Court setting aside the *alias fieri facias* No. 8 of January Term, 1889.

It is claimed that the only remedy the plaintiff had was an appeal under the Act of April 4, 1877 (P. L. 53); but that is a mistake. The Act referred to provides for an appeal to this Court by parties aggrieved by the action of Court on applications to open judgments entered by warrant of attorney, etc. A writ of error is the proper remedy for such action of the Court as is here complained of. The Court below had before it at the same time two distinct rules, one to open the judgment, and the other to set aside the *alias fieri facias*. Both were made absolute, but no appeal having been taken from the former, it is not before us. The latter, however, is properly here on the writ of error. An order setting aside an execution is in the nature of a final judgment, to which a writ of error lies. (Pontius *v.* Nesbit, 40 Pa. 309.)

The only remaining question is whether there was anything to warrant the action complained of. The Court appears to have found as a fact

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that the execution was issued in direct violation of an express agreement not to do so, except in a certain contingency, which had not then happened. The agreement is in writing, signed by the plaintiff at the time he received from defendants the bond on which the judgment above referred to was entered; and, as recited in the opinion of the Court below, reads as follows: "Whereas, Jacob H. Norbeck and Jacob Miley have executed this day a judgment as collateral security to John Feagley to secure him against all liability as indorser or surety for the said 'Norbeck & Miley,' payable one day after date, now it is agreed, that for and in consideration of one dollar that the said John Feagley will not issue execution upon said judgment, unless it should become necessary by reason of delay, or on account of judgment being about to be obtained and execution issued by some other party against the said 'Norbeck & Miley.'

"(Signed) JOHN FEAGLEY."

As above stated, the Court found that the execution in question was issued in violation of the agreement. The plaintiff has failed to satisfy us that there was an error in that conclusion. The docket entries show that depositions were taken, to be used on hearing of the rules, but we have not been furnished with them. In the absence of anything to the contrary, we must assume that the finding of the learned Judge is correct. If so, the execution was rightly set aside.

Order of Court setting aside *alias fieri facias* is affirmed, with costs to be paid by plaintiff.

Opinion by STERRETT, J. H. S. P. N.

Jan. '89, 5. May 10, 1889.

Bush et al. v. Gamble et al.

Trespass quare clausum fregit for cutting and carrying away timber — Double and treble damages therefor — Tenants in common — Acts of March 27, 1824, and May 4, 1869.

The plaintiffs in an action of ejectment who have recovered therein an undivided interest in the real estate sued for, and been put in possession thereof by a writ of *habere facias possessionem*, may bring an action of trespass *quare clausum fregit* against the defendants in said action of ejectment who were in possession of the premises in question, and therein recover damages for the cutting and removal of timber trees by said defendants, under the provisions of the Act of May 4, 1869 (P. L. 1251), which provides that in case of the cutting or removal of timber trees, by one or more tenants in common, without the consent of all co-tenants, "the parties injured shall have every remedy in law and equity for the recovery of damages for the cutting or removing of the same, which they now have against an entire stranger," but in such action the plaintiffs can only recover single damages, as the penalty provided by the Act of March 27, 1824 (8 Sm. 283), was not extended by the said Act of May 4, 1869, to the action by one tenant in common against another.

Error to the Common Pleas of Warren County.

Trespass *quare clausum fregit*, by William J. Gamble, Levisa Bingham, William J. Gamble and Esther his wife, in right of said wife, T. J. Thomas, surviving husband of Mattie Bingham, deceased, and Eliza A. Bingham, widow, all heirs-at-law of W. B. Bingham, deceased, George W. Porter, F. E. Porter, A. B. Porter, Mary O. Porter, D. K. Rodgers and Julia A. Rodgers his wife, in right of said wife, heirs-at-law of Wm. Porter, deceased, against George Bush, Frank Skiff, and John McKinney, to recover double and treble damages for cutting, carrying away, and converting timber trees. The suit was brought under the provisions of the Act of March 27, 1824 (8 Sm. L. 283).

On the trial, before BROWN, P. J., the following facts appeared: On December 6, 1882, the plaintiffs had brought an action of ejectment against the defendants for the land in question, and recovered judgment in their favor for an undivided three-fourths interest therein, and on May 20, 1886, were put in possession thereof by virtue of a writ of *habere facias possessionem*. On February 4, 1887, they brought this action of trespass. The plaintiffs proved title out of the Commonwealth as they had proved it in the ejectment. In reply, the defendants gave in evidence a tax deed in 1868, under which they had claimed title to the whole property, and in rebuttal the plaintiffs proved that the taxes had been paid before the treasurer's sale.

On May 17, 1888, the jury reported that they found for the plaintiffs $839.07, made up as follows, in single damages: Value of three-fourths of the timber cut and taken away by defendants between the 4th day of February, 1881, and December 6, 1882, $66.75; value of three-fourths of the timber cut by defendants and left on the ground, between above dates, $10.00; value of three-fourths timber cut and taken away by defendants between December 6, 1882, and May 20, 1886, $712.32; value of three-fourths the timber cut and left on the ground by defendants, between above dates, $50.00; and further, that the plaintiffs' title to the three-fourths of the land in this suit was not divested by the treasurer's sale to D. H. Mitchell, in 1868.

Subsequently the plaintiffs obtained rules to show cause why the damages found by the jury for timber cut down and left, should not be doubled and the other damages trebled. These rules were made absolute, and judgment entered in favor of the plaintiffs for $2457.21. Whereupon the defendants took this writ, assigning for error, *inter alia*, the action of the Court in doubling and trebling the damages.

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William E. Rice (*R. Brown*, *Charles W. Stone*, and *H. E. Brown*, with him), for the plaintiffs in error.

Charles H. Noyes (*Watson D. Hinckley*, *C. W. Tyler*, *Hallock & Wetmore*, with him), for the defendants in error.

May 27, 1889. THE COURT. This is an action of trespass *quare clausum fregit*, for cutting, and for cutting, carrying away, and converting timber trees; the claim is for double and treble damages under the third section of the Act of March 27, 1824 (8 Sm. 283). At the trial, the plaintiffs offered in evidence the record of an action of ejectment, in which they had recovered, as against the defendants, the undivided three-fourths of the premises in question, with the writ of *habere facias* issued thereon, and the return, and this established their actual possession at the time this suit was brought, and their right of possession and title when the writ of ejectment issued.

Although the testimony is not all printed, it appears from the paper-books, and it is not denied, that the plaintiffs then gave in evidence their title according to the abstract filed in the ejectment. The defendants in reply gave in evidence the tax deed to Mitchell; and the plaintiffs in rebuttal proved the payment of the taxes before the treasurer's sale. The plaintiffs thereby not only re establish their right to the undivided three-fourths of the land which they had recovered in the ejectment, but exhibited their right to recover damages beyond the title of the writ of ejectment (Osbourn *v.* Osbourn, 11 S. & R. 55; Huston *v.* Wickersham, 2 W. & S. 308).

But the plaintiffs only established title to three-fourths of the land, and they were admittedly in possession only to that extent. Not only the judgment in the ejectment, but the title papers, plainly disclosed the fact that the plaintiffs' title covered nothing beyond this undivided interest in the land, and the defendants, being in possession of the remaining one-fourth, claiming title thereto, we cannot see how the parties can be regarded otherwise than as tenants in common. It is true the testimony disclosed facts which would or might wholly invalidate the treasurer's deed, under which the defendants claimed title, but the burden of proof was upon the plaintiffs; they were entitled to recover on the strength of their own title, and as they established their right only to the undivided three-fourths of the land, the defendants were not called upon to exhibit their title to the remaining one-fourth, *non constat* that they did not have a conveyance from John Dick for this outstanding interest. The parties held the lands by several and distinct titles, but occupied them in common; the only unity recognized between tenants in common is that of possession, and we are of opinion that the plaintiffs and the defendants must, in this case, be assumed to bear that relation in the ownership of this land.

At the common law, trespass was not recognized as a remedy between tenants in common, except when mesne profits, strictly so-called, were sought to be recovered, or there had been an actual ouster from, or destruction of the property (Bennet *v.* Bullock, 35 Pa. 364; Filbert *v.* Hoff, 42 Id. 97; Lane *v.* Harrold, 72 Id. 267).

But by the second section of the Act of May 4, 1869 (P. L. 1251), it was provided, that in case of the cutting or removal of timber trees, by one or more tenants in common, without the consent of all co-tenants, "the parties injured shall have every remedy in law and equity for the recovery of the said timber trees," etc., "and also for the recovery of damages for the cutting or removing of the same, which they now have against an entire stranger to the title." As it cannot be doubted that an action of trespass would have been sustainable for the injury complained of in this case against a stranger to the title, it is plain that under the provisions of this Act of Assembly the plaintiffs have a right to the same remedy. If in any given case, trover, trespass, or replevin might be sustained against a stranger, the same remedy is available to a tenant in common in a like case against his co-tenant, or against any other person acting for or under him; but it does not follow, for the Act of Assembly does not so provide, that the recovery may be to the same extent. Indeed it has been expressly held in Wheeler *v.* Carpenter (107 Pa. 271), that the penalty provided by the Act of March 27, 1824, was not extended by the Act of May 4, 1869, to an action by one tenant in common against his co-tenant, for unauthorized cutting and conversion of timber trees.

Whether, therefore, this be treated as an action of trespass *quare clausum fregit*, or an action for mesne profits, compensation is the measure of the plaintiffs' recovery, that is to say, three-fourths of the value of the timber. We are of opinion that judgment should have been entered on the verdict for single damages only.

The judgment is reversed, and judgment is now entered on the verdict for $839.07, with interest from May 17, 1888, and costs.

Opinion by CLARK, J. C. K. Z.

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Common Pleas.

C. P. No. 4.

Eisenbrey v. City of Philadelphia.

Negligence—Contributory negligence—Proximate cause—Municipality—Highway.

A city is not responsible for damages resulting from obstructions to the highway, the danger from which is occult.

Damages cannot be recovered from a defendant for an accident of which his negligence is not the immediate cause, or so proximate a cause that the accident might have been reasonably foreseen as likely to happen therefrom.

Rule for a new trial.

Action to recover for damages occurring through negligence.

The facts appearing on the trial were as follows: The owner of the house No. 1431 Filbert Street built an open paling fence around the front door steps, in which was a gate that opened outwardly towards the street. The house was built four feet back from the street line, with steps extending two feet eleven inches on the sidewalk, or one foot seven inches short of the legal limit for such obstructions, which is by the city ordinance four feet six inches. When the gate in the fence was swung outwardly and was at right angles with the fence it exceeded the legal limit for such obstructions by ten inches. The fence was put there in 1884. About 7 o'clock on the evening of November 7, 1888, the plaintiff, a man sixty-nine years of age, who had been at the Masonic Temple, at the corner of Broad and Filbert streets, was walking on the north side of Filbert Street, intending to take the cars at Sixteenth Street. When directly opposite to this gate it was thrown violently open by some person coming out of the house and struck the plaintiff upon the breast. The effect of the blow was to knock him down. He fell and his left hip was broken, and he was otherwise severely bruised. He was picked up by passers-by and taken to the hospital, where he remained eighty-four days. The injury was a permanent one, inflicting great suffering and rendering the plaintiff unable to walk without crutches.

The jury gave a verdict for the plaintiff for $2900. A rule nisi for a new trial having been obtained,

George B. Carr, showed cause.

Robert Alexander, assistant city solicitor, for the rule.

June 15, 1889. THE COURT (after stating the facts). The plaintiff's case is a very hard one, and the damages awarded by the jury, $2900, are by no means excessive if the verdict can be sustained upon legal grounds. After the fullest argument and the most careful consideration given to the subject by the Court, we have arrived at the conclusion that the city cannot be legally held responsible for this accident. The fence had been there three or four years, certainly long enough to give rise to the presumption that the city authorities had notice of it. But the fence itself was neither a purpresture nor a nuisance. It was considerably within the line which defines the limits to which such structures are permitted by law to project into the highway. The only dangerous feature about it was the gate, but that was an occult danger which would not naturally attract the attention of any person, and which few people perhaps would, except for the accident, consider dangerous. Thousands of people have doubtless passed that point daily without suspecting that any danger lurked behind that gate. If it would not appear to the public as a dangerous thing in itself, how can the city be held to have had notice of the danger? If the danger here had been patent, and observable by the eye, if it had been of a character to attract the attention of persons of ordinary intelligence and caution, then the city might be justly chargeable with it. But we do not think that can be reasonably maintained. The danger was a secret and hidden one, not calculated to attract any one's attention. Indeed there would have been no serious danger to any one, and in all probability no accident whatever to the plaintiff, if the gate had not been carelessly and violently thrown open by the person who came out of the house. The gate might have remained there forever without injuring any one if the persons opening it used reasonable care and caution in doing so. And that leads me to speak of another obstacle in the way of the plaintiff's recovery. The proximate cause of the injury sustained by the plaintiff would appear to have been the carelessness and heedlessness of the person who threw the gate open. Damages cannot be recovered for an accident of which defendant's negligence is neither the immediate cause nor so proximate a cause that its effects might have been foreseen by a man of ordinary foresight. (Hunter *v.* Wanamaker, 17 WEEKLY NOTES, 232.) A man is responsible for his act only so far as the results may be foreseen by ordinary forecast, and not for consequences which arise from the conjunction of his act with other circumstances of an extraordinary nature. (Morrison *v.* Davis, 8 Harris, 175.) A man is answerable for the consequences of a fault which are natural and probable. If his fault concur with something extraordinary and not likely to be foreseen, he will not be answer-

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able. (McGrew *v.* Stone, 3 Sm. 436; Fairbank *v.* Kerr, 20 Id. 90; Chartiers Township *v.* Phillips, 22 WEEKLY NOTES, 488.) In our judgment the proximate cause of the plaintiff's injury was the negligence of the person who opened the gate in a careless and reckless manner. The case falls therefore within the rule established by the authorities which I have cited. For these reasons I am constrained to say that the case went to the jury upon improper grounds, and the verdict cannot be sustained.

Rule absolute.

Opinion by THAYER, P. J. H. B.

Orphans' Court.

January 22, 1889.

Murphy's Estate.

Petition to sell real estate for payment of legacies—Act of February 24, 1834—Specific devise of real estate—When legacies are chargeable upon lands.

Sur petition and answer.

The petition of Julia Rushton and Sarah Perry, daughters and legatees under the will of Mercy Murphy, set forth: that decedent by her will, after bequeathing a number of legacies, devised certain of her real estate, described in her will, to her daughter, Margaret Krewson (now McLees), and certain other real estate to her daughter Josephine Krewson, said bequest including all of testatrix's real estate, and left all the residue of her estate, real and personal, to said daughters. At the audit of the executor's account, it was found that the personal estate was insufficient to pay the debts, and the executors were creditors to a small amount. The petition prayed for the sale of the real estate for the payment of debts and legacies.

The answer set forth that the real estate was devised to respondents "without condition, limitation, or charge of any nature whatever, either express or implied;" and "that the only claims against the said decedent's estate in the nature of debts are held by and owing to us, and that said petitioners have no claim against said decedent's estate, except for the bequests contained in said decedent's will, and, as shown by said final account or settlement of said estate, there are no funds for the payment thereof."

George Robinson, for petitioners, cited—
English *v.* Harvey, 2 Rawle, 305.
Okeson's Appeal, 9 Sm. 99.
Neal *v.* Torny, 4 Clark, 421.
Brandt's Appeal, 8 Watts, 198.
Montgomery *v.* McElroy, 3 W. & S. 370.
McCleneghan's Appeal, 24 Leg. Intel. 276.
Buchanan's Appeal, 22 Sm. 448.
Cox *v.* Corkendall, 2 Beasley, 138 (and cases cited)
Lypet *v.* Carter, 1 Vesey, 499.
Van Winkle *v.* Van Houten, 2 Green. Ch. 172.
Bray *v.* Lamb, 2 Dev. Eq. 372.
Becker *v.* Kehr, 13 Wr. 223.
2 Jar. on Wills, *525.

Joel H. De Victor, for respondents, cited—
Colhoon's Estate, 16 Phila. 311.
Hart *v.* Homiller's Ex'rs, 11 Har. 39.
Pope's Estate, 4 WEEKLY NOTES, 431.
Bentz *v.* Nieman, 6 Watts, 86.
Eavenson's Appeal, 3 Nor. 178.
Gallagher's Estate, 12 Wr. 121.
Montgomery *v.* McElroy, 3 W. & S. 370.
Wright's Appeal, 2 Jones, 256.
Brookhart *v.* Small, 7 W. & S. 229.

The case before the Court is one of pecuniary legacies bequeathed to the petitioners, followed by specific devises of the real estate to the respondents, and the residue of both real and personal estate to them.

It is submitted that in no case has it ever been held that where there is a *specific* devise of the real estate *prior* to the residuary clause will such antecedent pecuniary legacies be chargeable upon the real estate upon a failure of personal assets, unless the intention to do so appears by direct expression or plain implication.

There is nothing in this will to indicate such an intention.

February 9, 1889. THE COURT. In order that it shall conform to the Act, we may regard this petition as a prayer to charge the land with the payment of the legacies. To warrant this, an intention directly expressed or plainly implied must appear in the will. (Brandt's Appeal, 8 W. 198.) There was no express intention in this will to charge the real estate. The testatrix gave pecuniary legacies to the petitioners, and devised certain real estate to two other children, to whom she also left all the residue of her property, real and personal. The residuary gift of blended realty and personalty, by which the residue was converted into a single fund, would raise an implied intention that the legacies were to be paid by the real estate on a deficiency of personal assets. (Gallagher's Estate, 12 Wr. 121.) But according to the answer, which has not been traversed and must be accepted as true, the testatrix had specifically devised all her lands, and there was consequently no residue of real estate. The two classes of gifts, therefore, stand as though there were no residuary clause at all, and the legatees must look for payment to the personal estate alone.

The petition is dismissed.

Opinion by ASHMAN, J. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, JULY 26, 1889.* [No. 13.

Supreme Court.

Jan. '89, 229. April 5, 1889.

Woelpper's Appeal.

Wills—Devise for life with remainder over to survivors—Construction of the word "surviving"—Does not refer to death of testator, where a clear intention to the contrary is shown.

The general canon of construction that where there is a devise for life with a remainder over to survivors, the word survivors shall be taken to refer to the period of testator's death, will not be applied where it clearly appears that the testator intended to refer it to a different period.

A testator directed his trustees to pay an income to each of his daughters for life, "and from and immediately after the decease of my said daughters respectively, and as that event happens, I give and bequeath the estate and property of the daughters dying which shall then be held by the said trustee under this my will to be equally divided among the surviving brothers and sisters and the lawful issue of such as may be dead (if any); . . . . provided, however, that if my said daughters, or either of them, should die leaving lawful issue, the share of such daughter so dying shall go to and be equally divided among such issue and the lawful issue of such as may be dead:"

Held, (1) that the principal objects of testator's bounty, as to these shares, were his daughters and their issue, and the time he had in mind when the shares should possibly go to any one else, was the death of the daughters, and it was with referenec to that time that he designated the surviving brothers and sisters as the ultimate devisees.

(2) The mere fact that the devise over is put between the devise to the daughters and that to their issue, cannot change the obvious intention of the testator.

Appeal, by Abbie M. Woelpper, executrix of the will of David Woelpper, Jr., deceased, from a decree of the Common Pleas No. 4, of Philadelphia County, sustaining certain exceptions to a report of a Master in partition.

The facts of the case were as follows: David Woelpper, Sr., died in the city of Philadelphia, December 18, 1839, seised of certain real estate in the Thirteenth Ward of the said city. He left to survive him a widow, Mary, and five children, David, George, Margaret, Mary, and Dorothy. By his will, duly proved, David Woelpper ordered his executors to sell his real estate, invest the proceeds and pay the income of one-third thereof to his widow for life, and the other two-thirds thereof he divided into five parts, and gave one of said fifth parts to each of his children. The share or portion of Margaret he directed his executors to pay to Lawrence Shuster, trustee of his said daughter, to care for, protect, and maintain her in her then low state of mind, during her life, and if she continued in her life in such state as to be incapable of taking care and managing her estate, then, at her decease, he did "give and bequeath so much of her estate as shall be then remaining to be equally divided among the surviving brothers and sisters and the lawful issue of such as may be dead," and in the event of her restoration to reason, then the trustee was to hold the share of the said Margaret upon the same trusts as those of his other daughters, Mary and Dorothy. As to the other daughters he directed the trustees to pay the income to each of them for life,—

"And from and immediately after the decease of my said daughters respectively, and as that event happens, I give and bequeath the estate and property of the daughters dying which shall then be held by the said trustee under this my will to be equally divided among the surviving brothers and sisters, and the lawful issue of such as may be dead . . . . provided, however, that if my said daughters, or either of them, should die leaving lawful issue, the share of such daughter so dying shall go to and be equally divided among such issue and the lawful issue of such as may be dead."

The power of sale was never exercised, the parties electing to treat the property as realty. The widow of the testator is dead. Of testator's daughters, Dorothy married Louis Poppal, who has since died, and Mary married Samuel P. Chandler, both of whom died, leaving two children, D. Woelpper Chandler and George W. Chandler.

A bill in equity for the partition of testator's real estate was filed November 15, 1879, and on July 17, 1880, a final decree was entered allotting said real estate to the several parties, wherein it was provided, *inter alia*, that the premises Nos. 733 and 735 Wood Street be provisionally reserved and withdrawn from the operation of the partition, with leave to any of the parties in interest to apply, after the death of Margaret Woelpper, for any other or further order touching the partition, sale, or other disposition thereof as might be for his or their interest and might be lawful in the premises.

The said David Woelpper, the son, died January 11, 1886, without issue, leaving a will whereof his widow, Abbie M. Woelpper, is sole devisee, legatee, and executrix.

The said Margaret Woelpper fully recovered her reason and died unmarried and without issue, March 7, 1887, and subsequently thereto, upon the petition of the remaining parties interested, the said premises, Nos. 733 and 735 Wood Street, were sold, and the distribution of pro-

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ceeds thereof was referred to A. Atwood Grace, Esq., as Master.

At the time of the entering of the original decree as above recited, David Woelpper, the son, had a one-fifth interest in the said premises. George Woelpper had a one-fifth. The trust estate of Margaret Woelpper had a one-fifth. The trust estate of Dorothy Poppal had a one-fifth, and D. Woelpper Chandler and George W. Chandler together had the remaining fifth.

The Master was of the opinion that, under the ruling of Johnson *v.* Morton (10 Pa. 251), and Ross *v.* Drake (37 Id. 375), that the word "surviving" in connection with the disposition of the one-fifth share held in trust for Margaret Woelpper for life referred to the death of the testator; and David Woelpper, the son, having survived that period, had a vested interest in the share of Margaret, and his estate was entitled to share in the proceeds thereof.

To this finding exceptions were filed, which the Court, in an opinion by ARNOLD, J. (reported in 23 WEEKLY NOTES, 469), sustained; whereupon this appeal was taken, specifying for error the action of the Court.

John J. Pinkerton, for appellant.

John G. Johnson (*Emil Rosenberger* with him), for appellees.

May 27, 1889. THE COURT. It is perfectly clear that the will of David Woelpper, Sr., creates contingent remainders in the shares left to his daughters, determinable on the death of each respectively, without issue. The language of the will is, "And from and immediately after the decease of my said daughters respectively, and as that event happens, I give and bequeath the estate and property of the daughters dying which shall then be held by the said trustee under this my will, to be equally divided among the surviving brothers and sisters, and the lawful issue of such as may be dead (if any) . . . provided, however, that if my said daughters, or either of them, should die leaving lawful issue, the share of such daughter so dying shall go to and be equally divided among such issue and the lawful issue of such as may be dead."

The primary and controlling gift here is to the daughters for life, and upon their deaths to their issue if they should leave any. "Die leaving issue" naturally and necessarily means issue surviving at the time of the daughters' death, and the previous devise in the same clause to the "surviving brothers and sisters" must refer to the same time, for then only can the contingency on which alone they are to take, to wit, at the death of the daughters without leaving issue, be determined. This would be beyond question if the clause were written in its natural order, giving the share to the daughters for life, and on their deaths to their issue, but in case they should die without leaving issue, then over to the surviving brothers and sisters. But the order being inverted, and the devise over to the surviving brothers and sisters being interpolated between the devise to the daughters and that to their issue gives rise to the argument that the remainders to the brothers and sisters are vested in those surviving at the death of the testator, subject to be divested by the birth of issue to the daughters. But if the remainders are vested in the brothers and sisters on the death of the testator, and divested by the birth of issue, then they must revest in the brothers and sisters on the death of the issue in the mother's lifetime, and be again divested by the birth of other issue, and so be tossed to and fro like shuttlecocks as successive children may be born and die. But even if this inconvenient shifting could be maintained, is the technical argument technically sound? The remainder is not to issue born to the daughters, but issue left surviving at their death. This remainder is incontestably contingent. But if the remainder was vested in the brothers and sisters first, and is then divested by the contingent remainder in the issue after their birth, where is the remainder to vest during the joint lives of the daughters and their issue? Not in the issue certainly, for their estate is contingent on surviving their mother. Nor can it be in the brothers and sisters, for the living issue stand between them and the devise over, and their estate is contingent on the now existing and future born issue dying before their mother. In fact the remainders are not vested at all, but contingent, as to both the issue and the brothers and sisters, and where the rest of the fee is, whether in *nubibus*, or in *gremio legis*, as the early lawyers called it, or in reversion in the heirs of the testator, as Fearne maintains (2 Sharswood's Blackstone, 107 n.), is not a practical question which we need discuss here.

Without going into such subtleties it is entirely clear that the principal objects of the testator's bounty as to these shares were his daughters and their issue, and the time he had in mind when the shares should possibly go to any one else, was the death of the daughters, and it was with reference to that time that he designated the surviving brothers and sisters as the ultimate devisees.

This being clearly the actual intent of the testator, what is in the way of holding it to be also the legal intent of his language? It is said that there is a settled rule of interpretation that where land is devised for life, with a remainder over, whether to persons *nominatim*, or to a class, it will vest in the objects to whom the description applies at the death of the testator, and the word "surviving," when used in the de-

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scription refers to the period of the testator's death.

Is there any such rule settled in the sense that it must be unbendingly applied to all cases? Has any phrase or description of persons acquired a set and absolute meaning, that must be conclusively presumed and adhered to without regard to the context, or the circumstances, or the actual intent of the testator? If so it is a clear perversion of fundamental principles, and the grounds for maintaining it should be strong indeed.

In the construction of wills the great general and controlling rule is that the intent of the testator shall prevail. And by his intent is meant his actual intent. It is often said as in the language of Weidman's Appeal (42 Leg. Int. 338), quoted by our brother GREEN in Hancock's Appeal (112 Pa. 532), and cited by appellant, "The question in expounding a will is not what the testator meant, but what is the meaning of his words." But by this it was never intended to say that testator's meaning when apparent can be disregarded, but that it cannot be got at *aliunde*, by what he might have meant, or even what under the circumstances perhaps he would have meant, but only by what he said. The search is confined to his language, but its object is still his meaning.

With the desire to reduce to a minimum the perplexity, and uncertainty unseparable from the subject, Courts have established certain more or less artificial and arbitrary canons of construction by which certain forms of expression are presumed to have certain meanings, and in doubtful cases these presumptions are held to be decisive. But all of these canons are subservient to the great rule as to intent, and are made to aid, not to override it. As in all such cases, care is required that tools shall not become fetters, and the real end shall not be sacrificed to what was intended only as the means of reaching it.

The canon relied on by the appellant is, as already said, that where there is a devise for life with remainder over to survivors, the word survivors shall be taken to refer to the period of the testator's death. Three cases are specially cited to maintain the applicability of this rule to the present will: Johnson *v.* Morton (10 Pa. 251); Ross *v.* Drake, (37 Pa. 375); and Barker's Appeal (2 Central Reporter 282).

Johnson *v.* Morton is an excellent illustration of the rule, and of the principle on which it should be applied. After discussing the English cases, and the then comparatively recent stand made by Sir JOHN LEACH in Cripps *v.* Wolcott (4 Madd. 11), for an intelligent application of the rule on principle, and not blindly and indiscriminately on authority to all cases, ROGERS, J., concludes to follow the older precedents, yet he does it expressly on the ground that there was no clear intent of the testator to the contrary. "Although we believe the general rule to be that, the words of survivorship must be referred to the death of the testator, whether the gift is immediate, or the limitation is after a prior life, or particular interest carved out; yet that general intent may be controlled by particular expressions in the will, indicating a contrary intent. *I had some doubt whether that was not the case here;* but on consideration I have come to the conclusion that it differs in no respect from Rose *v.* Hill (3 Burr. 1881), where, in a case nearly similar, the survivorship was referred to the death of the testator."

Ross *v.* Drake though a stronger case in favor of the application of the rule, is not essentially different in principle. The testator gave a sum of money to the use of his son John for life, with remainder to John's surviving children, but with a proviso, that if John should so elect, the money was to be expended for a tract of land for his use for life, with remainder as before. The Court held that the rule laid down in Minnig *v.* Batdorff (5 Pa. 503) applied, and the case must be treated as a devise of realty, and that the remainder vested in John's children at the death of the testator. But that this was not intended to be the peremptory application of the rule, irrespective of the intent of the testator, is clear from the language of STRONG J., who says: "Such a remainder vests in the objects to whom the description applies at the death of the testator, subject to open and let in others after born. *A testator may indeed direct otherwise*, and it is supposed he did so in this case by limiting the remainder to the surviving children of John," etc. He then proceeds to discuss the period to which the word surviving relates, and concludes that under the cases in England and this State, citing specially Johnson *v.* Morton, the period is the death of the testator.

Barker's Appeal is a very recent case, decided January 4, 1886, and meagrely reported. It does not call for any extended notice. The opinion of the Court below, affirmed *per curiam*, is that, "it is evident there is nothing in this clause of the will showing a manifest intent that the word surviving should be otherwise applied, and therefore it refers to the death of the testator."

There are numerous other cases more or less closely in point, but these have been selected especially by the plaintiff in error, and are as strong as any of their class. It may well be doubted whether one or more of them has not, in the desire already spoken of to reduce the uncertainties of the subject to a minimum, pushed the application of the set general rule up to or beyond the true bound, but the strongest and most emphatic of them has stopped short of de-

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ciding that the rule declaring the presumed intent of the word surviving to apply to the time of the testator's death, shall override the plain actual intent of the testator to refer it to another period. Even strict technical terms, words of art which are edged tools, dangerous in unskilled hands, will be taken out of their technical meaning by a clear intent of the testator to use them in a different sense, and it is not tenable for a moment that any more unyielding force should attach to words or phrases like "surviving brothers," etc., which are not technical words at all, and have a set presumptive meaning as to time only, because experience has appeared to indicate that they are most commonly used with reference to that period. Giving them a *quasi* technical meaning for the purpose of aiding in the ascertainment of intention, is far short of making them a Procrustean bed on which every unfortunate testator's will shall be stretched out of its proper shape or shorn of its members, to make it conform to the arbitrary standard.

It is not therefore necessary to consider how far reported decisions would be binding precedents, without reference to actual intent, in cases exactly parallel. No case has been cited in which the language is exactly like the present, or even closely similar, if we take it with its context just as it is written; and taking the cases therefore as precedents, not for the meaning of the exact language of Woelpper's will, but for the principles of construction by which his meaning is to be ascertained, we concede them all their legitimate authority in conceding that they establish the general rule that the phrase "surviving brothers and sisters" means surviving at the death of the testator, and that it shall be so construed unless it clearly appears that the testator meant it to refer to a different period. As already shown, the testator in the present case plainly meant to refer to the time of his daughter's death, and his actual intent being thus entirely clear, there is no room for any presumption, and the cases establishing that presumption have no application. "All mere technical rules of construction," says SHARSWOOD, J., in Reck's Appeal (78 Pa. 435), "must give way to the plainly expressed intention of a testator, if that intention is lawful. It is a rule of common sense as well as law, not to attempt to construe that which needs no construction."

The learned Judge below followed the true intention of the will, and the decree must be affirmed.

Decree affirmed.

Opinion by MITCHELL, J. W. M. S., Jr.

July '87, 115. January 13, 1888

Provident Life and Trust Co., Exr., etc. v. Loftus.

Ground-rent—Assumpsit—Covenant—Privity of estate—Profert—Demurrer.

A. being the owner, in 1786, of a large lot of ground, subject to a ground-rent of $88, granted and conveyed three small lots from the eastern portion thereof, reserving to himself a ground-rent of $18 out of each of said lots, and covenanting to save harmless and indemnify the grantees of same from the paramount ground-rent. A.'s title to the balance of the lot in 1875 became vested by sundry mesne conveyances in C., and the ownership of the three ground-rents of $18 each became vested in D.

In 1883 D. brought assumpsit against C., and after setting out the above facts in his declaration he alleged in his first count that a large amount of the $88 ground-rent was due and in arrear by C.; that a large amount of the rent reserved in the three $18 ground-rents was due and in arrear to him; that C., for the purpose of compelling the tenants of the three small lots to apply the money due D. to the payment of his, C.'s, indebtedness for the arrears of the $88 ground-rent, neglected and refused to pay a large portion of said ground-rent of $88, whereupon the owner of the $88 ground-rent collected the same out of the said three lots of ground, by means whereof D. was prevented from collecting a large amount of the rent due him on the three ground-rents, and C. was relieved from the payment of so much of the ground-rent of $88, by means whereof C. became liable to pay D., etc., and being so liable on, etc, promised, etc. In the second count the same facts were set out followed by an allegation that C. collected and received from the tenants of the three small lots of ground the rent of $18 reserved out of each of these lots.

C. demurred to this declaration:

Held, that the action in assumpsit could not be sustained, neither could D. bring covenant as he had no privity of estate with C.; that if D., by the second count, meant that C. collected the small ground-rents in his name or on his behalf, or as his agent, or under the pretence that he was the owner of the ground-rents, then it should have been so alleged in the declaration.

Held further, that as the deeds referred to in the declaration were made the ground of D.'s cause of action he was bound to make profert of such of them as were presumed to be in his possession, or to set forth an excuse for the omission, and that his failure to do so was good ground for demurrer.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by James T. Lukens against John E. Loftus.

The material portions of the declaration are set out in the opinion by THAYER, P. J., *infra*.

Defendant demurred to this declaration, assigning, *inter alia*, the following causes of demurrer to the first count:—

(1) Because the plaintiff does not make profert of the several supposed indentures, deeds, mesne conveyances, proceedings, and assurances in the law in said first count mentioned, or show any excuse for his omission so to do.

(7) Because it does not appear, and it is not

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alleged in said first count that the defendant was under any legal obligation to the plaintiff to pay the said paramount yearly ground-rent of eighty-eight dollars.

(8) Because the supposed facts in said first count alleged are not such as the law could therefrom infer an assumption by the defendant to pay the plaintiff the said moneys in said first count, claimed by the plaintiff to be due and owing to him by the said defendant. And also that the said count is in other respects uncertain, informal, and insufficient, etc.

And to the second count the following causes, *inter alia*:—

(1) Because the plaintiff does not make profert of the several supposed indentures, deeds, mesne conveyances, proceedings, and assurances in the law in said second count mentioned, or show any excuse for his omission so to do.

(6) Because it does not appear, and it is not alleged in said last-mentioned count, that the defendant was under any legal obligation to the plaintiff to pay the said paramount yearly ground-rent of eighty-eight dollars.

(7) Because it does not appear, and is not alleged in said last-mentioned count, that the defendant collected and received from the tenants of the said three smaller lots of ground the said sum of five thousand dollars, unlawfully or fraudulently, nor is it stated why, for whom, by whose authority, in whose right, or for what reason, or for whose, or for what account the said defendant collected said moneys in said last-mentioned count alleged.

(8) Because the supposed facts in said last count stated are not such as the law could therefrom infer an assumption by the defendant to pay the plaintiff the said moneys in said last-mentioned count claimed by him, the said plaintiff, to be due and owing to him, the said plaintiff, by the defendant, and also, that the said last-mentioned count is in other respects uncertain, informal, and insufficient, etc.

Subsequently plaintiff died, and his executor was substituted on the record.

The Court, THAYER, P. J., after argument on the demurrer, filed the following opinion:—

"This is an action on the case, and the plaintiff's cause of action, stripped of its formalities, is thus stated in his first count. On the 29th of June, 1785, John Penn, Esq., and John Penn, Jr., conveyed to John Kunckel in fee a lot of ground on the north side of Callowhill Street and east side of Fourth Street, containing in breadth on Fourth Street seventy-two feet, and in depth on Callowhill Street ninety feet, reserving thereout a yearly ground-rent of $88, payable to the said John Penn, Esq., and John Penn, Jr., their heirs and assigns, on the 29th of June of every year. On August 1, 1786, the said John Kunckel and wife conveyed the same lot of ground to Christian Knies and Jacob Ettwein in fee, as tenants in common, subject to the aforesaid ground-rent of $88 per annum. Afterwards Christian Knies and wife and Jacob Ettwein and wife, by three several indentures, dated respectively August 3, August 7, and August 7, 1786, conveyed in fee to Peter Fiss, Philip Wink and John Ware, respectively, three several lots of ground, parcel of the large lot aforesaid, at Fourth and Callowhill streets, each of the said three lots containing eighteen feet on Callowhill Street by seventy-two feet deep, reserving out of each of said smaller lots a yearly ground-rent of $18, payable to the said Christian Knies and Jacob Ettwein, their heirs and assigns, on the 29th of June of every year, the said Knies and Ettwein covenanting in each of said deeds, for themselves, their respective heirs, executors, and administrators, with the several grantees named in said deeds, respectively, that they, the said Christian Knies and Jacob Ettwein, their respective heirs, executors, and administrators would, at all times thereafter, indemnify and save harmless the said grantee, his heirs and assigns, and his and their goods and chattels, lands and tenements, and especially the lot of ground thereby granted, from the said paramount ground-rent of $88, payable to John Penn, Esq., and John Penn, Jr., their heirs and assigns, and from all costs, suits, entries, distresses, loss or damage on account of the non-payment thereof, so that if at any time any entry or distress should be made upon the thereby granted lots for the said paramount ground-rent, then it should be lawful for the grantee, his heirs and assigns, to enter and distrain in and upon their, the said Christian Knies and Jacob Ettwein, the remaining westernmost part of said whole lot, and sell and dispose of the distress there taken, or sue for and recover the loss or damage by *action of debt or covenant*. The count then goes on to aver that afterwards, on the 20th of March, 1875, the title of said Christian Knies and Jacob Ettwein to the aforesaid three yearly ground-rents of $18 each became vested in the plaintiff by divers mesne conveyances, and that the title of the said Christian Knies and Jacob Ettwein to the westernmost thirty-six feet of the large lot first described, became vested, by sundry mesne conveyances, in the defendant in fee, subject to the payment of the whole of the ground-rent of $88 per annum, and that afterwards, on March 2, 1883, a large amount of the $88 ground-rent became due and was in arrear by the defendant; that a large amount of the said ground-rent reserved in the said three $18 ground-rents also became due and was in arrear to the plaintiff from the tenants of the said three lots of ground, but that the defendant, for the purpose of compelling the ten-

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ants of the said three smaller lots to apply the money due to the plaintiff to the payment of the defendant's indebtedness for the arrears of the $88 ground-rent, *neglected and refused to pay a large portion of the said ground-rent of* $88, to wit, the sum of $5000, whereupon the owner of the said $88 ground-rent collected the same out of the three lots of ground upon which the said three $18 ground rents were payable, by distress, levied, thereon, *by means whereof the plaintiff was prevented from collecting a large portion of the said three ground-rents of $18 each, to wit, $5000 out of the said three lots of ground*, and the defendant was relieved from so much of the ground-rent of $88, by means whereof the defendant became liable to pay the plaintiff the money paid by the tenants of the said three lots to the owner of the ground-rent of $88, and being so liable the defendant on, etc., promised, etc.

"No precedent has been shown to us which sustains such a cause of action as is here set up, and we know of no principle or authority upon which it can be maintained. If the action was covenant, and the plaintiff was the terre-tenant of one of the three lots of ground out of which the ground-rent of $18 was reserved, deducing his title from the grantee of Christian Knies and Jacob Ettwein under the deed of 1786, an interesting question might have arisen, whether the covenant of indemnity against the paramount ground-rent entered into by Knies and Ettwein for themselves, their heirs, executors, and administrators, with their grantee, is a covenant running with the land, the burden of which would have fallen upon the defendant as the alienee and present owner of the larger lot of ground out of which the small lots were carved. Such an inquiry would have ushered us into that wilderness of law beginning with Spencer's Case in 1583 (6 Coke, 275) and extending in an unbroken forest of cases over the three centuries which have since elapsed. But that is not a domain into which a Judge who has any other business will care to stray, unless he has a serious errand there, however attractive its dim recesses and perplexing paths may be to the legal philosopher and professional annotator. In the present case it would be a work of supererogation to enter into the question whether the covenant of indemnity referred to runs with the land, and whether the burden of it can be imposed upon the defendant, for the reason that this is neither an action of covenant nor debt, and if it were, and if it were conceded that the covenant ran with the land, it is too plain almost for argument that the plaintiff cannot maintain an action founded upon that covenant. He is in no way privy to it, and is a total stranger to it. It is true that he derives his title to the ground-rents from the persons who made the covenant; but his privity with them relates exclusively to the ground-rents. He has no privity with them in the covenant relating to the lands, for he has no ownership or estate in the lands, and for the same reason he has no privity with the defendant. The covenant of Knies and Ettwein was with the grantees of the land, the grantees to whom they conveyed the three lots of ground. It is not shown or alleged that they made any covenant whatever with the persons to whom they assigned the ground-rents from whom the plaintiff derives his title to them. Upon what principle then can the holder of the ground-rents claim the performance of a covenant not entered into with him or with the assignee of the rent under whom he claims, but with the grantee *of the land* only and his heirs and assigns? Could Knies and Ettwein in their capacity of owners of the large lot enter into a covenant with themselves as the owners of the small ground-rents to indemnify themselves against the paramount ground-rent? Can a man make a covenant with himself which is assignable to the remotest generation? Could Knies and Ettwein, as owners of the small ground-rents, sue thmselves as owners of the large lot for a breach of covenant in not keeping down the $88 ground-rent? and is a covenant which is not suable, assignable? But even if Knies and Ettwein could do any of these extraordinary things there is no pretence in this declaration, that they did it, or attempted to do it. What they did do was to covenant with the grantees of the three small lots of land, to indemnify *them* and *their* heirs and assigns against the paramount ground-rent; and if this covenant ran with the land, and the burden of it also ran with it (for it is possible for a covenant to run with land for the benefit of the covenantee and his assigns against the covenantor and his executors and administrators, while the burden of the covenant will not run with it so as to charge the covenantor's assigns, and there are many cases and much learning upon that subject), then the defendant would be liable upon such a covenant to the subsequent owners of the lots of ground, but his liability would be *to them only*. The owner of the ground-rents has no possible claim upon him. He has no estate in the land and the covenant was not made with him or for his benefit. So far as he is concerned he is an entire stranger to the covenant, having no privity of estate whatever with the defendant. He has an adequate remedy for the collection of his ground-rents against the owners of the lots out of which they are reserved. If they are not paid, he can re-enter, or distrain, or sell them upon a judgment obtained for the rent, but he has no claim whatever upon the defendant upon a covenant to which he is neither

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party nor privy, but which was made with other people for the protection of other interests. The plaintiff therefore having no claim whatever against the defendant upon this covenant, even if the action were rightly conceived, and was covenant and not case, the plaintiff's cause of action is reduced to this, viz: A. being indebted to B., and B. being indebted to C., A. neglects to pay B., by reason of which B. is unable to pay C. Thereon C. sues A. in an action on the case for his neglect to pay B. Is it necessary to waste words in showing that such an action will not lie? If such a doctrine existed it would set the whole community by the ears, for every man would be liable not only to his creditors, but to all the creditors of his creditors.

"The plaintiff's second count differs from the first only in this, that in the second count, after setting out the same deeds and covenant mentioned in the first count he alleges that the defendant collected and received from the tenants of the three small lots of ground the rent of $18 reserved out of each of those lots. Now, if the plaintiff means by that that the defendant by neglecting to pay the whole of the paramount ground-rent, subjected the tenants of the three small lots to the payment of it, or a portion of it, and so got the benefit of that, then, as I have already shown, the plaintiff has no cause of action against the defendant for that. The right of action for that, if there be any, is in the owners of the three small lots, and not in the plaintiff. But if the plaintiff means that the defendant collected the small ground-rents in the plaintiff's name, or on his behalf, or as his agent or under a pretence that he was the owner of the ground-rents, then the plaintiff ought to say so, and how he collected them, whether by suit or otherwise, and in whose name and from whom, and by what authority, and in what manner. We will give him an opportunity to say so by amending his count if he desires to say so. As it stands, the allegation is altogether too vague and indefinite, especially when taken in connection with the inducement and all the preceding parts of the count.

"As these two counts are, in the judgment of the Court, substantially bad, it is unnecessary to discuss at length the alleged formal defects of the pleading, which are also assigned as causes of demurrer. I may remark, however, that as the deeds which are referred to in the declaration are apparently made the ground upon which the plaintiff's cause of action is supposed to rest, and the foundation of his claim, he was bound to make profert of such of them as are presumed to be in his possession, or to set forth a valid excuse for the omission. The demurrer upon that ground is well taken. While pleading remains a part of our system of administering justice, the rules which govern it, and which authority and long experience have established as necessary for its use and regulation, should be observed. It will be time to dispense with them when pleadings are abolished and all contests are reduced to the hazards and chances of an indiscriminate and free fight before a jury.

"The demurrers to the first and second counts are sustained, and the plaintiff has leave to amend within ten days, otherwise judgment will be entered for the defendant upon the demurrers."

Judgment was subsequently entered for the defendant on the demurrers.

Plaintiff then took this writ, assigning for error the action of the Court (1) in holding that even if the burden of the covenant ran with the title of the corner property, the defendant would be liable to the owners of the three small lots only, and not to the owner of the ground-rents; (2) in holding that plaintiff had an adequate remedy for the collection of his ground-rents against the owners of the three small lots; (3) in holding that plaintiff was bound to make profert of the deeds; (4), in sustaining the demurrers; (5) in entering judgment for the defendant; and (6) in not entering judgment for plaintiff.

Howard J. Lukens (*John G. Johnson* with him), for plaintiff in error.

Edward C. Quin, for defendant in error.

January 7, 1889. THE COURT. This judgment is affirmed upon the opinion of the learned President of the Court below.

PER CURIAM. W. M. S., JR.

Jan. '89, 113. May 1, 1889.

Hindmarch v. Hoffman.

Action to recover money in hands of person to whom it came mala fide—Assumpsit, when maintainable—When promise is presumed on the part of bailee in such case.

On October 10, 1885, S. stole from H. a large sum of money, $400 of which he deposited upon the same day with B., to be returned to him, or upon his order. B. was not aware that the money had been stolen, but while it was still in his possession was notified of the fact by the attorney of H. Notwithstanding this notice, he afterwards paid the money upon the order of S. to another person:

Held, that an action of assumpsit could be maintained against B. by H. to recover the money.

It was the duty of B. to hold the money for H. under the above circumstances, and upon satisfactory proof of ownership to pay it over to him. From the existence of that duty the law raised an implied promise by B. to do so.

Assumpsit for money had and received will lie by the

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true owner of money against a third person into whose hands it came *mala fide*, provided its identity can be traced and ascertained.

Where a defendant is proven to have in his hands money of the plaintiff, which *ex æquo et bono*, he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly; and after verdict, the promise is presumed to have been actually proved.

Error to the Common Pleas of Erie County.

Assumpsit, by W. H. Hindmarch against Edward Hoffman to recover the sum of $400. A *narr.* in *assumpsit* with the common counts was filed, to which defendant pleaded *non assumpsit*, with leave, etc.

The case was tried without a jury, under the Act of April 22, 1874, before GUNNISON, P. J., who found as follows:—

"On the morning of October 10, 1885, one Richard Savanack stole from the plaintiff, in Buffalo, New York, a sum of money, four hundred dollars of which upon the same day he deposited with the defendant, to be returned to him or upon his order.

"There was no allegation that the defendant knew the money was stolen at the time, and as a fact I find he did not know it. He was afterwards notified by the attorney for the plaintiff that the plaintiff claimed the money, that it had been stolen from him by Savanack, and after this notice he paid it, upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money.

"Upon his refusal afterwards to pay the amount to the plaintiff, this action in aasumpsit was brought.

"CONCLUSION OF LAW.

"I have been unable to find any authority sustaining the right to maintain assumpsit in a case of this kind. The rules governing the action are well established and require that there should be privity of contract, expressed or implied, between the parties in order to maintain it. (Finney *v.* Finney, 16 Pa. St. 380; Wells *v.* Stewart, 5 Binn. 325; Allen *v.* Irwin, 1 S. & R. 549.)

"'To maintain assumpsit, privity of contract, either express or implied, is necessary. The mere fact of one man's money coming into the hands of another does not, in law, raise such an implied promise as will sustain an action therefor.' (Hooper *v.* Stott, 2 Chester Co. Rep. 40.)

"'A plaintiff cannot waive a tort and proceed in assumpsit, except where there is a contract, either express or implied.' (Boyer *v.* Bullard, 102 Pa. St. 555; Bethlehem Borough *v.* Perseverance Fire Co., 81 Id. 445.)

"In this case there certainly was no express promise made by the defendant to pay the money deposited with him to the plaintiff. The express contract on the contrary was that he should repay it to Savanack, who deposited it with him. There being such an express promise, it cannot be said there was an implied promise to pay it to the plaintiff. Such a promise would be inconsistent with, and if performed, would defeat the performance of the express promise to pay Savanack. It would be absurd to say such a promise could be implied in this case.

"In each of the cases cited by the plaintiff's counsel as authority for this action, there was a promise either express or implied.

"In Lee *v.* Gibbons (14 S. & R. 105), Aycinena *v.* Peries (6 W. & S. 233), and McCafferty *v.* Brady *et ux.* (19 WEEKLY NOTES, 553), the opinions of the Court show that the decisions were based upon expressed promises.

"In McAllister *v.* Hoffman (16 S. & R. 147), and Forscht *v.* Green (53 Pa. St. 138), the Supreme Court decided that money bet upon an election could be recovered by the person depositing it with the stakeholder, if demanded before payment to the winner, on the ground that such a bet, being prohibited by law, there was an implied promise on the part of the stakeholder to repay the money to its legal owner.

"The case of McCullough *v.* McCullough (14 Pa. St. 295) is not in point. It was there decided that 'when one takes the personal property of another, the owner may waive the tort and maintain assumpsit for its value.' But this action is not against the taker of the money. If it were against Savanack, the principle would apply. In that case the law would imply a promise to repay.

"I am clearly of the opinion that the plaintiff cannot recover in this action."

Exceptions filed by the plaintiff to the decision of the Court were subsequently dismissed and judgment entered for defendant; whereupon plaintiff took this writ, and assigned for error the finding that the action of assumpsit could not be maintained upon the findings of fact, and the entry of judgment for defendant.

Theodore A. Lamb (*C. L. Baker* with him), for plaintiff in error.

The only question is, whether, when money has been stolen and deposited by the thief with a third person for safe keeping, the owner, after notifying the bailee of the facts and demanding his money, can recover it in an action of assumpsit for money had and received. For authority that this action can be maintained, see—

Clarke *v.* Shee and Johnson, 1 Cowper, 197.
Mason *v.* Waite, 17 Mass. 560.

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Sergeant *v.* Stryker, 32 Am. Dec. 404 (1 Harr. N. J. 464).
2 Greenleaf on Ev. §§ 102, 120.
McCullough *v.* McCullough, 14 Pa. 295.
McAllister *v.* Hoffman, 16 S. & R. 147.
Forscht *v.* Green, 53 Pa. 138.
Rohm *v.* Borland, 5 Cent. Rep. 562.

S. M. Brainerd, for defendant in error, relied principally on cases cited in the opinion of the Court below.

June 28, 1889. THE COURT. This case having been submitted for trial, without a jury, according to the provisions of the Act of April 22, 1874, the learned President of the Common Pleas found the facts substantially as follows:—

"On the morning of October 10, 1885, Richard Savanack stole from plaintiff in Buffalo, New York, a large sum of money, four hundred dollars of which he afterwards, on same day, deposited with defendant, to be returned to him or upon his order."

When defendant received the money, he was ignorant of the fact that it had been stolen from plaintiff by Savanack; but, while it was still in his possession and under his control, he was notified of that fact by plaintiff's attorney, and that plaintiff claimed it as his property. Notwithstanding the notice, he afterwards paid the money, "upon the order of Savanack, to Messrs. Brundage, Weaver & Bell, of Buffalo, receiving from them a bond to indemnify him against any liability to any other person for the money." Afterwards, upon defendant's refusal to pay the amount to plaintiff, this action of *assumpsit* was brought to recover the same.

It does not appear to have been even questioned in the Court below, that, upon the established facts, plaintiff had a good cause of action; but, the learned Judge was of opinion that he could not recover in the present form of action, and he accordingly entered judgment for defendant. His conclusions of law were duly excepted to, and they now constitute the specifications of error before us.

As found by the learned Judge, the money sued for, as money had and received by defendant to the use of plaintiff, never belonged to Savanack, nor could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control, he was fully informed of the theft, and also that plaintiff, as owner of the money, claimed it. Under these circumstances, it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so; but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner; and there is no good reason why it should not be recovered in the present form of action.

In Clark *v.* Shee (2 Cowp. 197) it was held that case, for money had and received, will lie by the true owner of money against a third person into whose hands it came *mala fide:* provided its identity can be traced or ascertained. Referring to the form of action in that case, Lord MANSFIELD characterized it as "a liberal action in the nature of a bill in equity, and, if under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action."

In 2 Greenl. Ev. (13 ed.) secs. 102 and 120, the principle is thus stated: "Where the defendant is proven to have in his hands the money of plaintiff, which *ex æquo et bono* he ought to refund, the law conclusively presumes that he has promised to do so, and the jury are bound to find accordingly, and after verdict the promise is presumed to have been actually proved."

"So, if money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort and bring assumpsit on the common counts."

Assumpsit was also sustained in Mason *v.* Waite (17 Mass. 558), upon the following facts: bank notes, done up in a package, were delivered by the owner to a carrier, who, without authority, paid them to a third party for a loss at a faro table. In an opinion sustaining a judgment in favor of the owner of the notes against the party to whom they were thus paid, the Chief Justice after remarking that trover would have been the better action, but for the difficulty of identifying bank notes, said: "We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money, and as to any want of privity or any implied promise, the law seems to be that where one has received money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."

The defendant, in the case at bar, did not better his position by improperly handing over the money in question, to those who had no right whatever to receive it, after he knew it had been stolen and that plaintiff was its true owner.

The undisputed facts connected with his possession of the money, immediately before he parted with it, are quite sufficient to raise such an implied promise as will support assumpsit. We are therefore of opinion that the Court erred in not entering judgment in favor of plaintiff for the

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amount claimed, viz: four hundred dollars with interest from May 24, 1886, the time suit was commenced before the City Recorder.

Judgment reversed and judgment is now entered in favor of the plaintiff and against the defendant for four hundred dollars with interest from May 24, 1886, and costs.

Opinion by STERRETT, J.

H. C. O.

July '88, 111. May 21, 1889.

Hohman's Appeal.

Sale of real estate by sheriff, subject to a mortgage—Evidence—Inquisition in case of habitual drunkard—Costs.

When the sheriff's vendee of real estate assumes a mortgage debt by giving his own mortgage for the same amount, and thereupon the original mortgage is marked "paid and satisfied" by the mortgagee, it is not error in an Auditor to find that the property was sold subject to the mortgage.

The decree of the Court upon the account of the committee of an habitual drunkard, ordering payment of the balance due the committee, is in the nature of a final decree in equity for the payment of money.

Such a decree or order has all the effect of a lien from the date of its entry in the judgment docket, and is entitled to participate in distribution in its proper order.

Appeal from the decree of the Common Pleas of Lancaster County distributing the proceeds of the sheriff's sale of the real estate of Simon Single.

The following facts were found by the Auditor (Daniel G. Baker, Esq.), appointed to distribute the proceeds of the sheriff's sale: In 1882 Simon Single was the owner of a lot of ground at the corner of Marietta Avenue, and West Orange Street, in the city of Lancaster, on which lot was erected a two story brick dwelling house with back buildings. About March 1, 1882, Single began to erect a two-story double brick dwelling house on the portion of the lot fronting on Marietta Avenue. The whole of this property was covered by a mortgage given by Single to the trustees of the Orphans' Asylum of Lancaster for $2800, dated and recorded March 31, 1882. On August 22, 1882, a mechanic's lien was filed by Sprecher and Pfeiffer against the building erected on the portion of the lot fronting on Marietta Avenue, amounting to $30.22 for slate furnished, etc. Before these buildings were completed, on account of certain difficulties, Single left his family, and went to Illinois, and on September 7, 1882, his wife presented her petition to the Court of Common Pleas of Lancaster County alleging that he was an habitual drunkard, and asking that an inquest be awarded. The inquisition was held in his absence, and without personal service, and he was found to be an habitual drunkard. The case was so far proceeded with that Frank Pfeiffer was appointed committe, and duly entered his bond as such committee. An order of sale of the real estate was granted on the committee's petition for the payment of debts, but the terms of sale were not complied with. An alias order of sale was then granted on November 11, 1884, but before the sale took place Single returned from Illinois, traversed the inquisition, and on April 26, 1886, the jury found that he was not an habitual drunkard. He then borrowed from John A. Hohman $1000 on his judgment note which was entered May 11, 1886, for the purpose of paying his debts.

On February 17, 1886, the Court granted a rule to show cause why the expenses incurred by the committee should not be paid out of Simon Single's estate, which rule was made absolute on April 17, 1886, and execution directed to issue for $225.62 with interest from April 17, 1886, and costs. On June 11, 1886, a rule was taken to show cause why the entry of this decree on the judgment docket should not be stricken off, but was afterward discharged by the Court. The Court awarded execution on the above decree for costs, and under this execution the fund in dispute was realized, and paid into Court. At the sheriff's sale, one of the trustees of the Orphans' Asylum gave notice that the property would be sold subject to the mortgage of $2800 held by trustees. The property was bought by John A. Hohman, a judgment creditor, for $575, who afterwards had the mortgage of $2800 satisfied of record, and gave another mortgage of the same amount to the trustees of the Orphans' Asylum.

The Auditor awarded the fund, first, to the claim of Sprecher and Pfeiffer, then to the payment of the costs of inquisition, and the balance to the Hohman judgment.

The report was referred back to the Auditor to find the curtilage to the property covered by the mechanic's lien of Sprecher and Pfeiffer, and to ascertain the value thereof. The value of this property was fixed by the Auditor at $1050, and the scheme of distribution set out in his original report adopted.

John A. Hohman filed exceptions to this report alleging error in the Master's finding that the real estate was sold by the sheriff subject to the $2800 mortgage; in not finding that the $2800 mortgage was discharged by the sheriff's sale as to the property covered by Sprecher and Pfeiffer's lien, and in not awarding the balance of the fund after the payment of this lien to the payment of the mortgage; in awarding payment of the costs of inquisition; in not award-

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ing the fund for distribution first to the lien of Sprecher and Pfeiffer, second to the $2800 mortgage, and third to the judgment of John A. Hohman; and in awarding interest on the committee's costs of inquisition from April 17, 1886.

These exceptions having been dismissed, Hohman took this appeal assigning for error the dismissal of the above exceptions.

Charles I. Landis and *D. G. Eshleman*, for appellant.

The sheriff cannot affect the rights of lien creditors by prescribing his terms of sale; he is the mere agent of the law in effecting the sale.

Devine's Appeal, 6 Casey, 348.

The question of costs in an inquisition is to be determined by the Court upon the final decree.

Act of June 13, 1836, P. L. 595.
Act of April 16, 1849, Id. 663.
Clark's Case, 10 Harris, 466.
Groves's Appeal, 18 Smith, 143.
Wright's Appeal, 8 Barr, 57.

B. C. Kready and *A. J. Eberly*, for appellee.

Under the Act of 1849, the Court may decree the payment of costs in such proportions as the justice of the case may require, and such decree may be enforced by execution.

Wier *v.* Myers, 10 Casey, 377.
Clark's Case, 10 Harris, 466.
Hassenplug's Appeal, 10 Out. 527.
Seibert's Appeal, 7 Harris, 49.

June 7, 1889. THE COURT. The subject of complaint in the first and second specifications is the finding of fact that the real estate of Simon Single, the proceeds of which is the fund for distribution, was sold subject to the $2800 mortgage in favor of the Orphans' Asylum.

It is a mistake to suppose there was no evidence before the Auditor to justify him in finding that fact. In addition to other testimony tending to prove that the property was sold subject to the mortgage, it was clearly shown that shortly after the sale, appellant, who was the sheriff's vendee, assumed the mortgage debt by giving his own mortgage for same amount, and thereupon the original mortgage was marked "paid and satisfied by the mortgagee, on the record thereof." That transaction, on its face, is wholly inconsistent with his present contention that the property was sold clear of the mortgage. If it was so sold, why did he assume the payment of the mortgage debt, as the evidence shows he did?

In view of all the evidence as to what occurred at the time of sale, as well as afterwards, there was no error in finding as complained of. The first and second specifications are therefore dismissed without further notice.

The third and fifth specifications relate to the costs of inquisitions, etc., $225.26, which the Court of Common Pleas, by its decree of April 17, 1886, ordered to be paid by the estate of said Simon Single.

The proceedings, which led to the making of that order or decree, were substantially as follows: In 1882, Simon Single, by inquisition duly taken, was found to be an habitual drunkard. Francis Pfeiffer, the appellee, was appointed committee of his person and estate and gave bond with sureties in $15,800. In June, 1884, the Court ordered a sale of the habitual drunkard's real estate, to which the committee made return, in November following, that the property remained unsold for want of bidders. An alias order was thereupon issued to sell on December 1, 1884, at seven o'clock P. M. On that day, before the hour of sale, a traverse of the inquisition was filed on behalf of the alleged habitual drunkard, and subsequently an order was made staying the sale until the traverse was disposed of. That was done on April 26, 1886, by the verdict of a jury finding that the traversor "is not an habitual drunkard." In the meantime Pfeiffer, the committee, having become satisfied that the traversor was capable of managing his own estate, determined not to resist the traverse and ceased to act as committee. He accordingly presented to the Court an itemized account of costs and expenses incurred by him as committee, etc., and asked the Court to approve the same and order payment thereof out of the estate of said Simon Single. The result was the decree of April 17, 1886, above mentioned, which on April 22, 1886, was entered on the judgment docket. Afterwards the Court awarded execution thereon, by virtue of which the real estate of Simon Single was levied on and sold. The proceeds of that sale constitutes the fund for distribution.

The presentation of the committee's account and the action of the Court thereon were manifestly intended as a final settlement; and the decree ordering payment of the balance due him is in the nature of a final decree in equity for the payment of money. It had all the effect of a lien from the date of entry in the judgment docket. In Vincent *v.* Watson (40 Pa. 306), it was held that the balance due a committee of an habitual drunkard, as per his account filed and confirmed by the Court of Common Pleas, becomes a debt of record, the settlement of the account being in the nature of a decree in chancery. Our Act of March 29, 1859, provides that decrees for the payment of money shall be a lien on the real estate of the defendants or debtors named in the decree, in like manner and with the same force and effect as the lien of judgments rendered by common law Courts, and shall be entered in like manner in the judgment docket of the proper county. (Purdon, 601, pl. 68.)

The order in question, being clearly in the

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nature of a decree in equity, and having been entered in the judgment docket, became a lien, from that date, entitled to participate in the distribution in its proper order. It was never reversed or modified. When the Court ordered execution to issue thereon, a writ of error to the execution was taken, but that appears to have been non prossed in this Court. As a decree, having the force and effect of a judgment duly entered in the judgment docket, it remained undisturbed and unsatisfied at the date of the sheriff's sale, and being prior in date to appellant's judgment, it was, of course, entitled to be paid in full, in preference to his.

From what has been said it follows that the fourth specification cannot be sustained.

Decree affirmed, and appeal dismissed at the costs of appellant.

Opinion by STERRETT, J. H. S. P. N.

July '88, 127. May 7, 1889.

Short v. Messenger.

Case—Action of—When it lies—Evidence—Principal and agent—Notice to agent.

In June, 1881, A. *et al.* sold to B. all the timber on certain tracts of land at certain prices per cubic foot, payments to be as follows: "$400 to be paid in five months from date, and the balance when the timber is sold, A. *et al.* to hold their interest in said timber until they receive payment therefor." In January, 1882, A. *et al.* sold the land in question to C., subject to the above contract with B. In an action on the case brought by B. against C. to recover damages for removing some of the above timber, C. claimed that B. had unreasonably delayed removing the timber, that the timber was deteriorating in value, and offered evidence to prove a notice to B 's father, who it was proved, both by B.'s and C.'s witnesses, had superintended B.'s work, to finish taking the timber or C. would take it. This evidence was rejected. The Court refused to charge that this action on the case could not be sustained, and also refused to charge that if the jury believe from the evidence that B. abandoned the job, C. was justified in taking off the timber, and would not be liable in damages therefor. Verdict and judgment for B. On writ of error:

Held, while the question was not entirely free from doubt, the Supreme Court was not prepared to say that this action on the case would not lie.

Held, also, that it was error to refuse to admit the evidence of notice to B.'s father.

Held, further, that if there was evidence to prove that B. had abandoned his contract, the Court should have charged, as requested, that if the jury believed that B. abandoned the job, C. was justified in taking off the timber, and would not be liable therefor.

Where the trial Judge refuses a point based upon the finding by the jury of a certain fact, and does not give his reasons for so doing, the Supreme Court will, on writ of error, presume that the point was refused because it was not considered good as a question of law, and not because there was no evidence to support such a finding of fact.

Error to the Common Pleas of Elk County.

Case, by George D. Messenger, Jr., against Samson Short, to recover damages for taking and converting to his own use some cut timber belonging to the plaintiff.

At the trial, before MAYER, P. J., the following facts appeared: On June 23, 1881, G. A. Carrier and others owning certain lands in Elk County, entered into a contract of sale with G. D. Messenger, Jr., as follows:—

The party of the first part agreeing to bargain, sell, or convey to the party of the second part all the down timber, both pine and hemlock, on their "Toby Tracts," that lies within one-fourth mile of Toby Creek, at the following prices: All the pine timber that will make once and one-fourth timber to be five cents per cubic foot; and that which is too small to make square timber to be cut in saw logs and the price to be five dollars per M. feet; and all the hemlock timber that will make once and one-half timber to be one cent per cubic foot, and such as is too small for square timber to be cut in logs, the price to be forty cents per M. feet.

In consideration of which the party of the second part agrees to pay to the party of the first part the aforesaid prices for the aforesaid timber, four hundred dollars, to be paid in five months from date, and the balance when the timber is sold, the party of the first part to hold their interest in said timber until they receive payment therefor.

On January 20, 1882, Carrier and the others sold both tracts of land to Samson Short, for $39,600, the contract of sale containing the following clause:—

This sale made subject to the contract between G. A. Carrier *et al.* of the first part, and G D. Messenger, of the other part, dated the 3d day of June, A. D. 1881, for the sale and purchase of the down timber, which contract is hereby assigned by the said parties of the first part hereto to the said Sampson Short, and the amount heretofore received by the said parties of the first part from said Messenger, to wit: The sum of four hundred dollars, is to be credited on the consideration of this agreement: The said parties of the first part to make, execute, and deliver a deed for the above two warrants of land on or before the first day of June, A. D. 1882, upon compliance with the terms and agreements and covenants to be done and kept on part of the said Sampson Short, as hereinafter stipulated.

Messenger, Jr., rafted, ran to market, and sold timber amounting in value to $322.38. He never paid any further sum on the contract. The timber was not all taken off, and in the spring of 1883 Short, claiming that the timber was deteriorating in value, and that Messenger, Jr., was not complying with the contract, took and cut some of the timber, and the plaintiff then brought this action.

The defendant claimed that he had requested Geo. D. Messenger, Sr., plaintiff's father, who had charge of the work, to finish taking the timber, and Messenger, Sr. had replied: "Well he told me repeatedly that there was no money in it for him; lost money in what he did take off; if father could make any money out of it he was welcome to do so."

The defendant offered to prove that he gave

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notice to George D. Messenger, Sr., who was the agent of the plaintiff, and who under the evidence in this case, did all the business in relation to that timber matter, and who was there upon the premises at the time carrying on the business, to take off this timber at once or proceed to take it off as fast as possible; that the timber was spoiling, and that if he didn't do it, that he, Short, the defendant, would be compelled to take it off himself—all there was left fit for use.

Objected to by plaintiff, because: (1) "We controvert the fact that he was such general agent, if notice to the general agent would be sufficient as would be notice to the plaintiff." (2) "We object to it because, in a case like this, even notice to the general agent would not affect the principal. I said we controverted the facts, or that we deny the facts, because we do not agree to the facts as they say." Objection sustained and evidence rejected. Exception.

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) That under the pleadings and facts, as they appear in evidence, an action on the case cannot be sustained. *Answer*. "This point is refused."

(2) That by the contract between the plaintiff and Carriers, the plaintiff acquired no such interest in the timber as would enable him to maintain any form of action against the owner of the land for the timber until by the terms of the agreement the owner of the land had been fully paid for the same, and there being no evidence of payments or tender of payment according to the terms of the contract, the verdict must be for the defendant. *Answer*. "This point is refused."

(3) That the action of case lies to recover damages which are consequential in their nature and directly connected with some act or omission of the defendant, but not for damages which are the direct result of an act and expected to follow therefrom, or the immediate object of such act, and under the facts in this case there are no damages shown of such a nature as will sustain an action of trespass on the case. *Answer*. "This point is refused."

(6) That the timber being down, if the jury believe that the plaintiff was dilatory or negligent in getting the same off or for market, the defendant would be justified in rescinding the agreement and cutting and taking the same for his own protection, especially after having notified the plaintiff to take off said timber. *Answer*. "This also is refused."

(7) That if the jury believe from the evidence that the plaintiff abandoned the job, the defendant was justified in taking off the timber and would not be liable in damages therefor. *Answer*. "This point is refused."

(9) That if the jury find from the evidence in this case that by reason of the negligence or non-fulfilment of the contract by the plaintiff, the defendant has suffered damages, he, the defendant, is entitled to recoup the same against any claims of the plaintiff. *Answer*. "This point is refused because there is no evidence going to show that the defendant has suffered any damages by reason of the negligence or non-fulfilment of the contract by the plaintiff."

The Court charged the jury, *inter alia*, as follows:—

"The timber consisted principally of hemlock, in the proportion of one-fourth pine and three-fourths hemlock. . . . By the terms of the agreement between the Carriers and Messenger no time was fixed for the removal of the timber. In order that the right of Messenger to remove this timber might be terminated, it was the duty of the Carriers or their assignee, Short, to give notice to Messenger to remove the timber within a reasonable time after notice; and, in case Messenger neglected or refused compliance with such notice, Short could declare his right of removal ended and proceed to remove the timber himself. But there is no evidence in this case going to show that Messenger, the plaintiff, was ever notified by Short to remove the timber. Consequently Short could not remove the timber and appropriate it to his use without accounting for whatever the value of this timber may be, if, after deducting the contract price that Messenger was to pay for the timber that was taken off by him, as well as that which was taken off by Short, anything is due to Messenger."

Verdict for the plaintiff for $606.46 and judgment thereon; whereupon the defendant took this writ assigning for error the rejection of the above evidence, the answers to points, and the portions of the charge of the Court above set forth.

George A. Rathbun and *S. M. Brainerd*, for plaintiff in error.

Charles H. McCauley (*John G. Hall* with him), for defendant in error.

May 27, 1889. THE COURT. While the question is not entirely free from doubt we are not prepared to say that an action on the case will not lie in this instance. It is clear that both the plaintiff and the defendant had an interest in the timber which is the subject of this controversy. It is true the interest and rights of the plaintiff below were paramount to those of the defendant, yet the fact remains that each had an interest, and I do not see how an action of trespass would lie by one against the other. The objection is purely technical, and while this suit was commenced prior to the Procedure Act of 1887, we must consider an objection to the

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form of action in the light of that legislation. Aside from this an Appellate Court is slow to reverse for an error in the form of action after a trial upon the merits.

The defendant's seventh point called upon the Court to instruct the jury "that if the jury believe that the plaintiff abandoned the job, the defendant was justified in taking off the timber and would not be liable in damages therefor." The Court refused this point. I do not understand it to have been refused because there was no evidence to sustain it. The learned Judge does not say so, while in his answer to the defendant's ninth point he expressly puts his refusal to affirm upon the ground that there was no evidence to sustain the point. The seventh point was well put as a matter of law, and if there was no evidence that the plaintiff had abandoned the job, the refusal of the point might well have been put upon that ground. It is no slight matter for us to go through 193 pages of testimony to see if there was evidence of abandonment by the plaintiff, and if the learned Judge below, who must have known how this matter stood, does not say so, we have a right to presume the point was refused because it was not good as a question of law. And from this there was some evidence which the jury might infer an abandonment.

If there was error in that portion of the charge in which the learned Judge said, "The timber consisted principally of hemlock, in the proportion of one-fourth pine and three-fourths hemlock," it will doubtless be corrected upon another trial.

We think it was error to reject the offer of evidence referred to in the last specification. If, as the defendant offered to prove, he "gave notice to George D. Messenger, Sr., who was the agent of the plaintiff, and who, under the evidence in this case, did all the business in relation to that timber matter, and who was there upon the premises at the time of carrying on the business, to take off this timber at once, or proceed to take it off as fast as possible; that the timber was spoiling, and that if he did not do it he, Short, the defendant, would be compelled to take it off himself—all there was fit for use," it would be a good defence. It is true the offer was objected to by the plaintiff because he controverted the facts on which the point was predicated. Had the facts assumed in the point depended upon the defendant's evidence the objection would have been well taken. Such is not the case, however. It appears from the testimony of the plaintiff himself that George D. Messenger, Sr., was the agent upon the ground, and had the whole charge of this timber business. The plaintiff was seldom on the ground himself, and in his absence his father, George D. Messenger, Sr., represented him. This fully appears by the following question and answer: Q. "Now then, was there any limit to his power to represent you in your business up there about that business, as to cutting timber, or to see whether it was gotten out?" A. "I don't know that there was in that respect." If the notice referred to was given upon the premises, to the plaintiff's managing agent, we are unable to see why such fact should not have gone to the jury. The notice was as to a matter directly relating to the business. In such case a notice to the agent would have been notice to his principal. The defendant was not bound to lie by and see the timber rot upon the ground. The taking of it off had already been greatly delayed. It had been going on through 1881, 1882, and part of 1883. It is a matter known to every one that timber, and especially hemlock timber, soon decays and becomes unmerchantable when left to lie upon the ground. And it is a question whether allowing timber to lie and rot, if the fact be so, would not be some evidence of an abandonment of the contract, as set forth in the defendant's seventh point.

We notice no error in the remaining assignments.

Judgment reversed, and a venire facias de novo awarded.

Opinion by PAXSON, C. J. C. K. Z.

Jan. '89, 121. March 28, 1889.

Seither v. Phila. Traction Co.

Damages—Liability for—Joint trespass—Release of one joint tortfeasor.

While separate suits may be brought against several defendants for a joint trespass, and there may be a recovery against each, yet the plaintiff can have but one satisfaction.

Where satisfaction for injuries sustained has actually been received, the cause of action is discharged.

Where a person injured by a collision between cars of two railway companies executes a release to one of the companies, he cannot recover from the other.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Frederick W. Seither against the Philadelphia Traction Company to recover damages for personal injuries.

The following facts appeared at the trial, before BIDDLE, J.: On February 23, 1887, Frederick W. Seither, while a passenger on a car of the People's Passenger Railway Company in the city of Philadelphia, was injured in a collision between the car in which he was riding and a

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car of the Philadelphia Traction Company. He then brought suit against each of these companies to recover damages for the injuries sustained by him in the collision.

The suit against the People's Company was first tried and resulted in a verdict of $14,000 for the plaintiff. The Court, however, granted a new trial, and subsequently, on February 23, 1888, the following release was executed by Seither to the People's Company in consideration of the payment of $6000 —

Know all men by these presents, that, whereas on the twenty third day of February, 1887, at Fourth and Market streets in the city of Philadelphia, Frederick W. Seither was a passenger of the People's Passenger Railway Company in car No. 209 of the Green and Coates Street Passenger Railway Company (lessee of the People's Passenger Railway Company), which said car was run into by a car of the Philadelphia Traction Company, by which collision the said Frederick W. Seither was seriously injured;

And whereas the said People's Passenger Railway Company contends that it was without fault in the matter and that the Philadelphia Traction Company is alone responsible for said injuries;

And whereas by the peculiar state of the law the said Seither is bound to elect against which of the said companies he shall first proceed, and has heretofore pushed the case against the said People's Passenger Railway Company;

And whereas the said People's Passenger Railway Company is desirous that the said case be pushed against the Philadelphia Traction Company;

Now know ye that in consideration of the sum of six thousand dollars paid to me, the said Frederick W. Seither, by the People's Passenger Railway Company, the receipt whereof I do hereby acknowledge, I do hereby release, quit-claim, and forever discharge for myself, my executors, administrators, and assigns, the said People's Passenger Railway Company, and all and every company whose railway is leased to or operated by said People's Passenger Railway Company, their successors and assigns and every of them, of and from all and all manner of action and actions, cause and causes of action, suits, sum and sums of money, damages, claims, and demands whatsoever, in law or equity, or otherwise howsoever which against the said People's Passenger Railway Company, or against any and every company whose railway is leased or operated by said People's Passenger Railway Company, I ever had or may have had upon, or by reason of the said accident, or by reason of any other cause, matter, or thing whatsoever.

It being understood, however, that the payment hereinabove mentioned is not in anywise an admission of any liability by the said company, but on the contrary the said company declares that it has been in nowise negligent, and that it is in nowise responsible by reason of said accident.

And in consideration of the premises I, the said Frederick W. Seither, hereby assign, transfer, and set over to the People's Passenger Railway Company so much of the amount I shall recover against the Philadelphia Traction Company as may reimburse the said the People's Passenger Railway Company the said sum of six thousand dollars above mentioned together with interest thereon and the costs, fees, and expenses by the said company laid out and to be laid out and expended. Reserving to myself, however, the ownership and right to all sums in excess of said amount required for reimbursement as aforesaid. And I promise in good faith to proceed in said action against the said the Philadelphia Traction Company, hereby authorizing the said the People's Passenger Railway Company to prosecute the same for its use according to the terms of this agreement with power to use my name in such prosecution.

A copy of this agreement, immediately after its execution, was sent to the counsel for the Traction Company, with notice that the suit begun against it would be pushed for trial. At the trial against the Traction Company plaintiff produced evidence to show that the accident was due solely to the negligence of that company. Defendant placed in evidence the above agreement.

The Court directed a verdict for the defendant. Verdict accordingly and judgment thereon. Whereupon plaintiff took this writ assigning for error the action of the Court in directing a verdict for defendant.

P. F. Rothermel, Jr., for plaintiff in error.
David W. Sellers, for defendant in error.

April 8, 1889. THE COURT. The rule is well settled that while separate suits may be brought against several defendants for a joint trespass, and there may be a recovery against each, yet the plaintiff can have but one satisfaction. (Livingston *v.* Bishop, 1 Johnson, 290.) And whenever the plaintiff has actually received satisfaction for the injury he has sustained, the cause of action is discharged. (Fox *v.* The Northern Liberties, 3 W. & S. 103; Addison on Torts, sec. 1353.) The plaintiff while riding as a passenger in a car of the People's Passenger Railway Company was injured by a collision of said car with a car of the Philadelphia Traction Company, defendant. He brought suit against both companies, and recovered a verdict of $14,000 againt the company first named. This verdict was set aside by the Court, probably because of its excessive amount, and a new trial granted. The plaintiff then settled with the said company (the People's); was paid $6000 in full of all claim against it, and executed a release in its favor. He also by said paper agreed to prosecute his claim against the Traction Company, and in case he should recover against it he was to reimburse the People's Company for the money he received from it; the balance, if any, over the $6000 he was to retain for his own use. The Court below held very properly that this agreement and release was a bar to a recovery in this action. The plaintiff had received one satisfaction, he was not entitled to a second. In his suit against the carrying company the plaintiff could only have recovered a verdict by showing that the collision was caused by its negligence; in other words, that the People's Company and not the Traction Company was in fault. In the opening sentence of the printed argument in this

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case, we find the following: "The evidence offered by the plaintiff proves that while riding in a car of the People's Company, he was injured by a collision due entirely to the negligence of the Traction Company, the carrying company and its agents being absolutely without fault." At the time this paragraph was written the plaintiff had in his pocket the sum of six thousand dollars which he had received from the company, which he now says was "absolutely without fault." A case so unique as this might be supposed to stand alone in the books. Tomkins *v.* Railroad Company (66 California, 165), is, however, its exact counterpart. There a woman was injured by a collision of street railway cars. She received compensation from the carrying company and executed a release. She then sued the other railway company, contending that her release was not intended as a satisfaction, but because her carrier was without fault, and the existing defendant was the real wrong-doer. The Court held, in a vigorous opinion, that she could not recover. So we say here. The plaintiff was not entitled to recover, and the learned Court below was entirely right in directing a verdict for the defendant.

Judgment affirmed.

PER CURIAM. H. S. P. N.

Jan. '89, 145, April 1, 1889.

Allen v. Krips.

Judgment de terris against widow and heirs—When scire facias to bind real estate must be issued—Striking off judgment—Practice.

In proceedings to charge the real estate of a decedent in the hands of his widow and heirs, the latter must be proceeded against within ten years from the death of such decedent.

If it appears of record that the widow and heirs were not proceeded against within ten years, any judgment *de terris* that may have been imprudently entered against them may be stricken off.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Elwood Allen, Frank C. Gillingham, and Franklin Knight, late trading as Allen, Gillingham & Co., to the use of Ernest Sopp, against Sarah A. W. Krips, administratrix of the estate of Henry Krips, deceased, to recover for lumber sold to said Henry Krips.

The parties to this proceeding, with the exception of one member of the firm plaintiff, are the same as in Allen *v.* Krips (21 WEEKLY NOTES, 46), and the facts in that case and the present one are the same.

Defendants took a rule to strike off the judgment entered against the widow and heirs for want of an appearance. This rule was made absolute and the judgment stricken off by the Court, whereupon plaintiffs took this writ assigning for error the action of the Court in making the above rule absolute and striking off the judgment.

F. Carroll Brewster, for plaintiffs in error, in addition to cases cited by plaintiffs in error in Allen *v.* Krips (21 WEEKLY NOTES, 46), cited—

Humphreys *v.* Rawn, 8 Watts, 78.
Devereaux *v.* Roper, Tr. & Haly's Pr. 459.
Horner *v.* McCann, 3 Wright, 126.
O'Hara *v.* Baum, 1 Norris, 416.

George Junkin (*Z. K. Loucks, Jr.*, with him), for defendants in error, cited Allen *v.* Krips (21 WEEKLY NOTES, 46) and Pantall *v.* Dickey (23 Id. 187) in addition to cases cited by them in the former case of Allen *v.* Krips.

April 15, 1889. THE COURT. It appears by the record in this case that the original action was brought against Sarah A. W. Krips, administratrix of Henry Krips, deceased, in January, 1873, but judgment was not obtained until March, 1886, more than thirteen years after the decease of the defendant's intestate. A scire facias was then issued on the judgment to bring in the widow and heirs, and afterwards judgment *de terris* against them was entered in default of appearance. In April, 1887, that judgment was stricken off on the ground that it was imprudently entered. That action of the Court has been assigned as error.

The question thus presented has been settled adversely to plaintiffs in error by a long line of cases, among the more recent of which are Allen *v.* Krips *et al.* (119 Pa. 1); Hope *v.* Marshall (96 Pa. 395). The principle firmly settled by these and several other cases is, that in proceedings to charge the real estate of a decedent in the hands of his widow and heirs, the latter must be proceeded against within ten years from the death of such decedent; and if it appears of record that they were not proceeded against within that time, any judgment *de terris* that may have been imprudently entered against them may be stricken off.

Judgment affirmed.

PER CURIAM. H. S. P. N.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, AUG. 2, 1889.* [No. 14.

Supreme Court.

Jan. '88, 338. March 18, 1889.

Vanhorn, Griffin & Co. v. Corcoran et al.

Limited partnership—Act of June 2, 1874—Act of May 1, 1876—Articles of association—Requisites of—Evidence—Practice.

The Act of May 1, 1876 (P. L. 89), supplementary to the Limited Partnership Act of June 2, 1874 (P. L. 271), authorizing subscriptions to the capital of such partnership to be made in property other than cash, requires the filing of a certificate showing explicitly the property so contributed, and the valuation thereof.

It contemplates a contribution of property appropriate to the kind of business expected to be carried on.

The certificate filed in such case must contain a description of the property of such a character as to enable creditors to ascertain precisely of what it does consist, and to judge of its value. It is not sufficient to insert an indefinite and general description, and lumping valuation.

A certificate filed in such case showing that a certain party has paid his subscription in "merchandise, lumber, book accounts, and bills receivable, transferred to the association, $21,609.18, and in cash $3390.82, making the total subscription $25,000," is not sufficient. The property should have been properly scheduled.

In the above case the evidence showed that the amount, $21,609.18, stated to have been contributed as above, represented in reality the difference between the estimated assets and liabilities of a firm not yet wound up:

Held, that even had the certificate set forth this fact, it would not have been sufficient.

Where the certificate filed under the Limited Partnership Act as above, is defective, the parties are liable as general partners, and may be held liable as such in an action of assumpsit. The plaintiff is not limited in such case to the remedy provided by section 2 of the said Act of June 2, 1874 (P. L. 271).

Error to the Common Pleas of Lycoming County.

Assumpsit, by Vanhorn, Griffin & Co. against James Corcoran and Byron L. Richards, late doing business as Corcoran, Richards & Co.; George Luppert, Alexander M. Dean, Morton D. Banks, John W. Buck, Orlo J. Spafford, and Jacob H. Linck, now or late doing business under the name and firm of Luppert & Kline Furniture Company, Limited, to recover the price of certain merchandise furnished to defendants.

On the trial, before CUMMIN, P. J., the defence was that the various defendants were not liable as general partners, having formed a limited partnership under the Act of June 2, 1874 (P. L. 271), and its supplement of May 1, 1876 (P. L. 89). The defendants put in evidence the articles of association filed by them under the provisions of said Acts, the material parts of which are set forth in the opinion of the Supreme Court.

One Isaac N. Kline being called as a witness, defendants offered to show by him and others "that Isaac N. Kline, the witness, was secretary and treasurer of the Luppert & Kline Furniture Company, Limited, a joint stock association organized under the Act of June 2, 1874, and its supplements. That the original subscribers to the said certificate of association paid the amount of their subscriptions respectively and wholly to the company so organized, and in the manner in the said articles of association set out, except that in the case of James Corcoran and Byron L. Richards, a subscription which by the terms of the articles was payable in lumber, was actually paid in cash within five months from the date of the organization of the company with interest; that George Luppert conveyed to the Luppert & Kline Furniture Company, Limited, real estate in Armstrong Township, which constituted the plant of the company, so organized for the purpose of manufacturing furniture; that the price stipulated between the co-partnership so formed, and the said George Luppert, at the time the association was formed, was the sum of about $52,000; that the subscription of George Luppert, to wit, the sum of $35,000, was paid as stipulated in the articles of association, being an allowance by him of a credit to that extent of the purchase-money; that the subscription of M. D. Banks of $10,000 was fully paid by the further allowance made by said Luppert to the Luppert & Kline Furniture Company, Limited, of a credit upon said purchase-money, making altogether, the sum of $45,000, and that the balance of said consideration, to wit, the sum of about $8000, was paid by the company in cash to the said Luppert; that the subscription of Isaac N. Kline, John K. Heilman, and Abram H. Heilman, amounted to the sum of $25,000, and was paid as follows: By the transfer to the company, limited, of merchandise, lumber, book accounts and bills receivable, the sum of $21,609.18; a schedule of which was at the time duly made, and the value of the properties in said schedule contained appraised at their true cash value, and that the remainder of said subscription of $25,000 was by said I. N. Kline and others paid in cash, being the sum of $3309.82.

"And further, that on the 29th of December, 1884, I. N. Kline, J. K. Heilman, and A. H. Heilman sold their entire interest in the limited company to Henry W. Steinhelper, and retired

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from said company, the election of said stockholder to membership being immediately made by stockholders to said company.

"That prior to that date the plaintiffs in this case had not sold any goods to said company, and had no dealings with them whatever.

"To be followed by actual notice to these plaintiffs that before the sale made upon which this suit is founded, of the retirement of I. N. Kline and others from the concern.

"The purpose being to show compliance by the subscribers with the terms of the articles of association, and for the further purpose of showing that A. H. Heilman and others cannot be liable in any event as general partners in this case to these plaintiffs."

Plaintiffs' counsel objected to the offer so far as it does not refer to the withdrawal of the firm of A. H. Heilman & Co., and the offer to prove notice to the plaintiffs of such retirement, for the following reasons:—

"(1) Because the evidence offered cannot be offered for the purpose of showing compliance with the provisions of the Acts of Assembly, as the Acts of Assembly provide that a statement should be filed containing certain requisites, and these requisites cannot be supplied by evidence *aliunde* or by any parol testimony.

"(2) The evidence offered is an attempt to prove by parol that the statement filed in pursuance of the Act of Assembly is cured by matters that are not in the statement itself, and any defect in the statement cannot be aided by such testimony. It is a statement recorded in pursuance of an Act of Assembly and must conform in every particular with the provisions of said Act of Assembly. The defect therein cannot be cured by any schedule or any matter that is not contained within the statement itself and recorded with the statement.

"(3) The evidence offered would only be evidence in case this was a proceeding to enforce the balance on the subscription, and is not evidence where the issue is, as in this case, whether parties have made themselves liable by reason of non-conformity with the Acts of Assembly.

"(4) Because the evidence is incompetent for the purpose for which it is offered, irrelevant, and immaterial.

"(5) The last part of the offer in reference to the retirement of A. H. Heilman & Company, and notice to the plaintiffs is objected to because it is immaterial and incompetent."

Objections overruled, evidence admitted. Exception. (Eighteenth assignment of error.)

Plaintiffs requested the Court to charge, *inter alia*, as follows:—

"That the articles of association filed by the defendants, and under which they claim to have been organized and carried on business as a limited co-partnership, are defective upon their face, in that the description of the property subscribed is too general to enable any one to form a correct estimate of the extent of the property, and gives only a lumping valuation, which renders it equally difficult to judge of the value of the property subscribed, and is therefore not a compliance with the requirements of the Act of 1876, and the defendants are liable as general partners." *Answer*. "Refused under the evidence established in this case." Exception. (First assignment of error.)

Verdict and judgment for defendants. Whereupon plaintiffs took this writ, assigning for error, *inter alia*, the answer to plaintiffs' point, cited above, and the admission of the above offer of evidence by defendants. The eighteenth assignment of error did not set out the testimony admitted under the ruling of the Court.

Samuel Linn (*John J. Metzger*, *V. H. Metzger*, and *Arthur D. Williams* with him), for plaintiffs in error.

A general description and a lumping valuation is not such a schedule as the Act of 1876 requires, and is not a compliance with its provisions.

Maloney *v.* Bruce, 13 Norris, 249.
Eliot *v.* Himrod, 12 Out. 569.
Keystone Shoe Co. *v.* Schoellkopf, 11 WEEKLY NOTES, 132.
Bement *v.* Philadelphia Brick Co., 5 Id. 58.
Vandyke *v.* Rosskam, 17 Smith, 330.

Good faith, honest intentions, or accident will not relieve the defendants from liability as general partners, if it be shown that the statement filed was defective or false in any material part.

Bates on Limited Part., § 50.
Haggerty *v.* Foster, 103 Mass. 17, 19.
Durant *v.* Abendorth, 69 N. Y. 148, 152.
Pierce *v.* Bryant, 5 Allen, 91.

John A. Beeber and *Henry C. McCormick*, for defendants in error.

June 28, 1889. THE COURT. The first assignment of error presents a question which controls this case. It alleges that "the Court erred in their answer to the plaintiffs' first point, which point was:—

"That the articles of association filed by the defendants, and under which they claim to have been organized and carried on business as a limited co-partnership, are defective upon their face, in that the description of the property subscribed is too general to enable any one to form a correct estimate of the extent of the property, and gives only a lumping valuation, which renders it equally difficult to judge of the value of the property subscribed, and is therefore not a compliance with the requirements of the Act of 1876, and the defendants are liable as general

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partners." The answer of the Court was: "Refused under the evidence established in this case."

The defendants were sued as general partners. Their defence was that they were members of a limited partnership organized under the Act of June 2, 1874 (P. L. 271), and its supplement of May 1, 1876 (P. L. 89). The former Act requires cash capital; the latter allows the members to make contribution to the capital "in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association: Provided, That in the statement required to be recorded by the first section of said Act, subscriptions to the capital, whether in cash or property, shall be certified in this respect according to the fact; and when property has been contributed as part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted."

It will be noticed that the Act gives a wide latitude as to the kind of property that may be contributed as capital. At the same time it is very evident that it contemplates a real actual capital in cash, or in property available for the business of the company and the payment of its debts. It was never intended that the property contributed as capital should be moonshine, wildlands, or water-lots. If the business be merchandising, a stock of goods and the store-house in which they are contained would be legitimate; if the business be mining, a mine with its machinery and improvements would be appropriate; and if manufacturing, the factory building, with its machinery and the stock, manufactured and unmanufactured, would be in the direct line of its business, and therefore a proper and available contribution to capital. The point of these remarks will appear later.

The capital stock of this association consisted of $100,000. A portion of this was contributed in cash. An examination of the certificate shows, however, that "Isaac N. Kline *et al.*, doing business as A. H. Heilman & Company, paid in merchandise, lumber, book accounts, and bills receivable, transferred to this association, $21,609.18, and in cash $3390.82, making their total subscription $25,000."

This description of the property contributed is upon all fours with that contained in Maloney *v.* Bruce (94 Pa. 249), of which it was said by this Court: "This is not the kind of schedule contemplated by the Act of 1876. The description is too general to enable any one to form a correct estimate of the extent of the property, and a lumping valuation renders it equally difficult to judge of values. The property contributed was intended as the equivalent of a cash capital, and the plain object of the provision in the Act of 1876, requiring a schedule, was to enable creditors to ascertain precisely of what the property consisted and to judge of its value. If parties seek to have all the advantages of a partnership, and yet limit their liability to creditors, they must comply strictly with the Act. Where property has not been contributed, scheduled, and valued as the Act of 1876 directs, there is no payment of the capital."

The description in this case is even more vague than in Maloney *v.* Bruce. It consists of "merchandise, lumber, book accounts, and bills receivable." A creditor looking at this description could not form any estimate of its quantity, character, or value. For all practical purposes it might as well have been omitted. If the property had been properly scheduled an estimate of its value might have been made approximating the truth. As an illustration, if the general and indefinite word "lumber" had been followed by the words "consisting of 100,000 feet of No. 1 yellow pine flooring," almost any business man could have formed a fair idea of its value, or he could have ascertained it from any one engaged in the lumber business.

The learned counsel for the defendants below evidently felt the strain of this part of their case when they made the offer of evidence embraced in the eighteenth assignment. The evidence referred to was admitted by the Court, and if properly assigned for error we would discuss and rule the point. As it was not properly assigned we refer to it merely to say that the evidence received in support of it only made the defendants' case so much the worse. For it thus appeared that the defendants did not contribute any specific property at all; they merely contributed their interest in a firm, with estimated assets of $75,000 and certain debts of $53,000. The value of the difference between the two was the alleged contribution of $21,609.18. The assets of the firm, estimated at $75,000, were turned over to the limited partnership, subject to $53,000 of debts which the latter assumed to pay. It is easy to see, therefore, why there was no schedule of the property contributed. There was no property to schedule. The whole of it in equity was liable to creditors, and could not be withdrawn from them without fraud until the last dollar of the debts of the firm was paid. So that instead of property the defendants contributed a mere equity, to wit, whatever was left of the assets of the firm after the payment of its debts. Their allegation in the certificate that they had contributed $21,609.18 in property was inaccurate, and came dangerously near being a false statement, though I do not think it was so intended. Had the certificate set forth that their contribution consisted of their interest in a firm

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subject to the payment of its debts it would have conformed to the truth, but it would not have been a compliance with the Act of 1876. That Act contemplates such contributions as shall be available to aid the business and pay the creditors of the limited partnership; of what use was this contribution? It could not properly be made available until the debts were paid. To turn the property and pay $53,000 of debts requires time. In the meanwhile the debts are drawing interest, and by the time the assets are converted, even if there is no shrinkage, there may be little surplus left. The Court below was evidently misled by the idea that the assets were worth their estimated value of $75,000. Conceding that they were it by no means follows that the margin between the assets and the debts was worth $21,609.18. The evidence does not show that it was, or that the company has realized any such sum, or any sum whatever, after the payment of the $53,000.

The defendants contend, however, that even if there was an irregularity in the formation of the association, they are not liable as general partners, but that the plaintiffs must proceed under the Act of 1874, as was done in Maloney *v.* Bruce (*supra*). It was true in that case there was no attempt to hold the defendants as general partners; the suit was against the company, and after judgment, leave was granted to take out execution against the defaulting member. The creditor there had his election to proceed against the association as a valid organization and pursue the remedy pointed out by the Act of 1874, or to hold all the members liable as general partners. He chose the former. In the case in hand the creditors elected to treat the members as general partners, or as liable as such. This they had a perfect right to do. *Prima facie* a firm transacting business is a general partnership. It can only shelter itself behind the Act of 1874 and its supplements by showing a strict compliance with the law. It was said in Eliot *v.* Himrod (103 Pa. 569), "Each partner is liable unless saved by statute. If the partners have not complied with the statutory requisites a limited partnership has not been formed." To the same effect is Maloney *v.* Bruce (*supra*). This is the key to the whole situation. A limited partnership that has not complied with the law of its creation is not a limited partnership at all; it is, however, a partnership in which all the members are liable as at common law. If the defect appears upon the face of the certificate, it is the duty of the Court to rule it as a question of law. It would lead to more than confusion to permit a defective schedule like this to be supplemented by evidence to show that there really was property and that it was of the value indicated. It would open the door to all kinds of fraud and perjury, and no man could know whether such an association was a valid limited partnership, until after the verdict of a jury.

As there were no disputed facts in this case the learned Judge below should have given the jury a binding instruction to find for the plaintiffs for the full amount of their claim.

Judgment reversed and a venire facias de novo awarded.

Opinion by PAXSON, C. J. L. L., Jr,

Jan. '89, 129, 130, 131. April 30, 1889.

City of Erie v. Brady, Assignee.
Same v. Cleveland's Heirs.

Municipal claims—Paving—Liability of abutting property owners for—Acts of May 1, 1876, and May 17, 1887—Estimate to be made by city engineer—Scire facias sur municipal claim—Affidavit of defence to—Sufficiency of.

The provisions of the Act of May 1, 1876 (P. L. 94), regulating the passage of ordinances by the councils of all cities except those of the first class, authorizing the grading or paving of streets, etc., are not obnoxious to the constitutional prohibition of special legislation.

An affidavit of defence to a scire facias sur municipal claim, for paving in a city of the fifth class, averred that the ordinance under the authority of which the paving had been done, had been passed by city councils "without causing the engineer of the city of Erie to make an estimate of the total cost of such improvement, particularly stating the items and the cost of each, and causing the same to be attached to said ordinance before and at the time of its passage," as required by the Act of May 1, 1876 (P. L. 94). The Court having refused judgment for want of a sufficient affidavit of defence, on writ of error:

Held, that although it was admitted at the argument that the provisions of the Act of 1876 had been complied with formally by the city engineer, but that the estimate made by him was not such an estimate as defendants chose to consider that the law required, yet as the defendants had not only assumed the responsibility of swearing to their own conclusions of law, but stated them as positive averments of fact, which was all that appeared on the record, the affidavit must be taken as true, and if true it was clearly sufficient.

Semble, that the proper mode of stating this defence would have been to set out a copy of the estimate, and an averment or suggestion of its defects, so that the Court might determine whether it met the requirements of the law.

The provisions of the Act of May 17, 1887 (P. L. 117), which provide that "all taxes heretofore levied in any of the cities of the third, fourth, and fifth classes, in any one year, in amount not exceeding twenty mills on the dollar, and all assessments made in pursuance of the ordinances of such cities, are hereby made valid," do not operate to validate assessments made prior to the passage of the Act, as the retroactive word "heretofore" is used only in

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connection with the word "taxes," and not with the word "assessments."

Writs of error to the Common Pleas of Erie County.

These were three writs of scire facias sur municipal claims, wherein in each case the City of Erie, for use of the Barber Asphalt Paving Co., was the plaintiff, and in the first case, John C. Brady, assignee of the German Savings Institution, the owner of the premises, and in the other two cases the heirs of W. L. Cleveland were the owners. In each case, the defendants filed an affidavit of defence, setting forth as follows:—

(1) The said city of Erie, the plaintiff herein, is a municipal corporation of the fifth class, duly organized and acting under and by virtue of the Act of General Assembly, approved May 23, 1874, and the several amendments to said Act—the said city of Erie having, in the year 1878, duly accepted and adopted the provisions of said several Acts of General Assembly, and thereafter acted under and conformed to the provisions of the same. This action is founded upon a municipal claim alleged to have been registered in the office of the prothonotary of the Court of Common Pleas of Erie County, against a certain lot of land owned by the defendants upon Eighth Street, in the city of Erie, and purports to be for the price of an asphaltum pavement laid by the Barber Asphalt Paving Company, the equitable plaintiff herein; that said pavement was laid under the pretended authority of a certain ordinance of the city of Erie, approved the 17th day of June, 1886, providing for the laying of an asphaltum pavement in Eighth Street of said city, from Parade Street to Walnut Street, and under a contract entered into between said city of Erie and said Barber Asphalt Paving Company. The said defendants are informed by counsel, and believe, and therefore allege, that the provisions of the said several Acts of General Assembly, to wit, the Act of May 23d, 1874, and the several supplements thereto, are unconstitutional and void so far as they seek to confer upon the city of Erie authority to order pavements to be laid at the cost of the abutting property, and that the said city of Erie had no right to file the said municipal claim for the cost of the said pavement.

(2) The petition of the property owners and the said ordinance of the city of Erie called for an asphaltum pavement upon Eighth Street, between Parade Street and Walnut Street, while the said contract under which the said pavement was laid, and entered into under the pretended authority of said ordinance, provides for the construction and laying of an entirely different kind of pavement, as shown by the specifications attached to said contract. The defendants are informed and believe, and expect to be able to prove on the trial of this cause, that only about five per centum of pure asphaltum was used in said pavement, and that the same was not in any sense an asphaltum pavement; that by reason of the insufficient amount of asphaltum used in said pavement the same had become cracked and broken.

(3) The defendants say that the said ordinance of said city of Erie providing for the paving of said street was illegal, unconstitutional, and void, for the following reasons: At the time of the approval of said Act of May 23d, 1874, and at all times thereafter to the present time, the debt of the city of Erie has exceeded the constitutional limit of seven per centum of the assessed valuation of the taxable property therein; the said city has never been authorized by law, nor has the assent of the electors of said city ever been had to increase said indebtedness in any manner; the said ordinance provides for the payment by the city of Erie of a certain portion of the cost of said pavement, to wit, the cost of paving all street intersections, which cost, in fact, amounted to the sum of $5584.57; no provision was made by the levy of a tax to pay said amount, nor was any appropriation made in the year 1886 by the councils of said city to pay the same; the adoption of said ordinance was a direct attempt to increase the debt of said city without authority of law; the said paving ordinance was illegal and void for the further reason that the assent of the majority of property owners on both sides of the street to be paved was not obtained to same, and the said city did not advertise the proposal to pass such ordinance in the official paper of the city, as required by law.

(4) The said contract purporting to have been executed in pursuance of said ordinance, is illegal and void, for the reason that said ordinance provides only for the laying of a pavement, while said contract provides for the construction of sewers, man-holes, and catch-basins, in addition to said pavement; in fact, the claim filed against the property of defendants in this case includes the cost of man-holes, catch-basins, and spills, largely in excess of defendants' proportion of the cost of said pavement according to the terms of said contract; the said ordinance and the contract made thereunder are illegal and void for the further reason that the city of Erie did not, as required by law, provide by ordinance for the payment of damages to property owners sustained by reason of changes of grade of said street caused by the construction and laying of said pavement. In fact, the property of these defendants was injured by such change of grade to an amount exceeding the cost of such pavement, and if required to pay for such pavement they will be remediless in the matter.

(5) For further defence to said claim of the

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city of Erie the defendants say: The said plaintiffs had no right to register a municipal claim against the property of the said defendants, for the reason that the subject of said claim was in part for the construction of certain man-holes, spills, and catch-basins, while the ordinance under which such claim purports to have been entered and registered provides only for the laying of a pavement in Eighth Street. The said municipal claim is illegal and void and of no effect, because it was not accompanied with any specifications of the items of cost of said pavement, nor with any specifications or statement of the contract under which said pavement purports to have been constructed. The said municipal claim has never been lawfully registered in the Court of Common Pleas of Erie County, such pretended registry having been made in a book known as a "Mechanics' Lien Docket," instead of the City Lien Docket, provided by law for that purpose, and kept in the office of said prothonotary of the Court of Common Pleas of Erie County.

The following supplemental affidavit was also filed:—

(6) The councils of the city of Erie passed the ordinance for the paving of Eighth Street, entitled "An ordinance relating to the *grading*, *paving*, and curbing of Eighth Street from Parade Street to Walnut Street, and providing for the assessment and collecting the cost thereof," under which the work was done and the materials furnished as claimed by the plaintiff in their case, without causing the engineer of the city of Erie to make an estimate of the "total cost of such improvement, particularly stating the items and the cost of each," and causing same to be attached to said ordinance before and at the time of its passage.

(7) After the city was organized under the Act of May 23d, 1874, an election was held, and the number of select and common councilmen required by said Act were elected, and at the time of the passage of the said referred to ordinance the councils were composed of the numbers respectively provided for in said Act which was different in both the select and common councils from the number required under the pre-existing law; and all of the acts and doings of said councils were done in pursuance of and in accordance with the provisions of the said Act of May 23d, 1874, and its several supplements.

(8) Before the passage of said ordinance the grade of Eighth Street in front of the defendant's lot had been fixed and determined by the action of the councils of the city of Erie; that, without authority of law and without any notice to defendant, and without his consent, the plaintiff changed the grade of the street in front of said lot, to the great damage of the defendant and to his great cost, the amount of which the defendant is unable to state, for the reason, among others, that the councils failed to have the city engineer make a particular, itemized statement of the cost of such grading, paving, and curbing, as required by law; and the cost of grading Eighth Street in front of defendant's lot is embraced in and forms a part of the claim of the plaintiff sought to be collected in this case.

In each of these cases the plaintiff took a rule for judgment for want of a sufficient affidavit of defence which rules were discharged by the Court in an opinion by GUNNISON, P. J., as follows:—

"The Act of 1st May, 1876 (P. L. 94), provides 'that the councils of cities in this Commonwealth shall not pass any ordinance authorizing the grading or paving of any avenue, street, or alley . . . . before they have caused the city engineer to make an estimate of the total cost of such improvement, particularly stating the items and cost of each . . . . which estimate, map or plan, and schedule shall be attached to the ordinance before its passage, and shall remain on file in the proper office for the benefit of all persons interested; and any ordinance which shall be passed by the councils of any city in this Commonwealth, authorizing the *grading* or paving of any avenue, street, or alley, before the provisions of this Act are complied with, shall be null and void, and of no effect: *Provided*, That the provisions of this Act do not extend to cities of the first class.'"

The ordinance under which the pavement, the cost of which is sought to be recovered in this proceeding, was laid, was approved June 17th, 1876, and the defendants set up as a defence (*inter alia*) that the requirements of the Act quoted above were not observed on its enactment.

"The defendants contend, first, that the Act of Assembly is unconstitutional because local legislation, and second, that even if it is constitutional, and its requirements were not observed in the passage of the ordinance, the informality was cured by the Act of 17th May, 1887 (P. L. 117).

"I cannot agree with the learned counsel for the defendants that the Act of 1876 is unconstitutional. It does not contain the objectionable features which were contained in the Acts of May 23d, 1874, and March 18th, 1875, which provided that it should be optional with each city whether or not it should become subject to their provisions, thus making it possible for some cities of a particular class to become subject to them, while other cities of the same class were not so subject. It applies to all cities of the Commonwealth excepting those of the first class. The classification of cities by the Act of 1874 has been declared to be within the power of the Legislature, and legislation for the government of all cities of any particular class therein constituted is general and

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not local legislation. (Wheeler *v.* Philadelphia, 77 Pa. St. 338; Kilgore *v.* Magee, 85 Id. 401.) This Act is general as to all cities excepting those of the first class, and the ordinance for the pavement, if not accompanied 'by the estimate of the total cost of the improvement, particularly stating the items and the cost of each,' was, by the express terms of the Act, 'null and void and of no effect.' That it was not accompanied by such estimate is alleged in the supplemental affidavit of defence, and that allegation, for the purposes of this rule, must be taken as true. Was the informality in the passage of the ordinance cured by the Act of 17th May, 1887. After authorizing cities of the third, fourth, and fifth classes to levy and collect taxes for general revenue, and for paying the interest on bonded indebtedness, and for the payment of loans to support the government and make necessary improvements, and giving priority of lien to such taxes, etc., it enacts 'and all taxes heretofore levied in any of the cities of the third, fourth, and fifth classes in any one year, in amount not exceeding twenty mills on the dollar, and all assessments, made in pursuance of the ordinances of such cities, are hereby made valid.'

"The plaintiff contends that the expression 'All assessments,' includes assessments for the cost of paving streets, which are made upon the property abutting the improvement, and which are not paid by general taxation. Is that the sense in which the expression is used in this Act? The word 'assessment' is not exclusively applicable to local charges for street improvements. It is equally applicable to all kinds of taxes, and has been repeatedly used by the Legislature in legislating upon the subject of taxation for general revenue purposes. The general tax laws provide for the 'assessment of county taxes,' the 'assessment of school taxes,' and the 'assessment of State taxes.' The supervisors of any township are authorized to 'lay a rate or assessment not exceeding one cent on the dollar at any one time upon all real and personal estates within said township;' similar authority 'to lay a rate or assessment' is conferred upon the overseers of the poor of any township. A similar use of the word occurs frequently in the municipal law of 1874 and its supplements, and indeed in many, if not most of the laws enacted upon the subject of taxation. It is my opinion that this is the sense in which it is used in the Act under consideration, for the purpose of providing for all possible objections that may be raised to the tax levies and assessments which were the subject of the Act. Taken in this sense, the language is clear and unambiguous and germane to all the preceding provisions of the Act. In the sense contended for by the plaintiff it is vague, uncertain, and wholly unconnected with the subject and purposes of the Act as expressed in the other portions of it. But if it is conceded that the word is used to indicate assessments for street improvements on property benefited by them, it may well be doubted whether the Legislature intended it to be retroactive in its effect as to such assessments.

"That the Legislature has the power to pass retrospective laws cannot be doubted. A recent example of the exercise of that power is found in the Act of 30th of April, 1885, P. L. 11, which enacted that all ordinances theretofore passed levying taxes in any of the cities of the third, fourth, and fifth classes in amounts not exceeding twenty mills in any one year, were validated; and the Supreme Court affirmed the validity of that Act in City of Erie *v.* Reed (113 Pa. St. 468). It was the clearly expressed intention of the Act that it should be retrospective in its effect. But there is no canon of construction better settled than this, that a statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to preclude all question as to the intention of the Legislature. 'Retrospective laws generally, if not universally, work injustice and ought to be so construed only when the mandate of the Legislature is imperative.' (Taylor *v.* Mitchell, 57 Pa. St. 209.) 'No statute is held to operate retroactively unless its language admits of no other construction.' (Neff's Appeal, 21 Pa. St. 243.) 'And nothing short of the most indubitable phraseology is to convince us that the Legislature meant their enactment to have any other than a prospective operation.' (Dewart *v.* Purdy, 29 Pa. St. 113. See also Juniata Township, 31 Id. 301, and Ihmsen *v.* The Monongahela Navigation Co., 32 Id. 153.)

"Here the language is: 'And all taxes heretofore levied in any of the cities of the third, fourth, and fifth classes, in any one year, in amount not exceeding twenty mills on the dollar, and all assessments made in pursuance of the ordinances of such cities are hereby made valid.'

"It will be seen that the word heretofore in the sentence is only used in connection with the word 'taxes,' and is not used in connection with the word 'assessments.' The omission is significant, and indicates the intention of the Legislature not to give the statute a retroactive effect as to assessments for street improvements, if that is what they meant by the word assessments. If they intended by the language to distinguish between general taxes and local charges, it is equally clear they intended to distinguish between the effect to be given to the Act upon the two kinds of taxation. As to the one its effect is retrospective, and as to the other prospective. At least it must be conceded that the language admits of that construction. It is the natural and

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grammatical construction. If I am correct in my conclusions as to this branch of the defence made by the defendants, their affidavit of defence is sufficient and it is unnecessary to consider the other questions raised.

"The rule to show cause is discharged."

Thereupon the plaintiff took these writs assigning for error the actions of the Court in discharging the rules and not entering judgment for the plaintiff. The three cases were all argued together by

F. F. Marshall and *Theodore A. Lamb*, for plaintiff in error.

S. A. Davenport (*George P. Griffith* with him), for defendants in error.

May 29, 1889. THE COURT. The affidavits in these cases are uncandid and evasive, being really affidavits to conclusions of law, carefully stated so as to appear to be facts.

The defence seems to be without merit either on the facts or the law, but on the affidavits the learned Judge was clearly right in refusing judgment, as they contain positive averments, as of facts, of certain matters that if true would be a good defence. The principal of these, which is all we need notice in detail, is the unqualified averment in the supplemental affidavit, paragraph six, that the councils passed the ordinance "without causing the engineer of the city of Erie to make an estimate of the total cost of such improvement, particularly stating the items and the cost of each, and causing the same to be attached to said ordinance before and at the time of its passage."

This if true was a good defence. The Act of May 1, 1876 (P. L. 94), expressly declares that any ordinances authorizing the grading or paving of streets, etc., before compliance with the requirements of the Act as to such estimate, etc., shall be void. And this defect is not cured as to the present claims by the Act of May 17, 1887 (P. L. 117), as is very satisfactorily shown by the learned Judge below.

It appears clearly by the admissions of the argument, both oral and printed, that in fact the provisions of the Act of 1876 were complied with formally by the city engineer, but that the estimate made by him was not such an estimate as defendants chose to consider that the law required. It is hardly necessary to say that the proper mode of stating this defence was to set out a copy of the estimate, and an averment or suggestion of its defects, so that the Court might determine whether or not it met the requirements of the law. Instead of doing this, the defendants not only assumed the responsibility of swearing to their own conclusions of law, but stated them as positive averments of fact, in the unqualified language already quoted. Such a course cannot be too strongly reprobated. But as this is all we have on the record, notwithstanding the concessions of the argument, the allegation in the affidavit must for the present purposes be taken as true.

The other averments, notably those in relation to the advertisement of the ordinance and to the change of grade, and the statement that the contract departs from the ordinance by providing for sewers, appear to be equally devoid of truth, and made with equal recklessness, but it is not necessary to discuss them further, as it is clear that on the face of the affidavits there is a good defence, and that is sufficient to prevent judgment.

Order discharging rule for judgment affirmed.

Opinion by MITCHELL, J. C. K. Z.

Jan. '89, 221. May 8, 1889.

Benedict v. Marsh.

Fixtures—Saw-mill—Portable engine and boiler—Character of—Evidence.

In determining the question whether articles attached as realty are realty or personalty, the articles being of such an equivocal character as to require the verdict of a jury to determine the question, the object and intention of the owner is to be regarded and is admissible in evidence.

Harmony Building Association *v.* Berger, 12 WEEKLY NOTES, 181, followed.

In an action of replevin brought by an execution creditor to recover certain articles severed from land sold under the execution and bought by him, the evidence was conflicting as to whether the articles, which consisted of a saw-mill and the machinery belonging thereto, were of a permanent or temporary character. The defendant, who claimed the articles under a bill of sale from the defendant in the execution, and who had severed them subsequently to the sheriff's sale, offered evidence of statements made by the defendant in execution to the plaintiff and others as to the purpose for which he wanted the mill to show its portable character:

Held, that this evidence was admissible.

The Court below cautioned the jury that if the character of the mill was evidently permanent, this character could not be changed by any evidence of the owner's intention to remove it:

Held, that with such a caution the jury could not possibly have been misled as to the precise question to be determined by them.

Error to the Common Pleas of Warren County.

Replevin, by S. J. Benedict against Boyd Marsh, for a saw-mill, machinery, etc., of the value of $1107.

On the trial, before BROWN, P. J., the following facts appeared: A. R. Kilburn was the owner of land on which was a steam saw-mill, in which mill, and attached to which was the machinery in dispute. The structure was a two-

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story building, upon timbers imbedded into the ground. The engine was set on a block, which was also imbedded into the ground, and the boiler was upon a stone foundation, while the other machinery was in the second story. The defendant showed by his witnesses that these were all of a temporary character, and not such as were ordinarily used where the mill was permanent. The mill was built by Kilburn, the owner of the land. S. J. Benedict obtained judgment against Kilburn January 26, 1887, which became a lien upon this land. Execution was issued upon this judgment, and the land, with the mill, was levied upon and sold September 26, 1887, to S. J. Benedict. After the sheriff's sale to Benedict, the defendant, Boyd Marsh, severed the engine, boiler, and machinery from the mill, and removed the same from the land. Benedict brought this action, claiming title as above set forth. Marsh claimed that the mill was a portable one, and therefore personal property, and claimed that he was the owner of the mill by virtue of a certain bill of sale from Kilburn, made in the summer of 1887, five months after the lien of the judgment of Benedict, upon which the land was sold, had attached. There was no severance of the machinery until after the sheriff's sale to Benedict.

The defendant offered to show by a witness, N. J. Whitcomb, that in his presence A. R. Kilburn who erected the mill stated to the plaintiff that he, Kilburn, wished to purchase a portable steam saw-mill, one that could be moved on to several tracts of land that he had, and from one to another, for the purpose of cutting timber, and purchased the mill in question for that purpose. Objected to as incompetent and irrevelant. Objection overruled and evidence admitted. Exception. (First assignment of error.)

The Court also admitted the evidence of A. W. Day, one of the workers in the saw mill, as follows: "Q. Did you have any conversation with Mr. Kilburn in the winter of 1886 as to what he was going to do with this mill after finishing the timber on the Flatt lot? A. He said he was going to move it up to the State Line Run from there." Objected to as incompetent and irrelevant. Objection overruled. Evidence admitted. Exception. (Second assignment of error.)

The Court charged the jury that it was a question for them whether the mill was of a permanent and substantial nature or of a temporary character, and that if it was a permanent structure the mere intention of the owner to remove it when the timber was exhausted would not change its character.

Verdict for defendant and judgment thereon. Whereupon the plaintiff took this writ, assigning for error the action of the Court in admitting the above evidence.

William E. Rice (*R. Brown*, *H. E. Brown*, and *Charles W. Stone* with him), for plaintiff in error.

W. W. Wilbur (*William Schnur* with him), for defendant in error.

June 28, 1889. THE COURT. The only question in this case was whether the machinery in controversy was personalty or realty. The question was very fairly and correctly submitted by the Court to the jury who found it to be personalty. There was conflicting evidence on the subject and it is clear that the determination of the issue depended upon a question of fact which could only be decided by a jury. The machinery in dispute was a certain steam engine and saw-mill machinery put up by one Kilburn on a tract of timber land belonging to him and used in sawing logs out from the land. Whether the engine and machinery were portable or permanent was the question. Kilburn, the owner, had treated it as personalty by selling it to William L. Marsh, by a written bill of sale, and the latter transferred it to his son, the defendant, before the sheriff's sale of the land but after the plaintiff's judgment against Kilburn had been entered. There was considerable testimony that the engine and machinery were portable in their character and were intended to be moved from one tract of timber land to another to cut up the logs on each. This brought the case within the catalogue of cases of an equivocal character which require the verdict of a jury to determine. In Harmony Building Association *v.* Berger (99 Pa. 320) we said: "There may be some things which are so essentially a part of the freehold that as between vendor and vendee the intention of the owner may be of little weight. But this is not such a case. The articles themselves were of such an equivocal character as to raise a jury question." That was a case in which the articles in controversy were placed in position by the owner of the premises. As between landlord and tenant the doctrine that physical annexation alone is the test has long been exploded. (Hill *v.* Sewald, 53 Pa. 271; Seeger *v.* Pettit, 77 Id. 437.) In Harmony Building Association *v.* Berger (*supra*), we said further that "the object and intention of the owner is to be regarded in considering the character of the articles." The learned Court below was very careful to say to the jury that if the character of the mill for permanency was certain, the mere intention of Kilburn to the contrary could not change it and make the machinery personalty. But we think it quite clear upon the testimony that the character of the mill for permanency was a very debatable question, and that the intention and ob-

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ject of the owner became very material in determining the question. In this point of view the evidence offered and received under objection and exception was highly illustrative. Thus the witness, A. W. Day, the tail sawyer at the mill, testified under exception as follows: "Q. What kind of a mill was it? A. It was a movable mill. I suppose the engine and boiler hung together but it was movable and intended to move it; that was their calculation after they cut their stock out there. Q. Did you have any conversation with Mr. Kilburn in the winter of '86 as to what he was going to do with this mill after finishing the timber on the Flatt lot? A. He said he was going to move it up to the State Line Run from there." Another witness, Whitcomb, had previously testified under objection and exception that he was the millwright who built the mill and was present with Benedict, the plaintiff, who sold the mill, and Kilburn who bought it, at the time of the sale. He was asked, "Q. State to the jury what took place there? A. He went and looked at this mill and decided on taking the saw-rig part, that is the saw-rig, carriage, and head blocks, and not the engine and boiler. Mr. Benedict wanted Kilburn to take the engine and boiler but he said it was too heavy: he wanted a lighter rig on a portable boiler so he could move it. Mr. Kilburn said to Benedict that he had a small engine, that he would have it brought to his shop and overhaul it and if it needed any repairing he would repair it; and Mr. Kilburn wanted a new portable boiler. Q. What was said as to the character of the mill he wanted? A. He said he wanted a light rig that he could move; he said over three different places; that he wanted to move it on different lots where there was timber to cut. Q. What did he say, if anything, about moving to different tracts of land where there was timber? A. He said he wanted to move it several times."

The foregoing is the testimony, the admission of which is complained of in the two assignments of error in this case. We see no error in its admission. It was directly upon the very point in controversy, and indicates with much force and directness the very purpose of the owner to put in portable machinery. It has the additional force of a communication of this purpose to the plaintiff himself and would be admissible for that reason. In view of the very conservative and cautious character of the charge of the Court it was not possible for the jury to be misled as to the precise question to be determined, and the considerations to be taken into account by them.

Judgment affirmed.

Opinion by GREEN, J. S. H. T.

Oct. '88, 58. October 15, 1888.

Dill v. Knapp.

Evidence — Admissibility of — Affidavit of defence—Practice—Rules of Court of Butler County—Construction of.

In an action of assumpsit in the Common Pleas of Butler County, brought by K. against D., to recover the value of certain barrels of petroleum, D. filed an affidavit of defence, averring that by fraud and deceit he had been induced to enter into a contract with K. for the purchase of a leasehold of two oil wells, and that by reason of the false representations of K. he had been put to great expense in regard to these wells; that he consequently had been obliged to surrender them, and that K. had given him an order for the barrels of oil to recompense him for his damage thus sustained. No copy of the contract or order was annexed. On the trial D. offered evidence to show that he had expended a large amount of money in running, managing, and controlling the wells, and that the proceeds of the oil were applied by him on account of the indebtedness due him by plaintiff, and to recompense him therefor; also, that defendant had spent a large sum in improving and repairing the wells, and that the order was given to him to compensate him for the money so laid out on plaintiff's property. This evidence was objected to on the ground that he had not complied with a rule of Court which requires the defendant to "file with his plea sworn copies of any instrument of writing, book accounts, etc., aver material facts on which he relies for his defence, under oath; . . . . and file his affidavit stating what amount he verily believes he is entitled to defalk or to recover from plaintiff in said suit;" and also because the defence was not set out in the affidavit of defence. The objection was sustained and the evidence excluded:

Held, not to be error.

Error to the Common Pleas of Butler County.

Assumpsit, by O. G. Knapp against John Dill, to recover the price and value of 904.10 barrels of petroleum. Plea, *non assumpsit*.

At the same time that he filed his plea the defendant filed an affidavit of defence, averring that he had a just and legal defence to the whole of the plaintiff's claim, as follows:—

(1) He is not indebted to the plaintiff in any amount, and for the purpose of this defence denies each and every allegation in plaintiff's affidavit of claim in this case.

(2) The plaintiff, by fraud and deceit, and upon fraudulent representations made to affiant, induced affiant to enter into a contract to purchase from plaintiff two certain oil wells for the sum of $2000, which said wells, in fact, were not worth more than $1000. And by reason of the false and fraudulent representations of the plaintiff affiant was induced to add additions, repairs, and expenses to said wells of about $1500, the said plaintiff having represented to affiant, prior to and at the time of contract aforesaid, that one of said wells was not tubed through nor into the oil-producing sand, but that there was an anchor and a working-barrel in the said well, and the

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same was filled up to the top of the sand, and was only tubed down to the top of the sand, and was pumping on top of the sand, and if cleaned out said well was good for an eight-barrel well per day, and guaranteed said well to be a good eight-barrel well. That affiant went to great expense and cleaned out said well, and then found said well was and had been tubed down to the bottom of the sand, and there was no anchor or no working-barrel in said well, and the representations were false and untrue, and were fraudulently made by said O. G. Knapp, and by his fraudulent representations the said contract was void. And the said O. G. Knapp gave affiant an order for the oil for which this suit is brought to the Pipe Line, for the purpose of partly recompensing affiant for his damage sustained and his expenses put upon said well, which he had sustained and incurred by reason of the false and fraudulent representations of the plaintiff in this case, and the defendant is not indebted to the plaintiff in this suit in any amount, but if a fair adjustment of the matter was made the said plaintiff would be indebted to affiant in the sum of about eight hundred dollars.

Affiant further states that said well was not as represented by the said O. G. Knapp, upon which representations affiant has relied. But the same did not do two and three-fourth barrels of oil per day. All of which affiant states to the best of his knowledge, information, advice, and belief.

On the trial, before HAZEN, P. J., the following facts appeared: O. G. Knapp by an agreement in writing sold to John Dill a leasehold of a farm in Fairview Township, upon which were two oil-producing wells, for the sum of $2000, to be paid in oil produced from said lease and wells, all the oil produced therefrom to be run to the credit of Knapp in the pipe line until the purchase-money should be paid in full. Knapp gave blank orders to C. R. Wattson, agent of the pipe line at Petrolia, so that he could sell the oil in the line, and place the proceeds thereof to Knapp's credit in the Argyle Savings Bank, as a credit on Dill's contract. Dill took possession of the lease and wells, and pumped the wells until he had put 904.10 barrels of oil in the pipe line to Knapp's credit. Dill then obtained from Wattson one of the orders in his own name, and sold the oil, and Knapp brought this suit to recover the value thereof.

Knapp proved the sale of the oil, the price obtained therefor by Dill, and that he had refused to pay over the same when requested, and rested. Dill claimed that the order for the oil had been given him by Knapp to pay him for the labor and money expended in cleaning out the wells and in improving the machinery connected with them, as set forth in his affidavit of defence. This was denied by Knapp.

Defendant offered to prove that the amount of oil sued for by the plaintiff was given by the plaintiff to the defendant, and the defendant received the oil in pursuance of this order given him by the plaintiff, and that the money was applied to the indebtedness that the plaintiff owed to the defendant, for the purpose of showing that this oil was given to him to recompense him for money paid out in improving his property, in running, managing, and controlling his wells.

Objected to by plaintiff, for the reason that the affidavit of defence does not advise of any alleged indebtedness on the part of O. G. Knapp to John Dill. There is no copy of any account or settlement filed, there is no defence set up here of offset except upon the contract, which has not been proved, and therefore that is incompetent and irrelevant. Objection sustained; because the defendant had not complied with sect. 2 of the rule of Common Pleas Court, the said contract being in writing. (First assignment of error.)

Defendant also proposed to prove that he had laid out and expended a large amount of money in improving and repairing the two oil wells belonging to the plaintiff, and that this order was given by the plaintiff to defendant to pay or compensate the defendant for the money laid out and expended in improving the plaintiff's property.

Objected to by plaintiff's counsel as incompetent and irrelevant, for the reason that no such defence was set forth in the affidavit of defence. Objection sustained, as not being in accord with the requirements of said rule of Court. (Second assignment of error.)

The rule of Court referred to was as follows:

"Defendant shall file with his plea sworn copies of any instrument of writing, book accounts, specify items of claim, and aver material facts upon which he relies for his defence, under oath; and file his affidavit, stating what amount he verily believes he is entitled to defalk or to recover from plaintiff in said suit."

Verdict for plaintiff for $653.38, and judgment thereon. Whereupon the defendant took this writ, assigning for error the rejection of his evidence as above.

Lev. McQuistion (*William A. Forquer* with him), for plaintiff in error.

R. P. Scott, for defendant in error, cited—
Peck's Appeal, 11 WEEKLY NOTES, 31.

January 7, 1889. THE COURT. The matter contained in the first offer of proof must be taken in connection with the defence set forth in the defendant's affidavit. If it was not admissible as a part of that defence it was not admissible at all. Upon recurring to the affidavit it is at once ap-

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parent that the whole substance of the defence grew necessarily out of a contract, which the defendant on the stand admitted to be in writing, and in the performance of which by the defendant the plaintiff became indebted to the defendant in the manner set forth in the offer of proof. The only indebtedness alleged in the affidavit was claimed to be due for work done by the defendant in the execution of the terms of the contract which is there described, but no copy of that contract was set out in the affidavit of defence; nor was any such copy filed, either with the affidavit or with the plea. The rule of Court on the subject is so defectively and ungrammatically written as to be almost unintelligible, but substantially it means that any instrument of writing relied upon by the defendant must be filed with the plea. It is not required to be set out, or even described in the affidavit of defence, nor is any penalty of inadmissibility prescribed, for noncompliance with the rule. But the Court in rejecting the offer said that to entitle the defendant to offer proof in regard to written instruments the requirement of the rule must be observed. That is the construction put by the Court upon its own rule, and we cannot say it was error. It was doubtless the meaning intended to be conveyed by the rule, though it is not so expressed. Here is the rule as printed in the paper-book. "Section 2. Defendant shall file with his plea sworn copies of any instrument of writing, book accounts, specify items of claim, aver material facts on which he relies for his defence under oath as required in section one of plaintiff, and file his affidavit stating what amount he verily believes he is entitled to defalk or to recover from plaintiff in said suit." By the literal terms of this rule an affidavit of defence seems to be required only when the defendant desires to "defalk or to recover from plaintiff in said suit." If an instrument of writing or a book account is to be used, as we must infer, for it is not so expressed, he shall file with his plea a sworn copy which would imply that it is only necessary to file the sworn copy, but as material facts must be averred under oath, it is a reasonable construction of the rule to infer that whatever facts are necessary to connect the instrument or account with the defence must at least be stated in writing and under oath. In the present case therefore we interpret this rule to mean that if the defendant has a defence which is based upon an instrument in writing he must, if he wants to give the instrument in evidence, at least file a sworn copy of it with his plea. As this was not done the Court below was not in error in rejecting the defendant's offer of proof since the defence grew out of the instrument which contained the contract of the parties. The same is true of the written order for the oil, of which no copy was filed, but which is nevertheless embraced in both offers of proof. The remaining part of the second offer does not appear in the affidavit of defence at all, and we must assume that it was for that reason not admissible.

Judgment affirmed.

Opinion by GREEN, J. S. H. T.

Common Pleas.

C. P. No. 1. June 6, 1889.

Commonwealth v. Kerchner & Miller, Executors of Agnes Redder, deceased.

Decedent's estate—Collateral inheritance tax—Act of May 6, 1887—The provision exempting estates of less than $250 refers to the amount passing to a collateral and not to the decedent's estate—Legacies under $250 are exempt from tax.

This was a case stated in which the following facts were agreed upon:—

The decedent died possessed of real and personal property situated in Pennsylvania amounting in value to $3416.88. By her will she bequeathed the sum of $50 to the fathers of St. Bonafacius Church and a like sum to St. Vincent Orphans' Asylum, and the remainder of her estate and property to her daughter.

The Commonwealth claimed the tax on the two legacies of $50 each.

J. P. Klinges, for the Commonwealth.

Boies Penrose, contra.

The provision in the Act clearly has reference to the amount passing to other than a father, mother, etc., and does not refer to the residue of the estate. The object of the Legislature was to exempt all legacies under $250, and this intent must prevail.

Dwarris on Statutes, 175.

The construction contended for by the State would render the Act unconstitutional, as it would create a discrimination and produce unequal taxation. A legacy of $100 bequeathed by a testator whose whole estate was less than $250 would be free of tax, while a legacy of exactly the same amount from a testator possessed of a larger estate would be subject in the legatee's hands to the tax.

THE COURT. Judgment on case stated for the defendants. W. G. T.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, AUG. 9, 1889.* [No. 15.

Supreme Court.

Jan. '89, 40. May 9, 1889.

New York, Lake Erie, and Western R. R. Co. v. Enches.

Railroad company—Negligence—Contributory negligence—Requisites of charge to jury, where contributory negligence is set up as a defence.

It is contributory negligence for a passenger to leave a car when it is in motion.

E. having brought suit against a railroad company for injuries received through the alleged negligence of the defendant, offered testimony to show that she was a passenger upon defendant's train, and upon arriving at her destination, she was detained on trying to leave the train by incoming passengers, and while standing upon the lower step of the platform preparing to alight, she was thrown from the cars by a sudden jerk in starting. Defendant's evidence showed that plaintiff and her mother endeavored to get off after the train had started, and were warned not to do so by a brakeman, who offered to stop the train. They persisted; the brakeman assisted the mother to get off in safety, but plaintiff stepped off, and was thrown, receiving the injuries for which suit was brought. Defendant requested the Court to charge that if the jury believed that plaintiff undertook to get off the train after it began to move, she was guilty of contributory negligence, and could not recover. This point the Court, "as a legal proposition applicable to the evidence in the case on trial," refused, leaving it to the jury "to find, from the evidence, and taking all the circumstances into consideration, whether the plaintiff, in attempting to get off the train, was guilty of such negligence or want of care, as contributed to the injuries complained of:"

Held, that the instruction was error; the point should have been affirmed.

Defendant also requested the Court to charge that if plaintiff attempted to get off the train after it was in motion, in disregard of the warning not to do so, she was guilty of contributory negligence. This point was answered in the same manner as the other:

Held, to be error.

In a trial of a suit for damages for alleged negligence, in which contributory negligence is set up as a defence, it is the duty of the Court to explain to the jury what would constitute contributory negligence of the plaintiff, and then to instruct them that if they found such facts in the case, the plaintiff could not recover if the accident resulted wholly, or in part, from such contributory negligence. It is not enough to say generally to the jury that a plaintiff cannot recover if he has been guilty of contributory negligence, they must be enlightened as to what facts would constitute such negligence in view of the testimony.

Error to the Common Pleas of Warren County.

Case, by Laura Enches against the New York, Lake Erie, and Western Railroad Company, to recover damages for injuries received by plaintiff owing to the alleged negligence of defendant. Plea, not guilty.

Upon the trial, before BROWN, P. J., it appeared that on the morning of August 21, 1886, the plaintiff, with her mother, took passage on the N. Y. Pa., & Ohio Railroad, leased and operated by the New York, Lake Erie & Western R. R. Co., at Bear Lake, in Warren County, for Columbus, in the same county. It was a local train, running between Salamanca, N. Y., and Meadville, Pa. Columbus is a station at a small town of some three or four hundred inhabitants, three miles east of the city of Corry. The train consisted of the engine and tender, baggage-car and two coaches, one being a smoking-car and the rear one the ladies' car. When the train was nearing Columbus Station the brakeman called out the name of the station in the car where the plaintiff and her mother were, in time to allow passengers to prepare for exit. The plaintiff testified that she heard the brakeman call out the station, and that she had been there before and knew when she reached the station. The plaintiff claimed that she prepared to go out, and started as soon as the train stopped, and was detained by incoming passengers near the door, but went out, her mother being ahead, and down the steps. That her mother stepped off upon the platform before the train started, safely, and that when plaintiff was standing on the last step of the car platform the train was started with a sudden jerk, and she was thrown clear across the station platform, receiving the injury for which suit was brought. She claimed further that the train was not stopped a sufficient length of time to enable them to get off.

The defendant's evidence showed that there were a number of passengers, three or four at least, who got off the train, and passengers who were waiting at the station to go out on the train passed in, and then the train was started. After the train began to move, the plaintiff and her mother came out on the forward platform of the ladies' car, the mother ahead and the plaintiff close behind her, and the mother started down the steps. The brakeman warned them not to try to get off, but to let him up and he would pull the bell rope and stop the train. He tried to make his way up the steps of the car, but the ladies kept pressing their way down, and finding that they were about to jump, he assisted the mother and kept her from falling. The plaintiff jumped while the brakeman was helping her mother, and fell on the platform, receiving the injury complained of in this suit.

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The conductor and other employés testified that one minute was the usual stop at that station, and that the stop on that morning was of the usual length. The plaintiff herself testified that the cars "were standing perhaps a moment; perhaps they stopped a half a minute, and perhaps a minute, I could not say." Her mother testified, "I don't think it stopped a minute, and might have stopped half a minute."

Other witnesses put the stop at from three-fourths of a minute to a minute and a half.

The Court charged the jury upon the question of negligence as follows:—

"The plaintiff bases her right to recover on the allegation of negligence on the part of the defendant; and the burden of proof is on her to sustain such allegation by the weight of evidence. If she has not done so she ought not to recover. If she has, then your verdict should be in her favor, unless it further appears that the plaintiff herself was also guilty of such negligence and want of care as essentially contributed to her injury. It is the law, that, although the defendant may have been guilty of negligence and want of care in the management of its cars, yet if the jury are satisfied that the plaintiff was also negligent and careless, and with her negligence and carelessness contributed in any degree to the injury, she cannot recover.

"The first question for you to answer, from the evidence, is, were the employés of the defendant company guilty of negligence in the starting of the train on which the plaintiff was a passenger and from which she was making her exit at the time of the accident? It is the duty of a railroad company, engaged in the business of the transportation of passengers, to conduct them safely and to make stops of a sufficient length of time to enable the passengers, using due diligence and proper care, to alight with safety. The claim on the part of the plaintiff is that the defendant was guilty of negligence in this: that the train was not stopped a sufficient length of time to enable the plaintiff, with ordinary care and with reasonable expedition, to alight safely.

"The law does not prescribe how long a train of cars shall be stopped to enable passengers to depart. The length of time must depend upon the particular circumstances of the case of which the jury are to judge. What would be negligence under given circumstances might not be under others. Passengers alighting from a train at a station where a large number get on and off, should, manifestly, be given more time than those alighting at a station where only a few passengers get on and off.

"The rule that we lay down for your guidance is, that if the train at the time of the accident to the plaintiff, taking into consideration the number of persons to alight at Columbus Station and the number on the platform to take passage, stopped a sufficient length of time to enable the plaintiff, using reasonable care and reasonable expedition, to leave with safety, then the defendant is not chargeable with carelessness, and the plaintiff should not recover.

"On the other hand, if, taking all the circumstances into account, such sufficient length of time was not given, then the defendant was guilty of carelessness; and if the plaintiff, without fault on her part, sustained injury as the consequence of such carelessness, she is entitled to a verdict.

"If you find that the plaintiff is entitled to a verdict, it will be your duty to ascertain what amount of damage in money will compensate her for such injuries and infirmities as the evidence shows is attributable to the want of care on the part of the employés of the railroad. This is a question for you to answer from the evidence and not for the Court. . . . etc."

Defendant requested the Court to charge, *inter alia*, as follows:—

(4) If the jury believe, from the evidence, that the plaintiff undertook to get off the train after it began to move, she is guilty of contributory negligence and cannot recover. *Answer*. This point, as a legal proposition, applicable to the evidence in the case on trial is refused; but we refer it to you to find, from the evidence, and taking all the circumstances into consideration, whether the plaintiff, in attempting to get off the train, was guilty of such negligence or want of care, as contributed to the injuries complained of; if she was she is not entitled to recover.

(5) If the jury believe that the plaintiff attempted to get off after the train was in motion, in disregard of the warning of the brakeman not to, she was guilty of negligence and cannot recover. *Answer*. This point is refused as applicable to the evidence in the case on trial; but if you find that the plaintiff attempted to get off the train after it was in motion, and if, taking all the circumstances into account, you find that this attempt was such an act of negligence and imprudence on her part as contributed to her injury then she cannot recover.

Verdict for plaintiff for $7750. A motion for a new trial having been refused, defendant took this writ, and assigned for error, (1) and (2) the answers to its 4th and 5th points, *supra*. (3) The Court erred in its general charge to the jury by giving undue prominence to the plaintiff's allegations of the negligence of the defendant, and by obscuring or overlooking the contributory negligence of the plaintiff. (4) and (5) a portion

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of the charge of the Court, and the admission of certain evidence as to the measure of damages, not necessary to the report of the case.

W. M. Lindsey (*James O. Parmlee* and *F. P. Ray* with him), for plaintiff in error.

The plaintiff's allegation of negligence rests upon two propositions, (1) that the train did not stop long enough for her to alight; (2) that she was thrown from the car by an improper starting or sudden jerking of the train. If the first proposition fails both must fail. The testimony showed that other passengers got off, and if there was time enough for them, there was time enough for her.

The getting off of a moving train is *prima facie* negligence.

Railroad Co. *v.* Aspell, 11 Har. 147.
McClintock *v.* Penna. Railroad Co., 21 WEEKLY NOTES, 133.

There are circumstances under which the rule is changed, but they did not exist, and were not alleged in this case.

As to the answers of the Court to defendant's points, see—

Catawissa R. R. *v.* Armstrong, 2 P. F. Sm. 282.
Baker *v.* Fehr, I Out. 72.
Penna. R. R. *v.* Zebe, 9 Casey, 318.
Penna. R. R. *v.* Peters, 116 Pa. St. 206.
Gabett *v.* M. & L. R. R., 16 Gray, 501.
Secor *v.* T. P. & W. R. R., 10 Fed. Rep. 11.

The defence of contributory negligence was not adequately presented in the charge, nor in the answers to the points.

Schwenk *v.* Kehler, 22 WEEKLY NOTES, 442.
Bishing *v.* Third Nat. Bank, 12 Nor. 79.

Charles H. Noyes (*Watson D. Hinckley*, *A. F. Bole*, *R. Brown*, *Charles W. Stone*, *H. E. Brown* and *William E. Rice* with him), for defendant in error.

It was the duty of defendant to stop its trains at stations long enough to enable the passengers to enter and leave the cars with safety. Whether it discharged its duty in that particular is not to be determined by counting the length of the stop, but by the necessities of the passengers entering or leaving the cars at the particular station. The testimony shows that the stop was not long enough for this purpose, as there was no proof that there was any delay on the part of the plaintiff.

The question whether she was negligent was purely for the jury; and the burden of showing it was upon the defendant.

Hays *v.* Gallagher, 72 Pa. St. 140.
C. & P. R. R. *v.* Rowan, 66 Id. 393.

Assuming that the plaintiff did get off while the train was in motion, which was not proved, this case is ruled by—

Penna. R. R. *v.* Kilgore, 32 Pa. St. 292.
Filer *v.* N. Y. C. R. R., 49 N. Y. 47.

June 28, 1889. THE COURT. There was abundant evidence in the cause that the plaintiff got off the car after it had started and while it was in motion. In view of this testimony the defendant's fourth and fifth points were propounded to the Court below. There was no evidence that there was any necessity apparent or real for the plaintiff to leave the car while it was in motion, and hence there was no occasion for any qualifying reservation as to the effect of her act of leaving the car while in motion if the jury believe such to be the fact. We are clearly of opinion therefore that it was the duty of the learned Court below to answer the points upon the facts of which they were predicated. This being so the simple question raised by the fourth point was whether the plaintiff was guilty of contributory negligence if the jury believed from the evidence that she undertook to get off the train after it began to move. The mere fact of the accident proved that the motion of the car was sufficient to cause the accident from the attempt to leave the car after it started, and hence the hypothesis of the point was fairly presented in the very terms in which it was stated and required a categorical answer. We have so often held that it is contributory negligence for a passenger to leave a car while it is in motion that it is unnecessary to discuss that question. (Railroad *v.* Aspell, 23 Pa. 147; McClintock *v.* Pa. R. R. Co., 21 WEEKLY NOTES, 133.) There being nothing in the circumstances of this case to qualify the effect of the facts presented in the point it should have been affirmed as it stood. The result of the qualified answer was to transfer from the Court to the jury the disposition of the question as to the legal effect of certain facts hypothetically stated in the point but warranted by sufficient testimony.

The same considerations are applicable in an increased degree to the answer given to the defendant's fifth point. There the act of leaving the car while in motion and in disregard of the warning of the brakeman not to leave, was submitted to the Court and was answered in the same manner as the fourth point was answered by referring the whole legal effect of the facts supposed by the point to the jury. There was distinct affirmative evidence that such a warning had been given, but the Court entirely ignored this feature of the point and said nothing about it in the answer. This was clear error. The answers to both these points were in reality not answers. They were mere directions to the jury that if the plaintiff was guilty of contributory negligence in attempting to leave the car she could not recover. Of course those instructions were legally true but they were not instructions upon the effect of the particular facts hypothetically stated in the points, and hence were not responsive to the points in any sense. If there had been no evidence to support the hypotheses

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of the points the error would have been immaterial, but there was such evidence and the defendant had a right to a specific instruction upon the effect of the facts stated. The first and second assignments of error are sustained.

We are of opinion also that the third assignment is sustained. On the trial of such a case it is the duty of the Court to explain to the jury what would constitute contributory negligence of the plaintiff and then to instruct them that if they found such facts in the case the plaintiff could not recover if the accident resulted wholly or in part from such contributory negligence. It is not enough to say generally to the jury that a plaintiff cannot recover if he or she has been guilty of contributory negligence. The jury must be enlightened as to what facts would constitute such negligence in view of the testimony, otherwise they have no guide by which to regulate their action, in determining the controverted facts. In the present case there was no definition or statement of any kind as to what was the meaning of contributory negligence or as to what kind of facts would constitute it or even tend to prove it. There is but one sentence in the charge on that subject, and that is a mere general statement of the rule of law that a plaintiff who has been guilty of contributory negligence cannot recover. All the rest of the charge is upon the alleged negligence of the defendant and the question of damages, and under the whole charge and the answers to the points the jury were without any instructions either upon the meaning of the term "contributory negligence," or upon the question as to whether there were any facts in evidence either proving or tending to prove that there was contributory negligence in the case. We have frequently held that such charges are misleading and therefore erroneous. The third assignment is sustained. The fourth and fifth assignments are not sustained.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J.

H. C. O.

July '88, 168. February 7, 1889.

Geiger's Appeal.

Wills—Construction of—Fee simple—Life estate—Executors and administrators—Liabilities of—Commissions—Counsel fees—Book entries—Evidence—Life tenant—Duty to keep down incumbrances.

A testator by his will devised his real estate to his wife, her heirs and assigns, then authorized his executors to sell the same for the payment of debts, and further directed that after his wife's death his property should be sold, his debts paid, and the remainder of the proceeds should be distributed among his children:

Held, that the widow took but a life estate.

The above testator appointed his widow and a son executors. The widow claiming that the real estate was devised to her in fee, sold and conveyed the same individually to a purchaser, the son joining in the receipt for the purchase-money. A portion of the purchase-money was applied to pay the debts of testator, and the residue went to the widow. After the widow's death the son filed an account as surviving executor:

Held, that accountant should be surcharged with the above purchase-money, except such part thereof as was applied to pay testator's debts.

Many years after testator's death, the widow being unable to keep the rest of the real estate, it was sold and conveyed by both executors to the son. The purchase-money was paid to the widow, except a certain part with which a judgment was paid off, which was a lien on the land, together with interest thereon, which the widow had allowed to fall into arrear. The son improved the land and afterwards sold it at an advance. Upon the filing of his account by the son as surviving executor:

Held, that he was chargeable only with the purchase-money paid by him, and that he should be allowed credit for the amount of the judgment paid off, but not for the interest in arrear thereon, it having been the clear duty of the widow, as life tenant, to keep down incumbrances.

A claim by the accountant in this case against testator's estate was properly disallowed, the same being stale, and the account produced to support it not being in a book of original entries, and supported only by accountant's testimony.

An executor who has used the money of the estate as his own, has kept no separate bank account, produces no vouchers for many items of credit, and files finally an account involving a long, tedious, and expensive audit, and upon which he is heavily surcharged, is not entitled to commissions. The fact that his dereliction of duty may have been the result of ignorance, makes no difference.

An executor is not entitled to credit for counsel fees for services rendered to him on his own account in defence of his conduct throughout his administration of the estate.

Appeal of Albert Geiger, surviving executor of Samuel Geiger, deceased, from a decree of the Orphans' Court of Montgomery County, in the matter of the account of the appellant.

Before the Auditor, N. H. Larzelere, Esq., appointed to audit and restate the account, the following facts appeared: Samuel Geiger, late of Pottsgrove Township, Montgomery County, died testate, May 13, 1854. There survived him a widow, Sarah Geiger and children, as follows, viz: Albert Geiger, Catharine, intermarried with Frederick Engle, Samuel Geiger, Mary, intermarried with Aaron Engle, Sarah, intermarried with William Kepler, and Michael E. Geiger.

By his will Geiger provided as follows:—

I give, devise and bequeath unto my beloved wife Sarah Geiger, her heirs and assigns forever, all my property, real, personal and mixed, of what nature or kind soever and wheresoever the same shall be at the time of my death.

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And I do nominate, constitute and appoint my said wife and my son Albert to be the executors of this, my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore by me made, and I do declare this to be my last will and testament. Also, I direct that if the executors see proper to sell any of the property, real or personal, to pay debts they may do so. Also, I do direct, after the death of my wife, the property, both real and personal, shall and must be sold, and all my just debts paid, and the remainder of the money to be equally shared amongst my children.

Samuel Geiger, the son, died in 1860, without a widow or children surviving. Sarah Kepler died July, 1860, leaving to survive her Henry Kepler, her husband, and one child, Wilhelmina, now intermarried with Morris H. Zuber. Wilhelmina was born April 19, 1858. Sarah Geiger, the widow, re-married in 1860, making John Bowman her second husband. Bowman died February, 1880, and Sarah in March, 1887. Testator's will was dated August 23, 1853, and was admitted to probate June 7, 1854.

Letters were duly granted to the executors, but no inventory was filed. In 1887 Albert Geiger, surviving executor, under an order of Court, filed an account showing a balance in his hands of $223.94. Wilhelmina Zuber filed numerous exceptions.

Testator at the time of his death was seised of a tract of land of 14 acres in Pottsgrove Township. There were at the time of his death two judgments against him, one for $900, and the other for $400.

On April 1, 1859, Sarah Geiger sold the above 14-acre tract to Jonas Moothard, for $1560. She conveyed it to him individually. The recital in the deed was as follows: "Being the same premises which Frederick Brendlinger and Mary his wife, by deed dated April 19, 1857, did grant unto Samuel Geiger, and Samuel Geiger by his last will dated August 23, 1853, devised unto his said wife, Sarah Geiger, in fee, as will appear by said last will and testament." The receipt to this deed was signed by both Sarah and Albert Geiger, April 12, 1859. Out of the proceeds the judgment of $900 was paid. The remainder of the purchase-money was paid into the hands of Sarah Geiger, who claimed it as her own.

Sarah Geiger also claimed to own in fee the rest of the real estate and appropriated the rents thereof, paying the interest on the remaining judgment of $400. In June, 1868, she became somewhat embarrassed financially and it was agreed that Albert Geiger should become the purchaser of a fifty-nine-acre farm and three small unimproved lots connected therewith, at the price of $2000; accordingly a deed was made by the executors, joined in by all the heirs excepting Wilhelmina Zuber, conveying this property to Michael E. Geiger, on the 15th of June, 1868, who on the same day re-conveyed it to Albert Geiger. Wilhelmina was only ten years old at that time, and was not represented either by a next friend or a guardian in the transaction.

Shortly before the sale the following receipt was given by Sarah Geiger (then Bowman):—

READING, June 6, 1868.

Know all men by these presents, that I, Sarah Bowman, late widow of Samuel Geiger, deceased, and now wife of John Bowman, of the Township of Colebrookdale, County of Berks and State of Pennsylvania, have had and received all moneys whatever promptly and entirely from my son, Albert Geiger, who was and is still joint executor with me in the matter of my late husband's Samuel Geiger's estate, and I do hereby certify that to my knowledge the said Albert Geiger has not now any money or obligations of indebtedness to said estate in his hands, having accounted to me fully for everything whatever which he received.

Out of the proceeds the judgment of $400 was paid, with the back interest, also various expenses of sale. The balance, except $296.87, which remained in the hands of the accountant, was paid to the widow or her nominees. Subsequently, in 1876, Albert Geiger, having greatly improved the farm and lots, sold the same for $3500.

The exceptant claimed that the accountant should be surcharged with the purchase-money of the fourteen-acre tract and with the proceeds realized by him from the sale of the residue of the real estate.

The Auditor held that the widow had a life interest only in the real estate, and that, therefore, the accountant was liable to be surcharged with the purchase-money of the fourteen-acre tract, except such part as was used to discharge the $900 judgment. As to the remainder of the real estate the Auditor held that accountant was only liable in the sum of $2000, and that he must be allowed credit on this to the extent of the portion thereof used to pay the $400 judgment. No credit was, however, allowed for the back interest paid on that judgment on the ground that it was the duty of the widow as life tenant to keep down the interest on that incumbrance.

Accountant claimed credit for a debt due him by his father's estate of $179.69. As to this the Auditor reported as follows: "In support of Albert's claim of $179.69, for which he asked credit in his account, he produced an old book, on the back page of which there is an account against his father running from 1847 to 1853. Albert is the only witness to this account, and it is very apparent that it is not a book of original entries. The Auditor concludes that the entries were all made at one time, and from some other book or memoranda. Another convincing proof of this is, that while this account begins in 1847, on the outside of the book is

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written as follows: 'The property of A. Geiger, January 4, 1851.' There is no proof when this was written, but taken with the fact, very apparent on the face of the page containing the charges, leads the Auditor to find as a fact that this is not a book of original entries." The accountant was accordingly surcharged with above amount.

The Auditor also reported as follows:—

"The accountant's claim for $120 commissions cannot be allowed. Commissions of trustees are not a question of percentages, but of compensation for labor and responsibility. (Montgomery's Appeal, 5 Norris, 230.) Where neither the one has been performed nor the other incurred there is nothing to be compensated. (McCausland's Appeal, 2 Wright, 470; Robinson's Estate, 5 Phila. 99.) In this estate the accountant has earned no compensation. Although in no respect guilty of any fraud, he has never performed in an ordinary manner the duties devolved by law upon him. If he was insolvent now, the heirs of Samuel Geiger would lose every cent of this money. He is compelled by citation to file his account, and files such a one as has caused a long, tedious, and expensive audit to ascertain that which it was his legal duty to have kept clear and simple. To reward an executor in such a case would be a premium upon looseness and carelessness in the performance and discharge of sacred duties and against the policy of the law. A trustee at least is bound to use ordinary care and prudence in the charge he undertakes. This subject is clearly illustrated in the following cases: Seiger's Estate (3 WEEKLY NOTES, 368); Sharp's Estate (2 Phila. 280); Sauter's Estate (6 WEEKLY NOTES, 95). Neither can the claim for $100 counsel fees for services to accountant be allowed. These were services on his own account in defence of his conduct throughout the administration of this estate. He must therefore pay for them out of his individual pocket."

Exceptions filed to the Auditor's report were dismissed by the Court in an opinion by SWARTZ, P. J., and a decree entered confirming absolutely the account as restated. The accountant thereupon took this appeal, assigning for error the decree of the Court.

Augustus S. Sassaman, for appellant.

In the construction of wills the law in doubtful cases leans in favor of an absolute rather than a defeasible estate, and that as early as can be.

Smith's Appeal, 23 Pa. St. 9.
Manderson *v.* Lukens, Id. 31.
Passmore's Appeal, Id. 381.
Rewalt *v.* Ulrich, Id. 388.
Letchworth's Appeal, 30 Id. 175.
Burd *v.* Burd, 40 Id. 182.
Womrath *v* McCormick, 51 Id. 504.
Fulton *v.* Fulton, 2 Grant, 28.

In regard to the last sentence of the will, there was no trust created or established in the surviving executor; as words of desire, expectation, direction, and recommendation create no trust.

Pennock's Estate, 20 Pa. St. 268.
Burt *v.* Herron, 66 Id. 400.
Johnson *v.* Johnson, 81* Id. 257.

The accountant is entitled to compensation for the performance of his services to the estate.

Scott's Intestate Law, 813-4.
Pusey *v.* Clemson, 9 S. & R. 209.
Miller's Estate, 1 Ash, 335.
Snyder's Appeal, 54 Pa. St. 67.
Price's Estate, 81 Id. 263.

An executor who files a separate account is not liable to the legatees of the testator for moneys received by his co-executor, unless he has been guilty of culpable negligence in respect thereto.

Muhlenberg's Estate, 35 Pa. St. 294.
Lightcap's Appeal, 95 Id 455.
Young's Appeal, 99 Id. 74.

Executors are entitled to credit for counsel fees.

Wilson's Appeal, 41 Pa. St. 94.
Sterrett's Appeal, 2 P. & W. 419.
Scott's Estate, 9 W. & S. 98.
Leow's Estate, 6 WEEKLY NOTES, 333.
Rankin's Estate, 9 Id 407.
Martin's Estate, 39 Leg. Int. 331.

John W. Bickel (*F. G. Hobson*, with him), for appellees.

February 18, 1889. THE COURT. The first assignment raises the question whether, under the will of Samuel Geiger, his widow, Sarah Geiger, took a fee or only a life estate. This is the important question in the case, though one entirely free from difficulty. The first clause in the will is as absolute a devise to the widow as could well be made, and the provision in the second clause, authorizing the executors to sell the real estate for the payment of debts does not in any degree curtail the previous devise. It merely authorizes the executors to do what the law authorizes them to do. Then follows the provision: "Also, I do direct, after the death of my wife, the property, both real and personal, shall and must be sold, and all my just debts paid, and the remainder of my money to be equally shared amongst my children." That this cuts the fee down to an estate for life is too plain for argument. Being the later clause in the will it must prevail. With this point established, we find no error in the ruling of the Orphans' Court upon the account of Albert Geiger, the surviving executor of Samuel Geiger. It was perhaps his misfortune that he yielded too readily to the demands of the widow, who was also his mother and co-executor. She appears to have been an imperious woman and thought she owned the estate in fee. But those who assume trusts must conform to the

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law. The executor charged himself with the sum of $2000, the purchase-money of certain real estate sold to Michael E. Geiger, but which was, in reality, a sale to the accountant. This property, after several years, was re-sold by the accountant at a considerable advance. The Court below did not surcharge him with this difference in view of the fact that the increase of price was due to the improvements which he had put upon the property, and that in the matter of the sale he had acted in good faith. The book account of $179.69 which the accountant claimed against his father's estate was properly disallowed for very satisfactory reasons given by the Auditor. He was the only witness to prove it; his book was manifestly not a book of original entries, and the claim itself was ancient, running back to 1847. The duty of the life-tenant to keep down interest on incumbrances is so well settled, that authorities upon this point need not be cited. Hence the credits claimed for this purpose were properly rejected. As to the refusal of the Court to allow commissions, it is sufficient to say that compensation is given only to the faithful steward. This accountant may not have intended any wrong; his derelictions may have been the result of ignorance, but we cannot excuse him on that account, and place him on the same plane with those who perform their duties intelligently. He appears to have used the moneys of the estate as his own; kept no separate bank account; did not produce vouchers for many of his items of credit, and as the learned Auditor finds, "files such an account as has caused a long, tedious, and expensive audit to ascertain that which it was his legal duty to have kept clear and simple." Whether such consequences are produced by knavery or stupidity, the results are the same to the parties whose money is thus wasted.

We find no error in this record.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

PER CURIAM. L. L., JR.

Jan. '89, 284. May 14, 1889.

Miller's Appeal.

Executors and administrators—Accounts of—Legacies—Who liable for interest on—Liability of co-executors for one another.

A., one of two co-executors, having made an assignment for the benefit of creditors, B., the other executor, made claim to a dividend at the settlement before an Auditor of the proceeds of real estate This claim was allowed by the Auditor upon the presentation of a judgment entered jointly against the executors, in favor of the Commonwealth to the use of certain devisees of the executor's decedent, on the ground that it was a first lien against the real estate, although it appeared that subsequently to the entry of the judgment the insolvent executor had paid all that was due from him upon it. B. made this claim to reimburse himself for other charges that he was liable to pay upon the account jointly filed by them, and which the insolvent creditor had failed to pay:

Held, that while the Auditor might have been justified in rejecting this claim, in allowing it, he did so as due to B., who was subrogated to the rights of the legatees of his decedent, and that it could not be treated as assets of said decedent in his hands.

Held, therefore, that B. was not liable for said amount to the residuary legatees of his decedent.

The co-executors having filed a joint account, an Auditor was appointed to make distribution of the balance, who reported a recommendation that $3000 thereof should be set apart to pay certain special legacies, and "safely invested for the legatees." This $3000 remained in the possession of A., and he having become insolvent the legacies to this amount were paid by B.:

Held, that this direction to invest was simply intended as a provision for the prompt payment of the legacies, and not to increase the residuary estate by the accumulation of interest.

Held, therefore, that B., never having been in possession of this fund, could not be charged with interest thereon for the benefit of the residuary legatees.

Appeal of Francis A. Miller, executor of Josiah Miller, deceased, from a decree of the Orphans' Court of Bedford County, in the matter of the account stated against said Josiah Miller as executor of Philip Devore, deceased.

Philip Devore died in January, 1868, leaving considerable real and personal estate. By his will he appointed Jacob L. Albright and Josiah Miller as his executors. Letters testamentary were granted to both February 6, 1868. These executors filed a joint account October 16, 1869, which was duly confirmed November 16, 1869, and S. L. Russell, Esq., appointed Auditor to make distribution. His report was confirmed February 14, 1870.

By the will of Mr. Devore six legacies of $500 each were given to his grandchildren and others, who were then quite young, and to be divided between them upon reaching majority.

The balance due on the first account, distributed by Mr. Russell, was $5818.14. The Auditor, in his report, directed that $3000 should be retained by the executors and safely invested for the legatees. The residue, $2818.14, was distributed presently to the residuary legatees and was promptly paid over to them by the executors. On October 26, 1871, the executors filed another account which was duly confirmed November 21, 1871. In this account they charged themselves separately, and the balance due by both was $4837.27. This account was also referred to Mr. Russell as Auditor, whose report thereon was duly confirmed, February 12, 1872, and the whole amount promptly paid, except about $307.90 due by Josiah Miller

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which was paid after judgment. The respective amounts in the hands of the several executors were kept separate by the Auditor in his report, thus: "Miller $2851.03, Albright $2018.97."

During all this period Albright was the active executor, and the bulk of the assets of the estate remained in his hands. In July, 1874, however, he became embarrassed and made an assignment for the benefit of his creditors. Miller, supposing himself liable for the $3000, set apart for the special legatees, inasmuch as he had joined with Albright in the filing of his first account, at once instituted proceedings to secure himself, and asked for and obtained a dividend of $192.61 with interest thereon amounting to $323.39, from the real estate of Albright in the hands of his assignee. This was allowed by the Auditor in settling Albright's assigned estate, upon the presentation of a joint judgment, entered in favor of the Commonwealth for the use of Philip Devore's devisees, against Albright and Miller upon a sci. fa. on a certificate from the Orphans' Court given prior to the payment of the amounts awarded on the second account of Devore's executors. This dividend was claimed by Miller and allowed, although it appeared that subsequent to the entry of the judgment Albright had paid more than the amount he was ordered to pay in the distribution of the second account.

In March, 1879, four of the residuary legatees of Philip Devore prayed the Orphans' Court for a citation against the executors, requiring them to file a final account. They filed answers to said citation, and an Auditor (Moses A. Points, Esq., was appointed, who charged Miller, *inter alia* (Albright having been discharged prior to the citation), with the above dividend, and also with the interest on the sum of $3000, which under the first Auditor's report was distributed to the special legatees and duly paid to each on their coming of age, and awarded said sums to the résiduary legatees.

Exceptions filed to the report of the Auditor were dismissed by the Court (BAER, P. J.), and a decree entered as recommended by him, whereupon Miller's executor (Miller having in the meanwhile died) took this appeal, assigning for error, *inter alia*, this action of the Court in charging the estate of Josiah Miller with the dividend received from the assigned estate of Jacob L. Albright, and also with interest on the sum of $3000 as aforesaid.

John M. Reynolds and *John Cessna*, for appellant.

Jacob H. Longenecker (*S. L. Russell* and *Thomas Armstrong* with him), for appellees.

May 27, 1889. THE COURT. The first assignment of error must be sustained. The money to which it relates was not due to the estate of Philip Devore but to Miller, for money which he had paid for his co-executor. The certificate from the Orphans' Court on which the lien had been entered in the Common Pleas was for a balance shown in the hands of the executors by their second account, which balance, so far at least as Albright was concerned, had been fully paid. When Miller presented it to the Auditor who was charged with the distribution of the proceeds of the assigned estate of Albright and asked a pro rata allowance upon it, he treated himself as subrogated to the rights of the plaintiffs who had been paid in full, and was himself the claimant. It may be that the Auditor would have been justified in rejecting this claim altogether, but he did not. He awarded to Miller his proportionate part of the fund as a creditor of Albright. The money was not due to Devore's estate, nor awarded to it, but to Miller, and it is a mistake to treat it as assets of Devore in the hands of Miller. The question raised by the second assignment is more formidable. The first account of the executors of Devore was filed as a joint account, on the 16th of October, 1869, and showed a balance in their hands of $5818.14. An Auditor was appointed to make distribution of this sum who reported a recommendation that $3000 should be set apart to pay six special legacies of $500 each, and "safely invested for the legatees," and that the balance should be distributed in accordance with a table submitted with the report. Final confirmation of this report was made on the 14th February, 1870, and distribution ordered in accordance therewith. The duty to see to the safe investment of the $3000 for the legatees was by the decree of confirmation imposed upon both the executors. The decree was not literally obeyed, but the legatees have been fully paid by Miller. The residuary legatees are now seeking to charge Miller with the interest which the fund would have produced if it had been invested at the date of the decree, and kept constantly at interest until the first legatee came of age in August, 1874, and then upon the several balances left due after the successive payments had been made, to January, 1884, when the last legatee came of age. Upon the total of interest so accumulated they charge interest to the date of the decree in March, 1888. If Miller had been in possession of the fund, and had been able to keep it constantly at interest, it might have earned for the benefit of the residuary legatees something like the amount thus claimed, but it is clear from the testimony, and we do not understand it to be denied, that the money thus set apart was mainly if not wholly in the hands of Albright, the co-executor, when the order was made, and so remained until he became insolvent, and was

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lost in great part by his failure. We are then to inquire into the effect of the order of 14th February, 1870, requiring the investment of $3000 for the payment of the six legatees. It was made for the protection of these legatees. In letter and in spirit it looked to a provision for the prompt payment of these objects of the testator's bounty as they severally came of age. It was not intended to increase the residuary estate by the accumulation of interest through a long series of years, nor was such a purpose fairly within the power of the Orphans' Court. The proceeding was one for making distribution. The recommendation of the Auditor was, as we have seen, intended to secure the payment of the six legacies, and the decree of confirmation did not enlarge its scope. It became the duty of Miller, therefore, as well as of Albright, to see that these legacies were paid as they fell due, and the fact that he allowed the fund to remain in the hands of his co-executor, and that it was lost by his failure, cannot relieve him from the obligation to pay. This obligation he recognized and has, at considerable loss to himself, discharged. He has made amends for his failure to invest the money with which to pay these legacies, by paying them out of his own pocket, and has thus discharged the duty imposed upon him by the order, not in accordance with its terms, but with fidelity to its object. The legatees, who were the objects of solicitude to the Auditor and the Orphans' Court, are not complaining and have no reason to complain. They are fully paid.

This proceeding is by the residuary legatees who seek to charge Miller with more than two thousand dollars of interest which it is conceded he never received, but which it is alleged it was his duty to accumulate for them under the order of 14th of February, 1870. But the residuary legatees were not the objects of that order. The specific purpose in view was security for the six legatees, and the Court made distribution from time to time to the residuary legatees recognizing the right to payment as fast as it could be made. They have no claim upon Miller by reason of the order to invest, because the investment was directed for a specific purpose in which they were not interested, and which has been fully met. His liability to them must depend upon his general liability as executor, and the fact that he joined in the first account with Albright; and if it is true, as asserted in the paper-book of the plaintiff in error, that every dollar of the assets which came to the hands of the executors, except the uncollected notes of Albright given to Devore in his life, has been accounted for, his general liability has been fully discharged. But one question relates only to his liability for the interest upon an investment that was never made, though directed for a specific purpose to which the residuary legatees were strangers. We hold that he is not liable by reason of the order of February, 1870, because that order imposed no duty on him relating to or for the benefit of the residuary legatees, but was made for the benefit and protection of the six legatees who were, at that time, under age, and because that order has been substantially obeyed by the actual payment in full of each of said legatees as he or she became entitled to payment. The purpose of the order having thus been fully met, the liability of the executor Miller to the residuary legatees must depend not on the order for investment, which is *functus officio*, but on the general principles regulating the liability of executors. If Miller has not fully accounted, or if any recognized basis of liability exists, his liability must be made to appear in the ordinary manner.

The second assignment of error is sustained. The third necessarily follows the second.

The decree of the Orphans' Court is reversed and record remitted.

Opinion by WILLIAMS, J. S. H. T.

Jan. '89, 342. May 14, 1889.

Madore's Appeal.

Conditions in a deed—Grant for specific purposes—Bill to restrain use of property for purposes not mentioned in deed.

The words "the said piece of ground to be used for milling or manufacturing purposes only," in a deed conveying a tract of land and a water right, are not a covenant on the part of the grantee to erect a mill of any kind upon the property.

A grantor has no legal right to complain because his grantee does not exercise all the rights and privileges which he purchased and paid for.

A covenant to use property for manufacturing purposes, implies the right to use it for all purposes incident to such object.

Appeal of John W. Madore, trustee, John W. Madore, John Wilhelm, William M. Hall, James C. Devore, and Michael Carpenter, from the decree of the Common Pleas of Bedford County, dismissing a bill in equity filed by them to restrain G. Newton Horn from using a certain lot of ground except for milling or manufacturing purposes.

The complainants were the owners of a tract of land in Bedford County, and under certain articles of association John W. Madore held the title as trustee. By deed dated May 10, 1883, and duly recorded, John W. Madore as trustee conveyed to G. Newton Horn a portion of this ground as therein described; following the description of the property in the deed were these words:—

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The said piece of ground to be used for milling or manufacturing purposes only, and the party of the first part shall be allowed to erect a dam in Will's Creek, near the Peerless Lime Company's quarry, and divert as much water from said creek as may be necessary to run a mill or manufactory that may be erected thereon, and shall have the right to clean out channel below said piece of ground, so as to allow a free flow of water from tail race and prevent back water. In case the dam is so erected in Will's Creek as to divert all the water from said creek the grantors reserve the right to a two-inch flow of water from race or creek above the dam; but if the water of said creek is not all diverted, whatever water is needed by said grantors or their assigns, it shall be taken from a point below the dam.

Horn took possession of the property at the time of the conveyance and had been in possession continuously up to the time of filing the bill in this case, February 16, 1885. He had erected a two-story frame building on a part of the said lot for a chair factory, but it was never so used, but was used as a dwelling-house and printing office, and afterwards as a store and dwelling-house.

Complainants then filed their bill in equity against Horn, setting forth the above facts, and alleging, *inter alia*, that the sale was made to Horn on his representation that he intended to erect a grist mill on the lot, that he had not erected such a mill, and by his not so doing had injured the sale of lots belonging to complainants which would have been increased in value by the erection of the mill. Complainants prayed that the defendant be restrained from using the said lot for any other purpose than for a mill or some other manufactory with water power; that he be required to remove the buildings erected on said lot, and be restrained from using them as a printing office and place of residence; that he be required to erect a mill or factory on said lot; and that he be directed to pay complainants damages for his use of the lot in violation of the limitation in the deed.

Horn erected a steam grist mill on the premises after the bill was filed.

After answer filed, the matter was referred to Hon. Alexander King, as Master, who found the facts as above set forth. Testimony was produced before the Master to show that part of the land in question was used as a coal yard. The evidence was not conclusive, but tended to show that the coal yard was on an adjoining lot. The Master, however, found as a fact. that there was a coal yard on part of the lot. The Master concluded as matter of law that the grant to Horn was an estate upon condition, that as no time for the performance of the condition was specified, a reasonable time should be allowed, which had not been done; but no attempt to comply having been made and other use having actually been made of the property, he therefore recommended that defendant be restrained from using the property for other than milling or manufacturing purposes, and from using it as a coal yard. That as he had erected a steam grist mill since the bringing of the suit, he should not be compelled to remove the store and dwelling-house. That defendant should pay complainants fifty dollars damages and costs.

On exceptions to the report of the Master, the Court (BAER, P. J.) decided that the estate of the defendant in the land was not an estate upon condition, and consequently the remedy for damages was by an action at law, and dismissed the bill. Whereupon complainants took this appeal, assigning for error the action of the Court in dismissing their bill.

William M. Hall, Jr. (*William M. Hall* with him), for appellants.

John M. Reynolds (*Kerr & McNamara* with him), for appellee.

May 27, 1889. THE COURT. The learned Judge below differed from the Master in his construction of the words, "the said piece of ground to be used for milling or manufacturing purposes only," contained in the deed from J. W. Madore *et al.* to G. Newton Horn. The Master held that the words referred to created an estate upon condition; the Court that they did not. We are not called upon to decide which was right, as we think upon the merits the bill was properly dismissed. The deed contains no covenant to erect a mill of any kind upon the property; the grantee acquired a right to do so, and to make use of the water power. The grantor has no legal cause to complain that his grantee does not exercise all the rights and privileges which he purchased and paid for. And even if a covenant to build a mill could be implied, no time was fixed within which it was to be done. It appears, however, that since the bill was filed the grantee has erected a grist mill which was intended to be operated by steam. The appellants object to this and say he should have used the water power. There is nothing in the deed which requires him to do so, and we cannot look elsewhere for it. The previous understanding of the parties, if there was one, must be presumed to have been merged in the deed. There is no averment of fraud, accident, or mistake in its execution. There is no attempt to reform it. It was alleged, however, that the appellee is using the property for other than milling or manufacturing purposes. He did erect a building for manufacturing purposes, but was unable to use it as such. It is now occupied as a store and dwelling-house. If we give the language quoted from the deed the effect of a covenant, we do not regard this as a breach. It must have a reasonable construction. A covenant to use property for manufacturing purposes would imply the right to use it for all purposes incident to such object. There must be a house or houses

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for those who operate the establishment to live in, and we cannot say that a store to supply their wants is not germane. The matter of the coal yard does not require discussion. There was no coal yard upon the lot. It is true the Master finds there was, but in this he was mistaken. The only evidence upon this subject is that of J. W. Madore, one of the plaintiffs, who said, "I am not certain that any part of Horn's coal yard proper is on this lot. He gains access to the coal yard and tipple over the lot." Upon the merits the plaintiffs had no case.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

PER CURIAM. H. S. P. N.

Common Pleas.

C. P. No. 4.

McClung v. Dearborne.

Master and servant—Liability of former for the latter's trespass.

A master is not liable for a wilful trespass committed by his servant in contravention of the express instructions of the master, although the trespass be in the course of a service rendered to the master.

Motion for rule for new trial.

Trespass. The narr. charged that "the defendant, by his agents, A. B. Fox and two colored men, *which said agents acted in the premises by order and instructions of the defendant, with force and arms* broke and entered a certain dwelling house of the plaintiff, and then and there made a great noise and disturbance and forced and broke open two doors, and *with force and arms* seized and took and carried away a certain cabinet organ of the plaintiff's, and converted the same to his own use."

On the trial the facts appeared as follows: The defendant was a dealer in pianos and organs, and sent the organ in question to one Mary Hamilton for approval. If she approved it she was then to make a contract for its purchase from the defendant. Shortly afterwards she disappeared and the organ too, the defendant not having received a cent for it. One A. B. Fox, who was in the defendant's general employ, having ascertained by a stratagem that the organ was in the possession of the plaintiff, informed the defendant of the fact, and told him that he could get it for him. The defendant thereupon told him that if he could get it peaceably and without any fuss to do so, but not to get it unless he could get it peaceably; that he would have no fuss about it. Fox then went to the plaintiff's house, taking with him two colored men, and having gained admittance to the house, carried the organ away by force, after some scuffling with the plaintiff's son and wife, who attempted to prevent him from taking it away, and delivered it to the defendant.

The Court instructed the jury that upon this state of facts a master is not liable in trespass for the acts of his servant unless the trespass was committed by his order, or in pursuance of his directions, and that even then he is not liable as master, but because a trespass committed by his authority is a trespass committed by him, because it is under such circumstances his own act, for in trespass all are principals, they who order it, and they who commit it, that it depended therefore upon the instructions given by the defendant to Fox in this case whether he was responsible for Fox's trespass or not; that if the instructions were to bring away the organ at all hazards, whether the persons in possession consented to it or not, then the defendant was responsible for what Fox did, for in that event Fox was acting within the scope of the authority received from the defendant, and the defendant was responsible for what he did; but that on the contrary if the instructions given by the defendant to Fox were not to get the organ unless he could get it peaceably, and with the consent of the persons in possession, that he was not to get it if he could not get it without any fuss, then the defendant was not liable for the trespass committed by Fox; that if Fox violated the instructions given to him, and of his own head committed the trespass charged by the plaintiff, the defendant is not answerable for that.

Verdict for the defendant.

Peter Boyd, for the motion.

John S. McKinlay, for defendant.

June 15, 1889. THE COURT (after stating the pleadings, evidence, and instructions at *nisi prius*). A doctrine so old and long settled as this, and so frequently recognized in the decisions of the Supreme Court of this State, can hardly be successfully challenged at this time of day. How can it be said with any plausibility that the servant here was acting within the scope of his authority, in committing this trespass, when it was committed wholly in violation of the authority given to him—when he did something which the master expressly ordered him not to do? A great deal of confusion has arisen upon this subject, growing out of the failure in discussing the question of the master's responsibility, to distinguish the difference between the rules regulating responsibility for negligence and those relating to responsibilities for torts and trespasses. In the present case, as in Yerger *v.* Warren (31 Pa. St. 319), where this

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subject was skilfully handled by Judge STRONG, it may be said that the employment of the servant is the act of the master, but the employment was not the immediate cause of the injury. The injury did not grow naturally out of his employment, and was not within the scope of the duties which he was ordinarily called upon to perform, or within any general authority committed to him. His authority was a special one, viz: to get the piano if he could do so peaceably, but not otherwise, and not to get it at all, unless he could do so without any violence, and peaceably. There are cases, chiefly against railroad corporations, in which it has been held that where a corporation commits to an agent the performance of certain acts, and delegates to him an unlimited discretion in the performance of those acts, the principal shall be responsible for a misuse of his authority. Such a case is the Penna. R. R. Co. *v.* Vandiver (42 Pa. St. 365), where a railroad company was held liable for injuries resulting from the violence of a conductor in putting the plaintiff off the train. But this case must be considered of doubtful authority since the decision of Allegheny Valley R. R. *v.* McLain (91 Pa. St. 442), which is in irreconcilable antagonism to it, and in which STERRETT, J., expressly reaffirmed Yerger *v.* Warren without qualification. Probably the true rule in such cases is, that where a passenger is negligently put off, the company is liable, but not liable where he is maliciously put off. I say probably, because there seem to be probabilities of law as well as probabilities of the weather, and there are cases in some of the other States which are in accord with Penna. R. R. Co. *v.* Vandiver. Nevertheless, it is as true now as it always has been, at least from the time of 2 H. Bl. (Rep. 442), that the master is not liable for the trespasses of his servant, unless the particular wrongful act was ordered or authorized by the master. When a man's agency in a particular transaction arises, as in this case, not out of his general employment, but out of a specially delegated authority, by the very terms of which he is expressly prohibited from doing a particular thing, by what rule of common sense or common justice can the master be held liable for his doing that thing? In the case of the railroad conductor, already referred to, he was acting within the scope of the unlimited discretionary authority given to him by the company. In the present case Fox acted not only outside of the scope of the authority delegated to him, but in direct violation of it. How can a man be said to order or authorize a trespass who expressly forbids it? The rule laid down by Judge STRONG in Yerger *v.* Warren (31 Pa. St. 319) is now, and always has been the law. The acts of a servant bind the master only when done in the course of the business committed to him or within the scope of an authority specially delegated (Kerns *v.* Piper, 4 Watts, 222). How can the act of Fox be said to be within the scope of an authority which was delegated to him, when he did that which he was commanded not to do? Snodgrass *v.* Bradley (2 Grant's Cases, 43), is in line with Yerger *v.* Warren, and Kerns *v.* Piper, and so are Allegheny Valley R. R. Co. *v.* McLain (91 Pa. St. 442), Phila., Germantown, and Norristown R. R. Co. *v.* Wilt (4 Whart. 143), and Pennsylvania Co. *v.* Toomey (91 Pa. St. 256). A master is never liable for the wilful trespasses of his servant. See Judge SHARSWOOD's Note, 1 Shars. Blackst. Com. 431*; Note 19, and the ancient cases there cited, an authority which the plaintiff seems to rely upon for his contrary proposition. Chancellor KENT lays down the same rule, placing much stress upon the decision in McManus *v.* Crickett (1 East, 106), where the King's Bench went into an examination of all the authorities, and after much discussion and great consideration, with a view to put the question at rest, decided that the master is not liable in trespass for the wilful act of the servant. "The Court considered that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed so far a wilful abandonment of his master's business (2 Kent's Com. 259*, 260*)." And this case, he points out, has received the sanction of the Supreme Courts of New York and Massachusetts, "on the ground that there was no authority from the master, express or implied, and the servant in that act was not in the employment of his master (19 Wend. 343; 17 Mass. 508)." But there seems to be little necesssity to resort to the decisions of other tribunals when those of our own are so conclusive. The mistake of the plaintiff lies in supposing that the defendant is responsible for the wilful trespass committed by Fox, because he was in the general employment of the defendant in matters which in no way related to such acts as those complained of. What Fox did, was not in the course of his general employment, but quite outside of it, and in doing it, so far from obeying the defendant's special orders, or acting under his instructions, he committed the trespass of his own head, and in flagrant disobedience of the defendant's commands. As the defendant was in no wise privy to the trespass or responsible for it, I cannot see that his neglect to return to the plaintiff his own property, which had been gotten from him by a fraud, can make him responsible as a trespasser. See North *v.* Williams (21 WEEKLY NOTES, 369).

Rule refused.

Opinion by THAYER, P. J. H. B.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, AUG. 16, 1889.* [No. 16.

Supreme Court.

May '89, 38. June 5, 1889.

Appeal of the Commonwealth of Pennsylvania.

Taxes and taxation—Collateral inheritance tax—Constitutional law—Act of May 6, 1887—Tax on real estate in foreign jurisdiction imposed by said Act, cannot be enforced—Title to Act.

A testator residing in Pennsylvania devised real estate situated in Maryland to a charitable corporation of Pennsylvania. The Commonwealth, under the Act of May 6, 1887, claimed the collateral inheritance tax upon the value of the real estate:

Held, that the property was not subject to the collateral inheritance tax.

The Act of May 6, 1887, so far as it imposes a collateral inheritance tax upon real estate situate in another State, transcends the power of the State, and cannot be enforced.

While the powers of the State for taxing purposes are very great, they are necessarily limited to either property or persons within her borders. All property of the citizens within the State may be taxed, and all such property outside the State, as is drawn to, or follows, in law, the person or domicile of the owner, such as bonds and mortgages, moneys at interest, etc., no matter where situate. But real estate is not drawn to the person or domicile of the owner for taxation or any other purpose, and hence cannot be taxed outside of the jurisdiction where it is situate.

Appeal of the Commonwealth of Pennsylvania from the decree of the Orphans' Court of Adams County, sustaining the appeal of the trustees of Pennsylvania College of Gettysburg from the collateral inheritance tax appraisement in the estate of William Bittinger, deceased.

The facts were these: William Bittinger, a resident of Abbottstown, Adams County, Pennsylvania, died there March 3, 1888, testate. His will, dated October 6, 1886, was probated by the register of wills of said county, March 9, 1888. By it he devised a farm situate in Frederick County, Maryland, to the trustees of Pennsylvania College, Gettysburg, to be applied to the endowment fund of said institution, provided it will be called the William Bittinger Professorship of Intellectual and Moral Science. Notice of the devise was given and the devise was accepted by the college. The farm was not included in the original collateral appraisement, but was made the subject of a supplemental appraisement under the Act of May 6, 1887 (P. L. 79), and valued at $15,000, from which the appraisers deducted $5000 as the value of the widow's dower.

The trustees appealed from this appraisement on the grounds that it included real estate situated out of the jurisdiction of this Commonwealth and that the Act of Assembly, by virtue of which the appraisement was made, was unconstitutional. The Court, without filing an opinion, sustained the appeal; from this decree the Commonwealth appealed, assigning the decree of the Court for error.

William McSherry, Jr. (*William S. Kirkpatrick*, attorney-general, and *John F. Sanderson*, deputy attorney-general, with him), for the Commonwealth.

The material portion of the Act of 1887 is as follows:—

SECT. 1. That all estates, real, personal, and mixed, of every kind whatsoever, *situated within this State, whether the person or persons dying seised thereof be domiciled within or out of this State, and all such estates situated in another State, Territory or country, when the person or persons dying seised thereof shall have their domicile within this Commonwealth*, passing from any person who may die seised or possessed of such estate, either by will or under the intestate laws of this State . . . . shall be, and they are hereby made subject to a tax," etc. etc.

The part in italics is not contained in the Act of April 7, 1826 (P. L. 227).

The title of the Act is, "An Act to provide for the better collection of collateral inheritance taxes." It is objected by the college that this title is defective, because broader in its terms, which define the subject-matter of the tax, than previous Acts relating to the same subject, and that for want of a more specific title the Act is ineffectual to impose the tax more extensively than it was formerly imposed.

To this objection it is replied that the title of the Act, if it read simply "An Act to provide for the collection of collateral inheritance taxes," would undoubtedly be sufficient to comprehend all collateral inheritance taxes and all collateral inheritances. How, then, can the insertion of the word "better" impair that which would be sufficient without it?

If the Act is read in connection with the legislation which existed at the time of its passage, it is submitted that the title of the Act gives notice, not only of the legislative intent to provide more effectual machinery for the collection of the tax, but also of a better definition of the subject-matter. But it is incorrect to read this statute in connection with previous legislation, as defining the subject-matter of the tax. The constitutionality of an Act of Assembly must be tested by what appears upon the face of it. It

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must stand or fall independently of other legislation.

What is true of an Act is undoubtedly true of the title, and as already shown, there can be no question as to the validity of this title, if we read it in connection with the Act itself and without reference to other legislation. The title and the subject-matter of the Act are properly connected. The title fairly gives notice of that subject-matter, and the Act itself embraces nothing which does not relate to and which is not cognate with it.

In re Airy Street, 113 Pa. St. 281.
Frederick *v.* Penn. Canal Co., 109 Id. 50.
Myers *v.* Commonwealth, 110 Id. 270.
Blood *v.* Marcelliot, 53 Id. 391.
Essling's Appeal, 89 Id. 210.
Mauch Chunk *v.* Magee, 81 Id. 433.
Allegheny's County Home's Appeal, 77 Id. 77.
Dorsey's Appeal, 72 Id. 429.

The tax in question is not a property tax but a tax upon a civil right or privilege, that is, the right of succession or the right to take property by inheritance or devise. If this be so, then the nature of the property embraced in the succession, whether real or personal, as well as its *situs*, must be immaterial, for the right of itself, which is taxed, depends upon the law of Pennsylvania.

Strode *v.* Commonwealth, 52 Pa. St. 181.
Orcutt's Appeal, 97 Id. 179, 185.
Scholy *v.* Rew, 23 Wallace, 331.
Eyre *v.* Jacob, 14 Grattan (Va.), 422.
Miller *v.* Commonwealth, 27 Id. 110.
Com. *v.* Herman's Executors, 16 WEEKLY NOTES, 210.

The cases of—

Coleman's Estate, 52 Pa. St. 468;
Orcutt's Appeal, 97 Id. 179;
Hood's Estate, 21 Id. 106;
Drayton's Appeal, 61 Id. 172;
Commonwealth's Appeal, 11 WEEKLY NOTES, 492,

which deal with the question of *situs*, are governed by the language of the Act of 1826, which does not include the property having a *situs* beyond the limits of the State, and therefore do not apply.

By the provisions of the Act of 1887, however, the State College in this very proceeding is made subject to a personal decree, adjudging its liability to pay the tax and the amount to be paid, and enjoys the right of appeal upon condition of giving a bond, upon which there would be an undoubted remedy for the payment of the very tax in question.

Again, the liability to the tax being made, by the provisions of the first section, a statutory duty or obligation, the payment of the tax can be enforced against the very land in question in the State of Maryland, the rule of law being that whenever by either the common law or statutory law of the State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matter, and can obtain jurisdiction of the parties.

Knight *v.* West Jersey R. R., 108 Pa. St. 250.
Dennick *v.* R. R. Co., 103 U. S. 11.

John M. Krauth and *David Wills*, for appellees.

The Act of 1826, and the subsequent legislation prior to 1887, were intended only to make estates within the Commonwealth subject to the tax. It defined the subject matter of taxation—"all estates, real, personal, and mixed . . . . being within this Commonwealth." The words "being within the Commonwealth," are so construed by the Act of March 11, 1850, sec. 3, "as to relate to all persons who have been, at the time of their decease, or now may be domiciled within this Commonwealth, as well as to estates, and this is declared to be the true intent and meaning of the Act."

The Act of 1887 makes that subject to the tax which was not made so by any previous Acts, namely, real estate situated in another State, when the title of the Act is, "An Act to provide for the better collection of collateral inheritance taxes." "Better collection" implies that there was such an estate made subject to the tax before, and a better mode was furnished for its collection. Under such a title the Act could not constitutionally impose a tax on that which had not been taxable before.

The title of an Act of Assembly is now deemed a part of the Act.

Penna. Railroad Co. *v.* Riblet, 16 Sm. 164.
Eby's Appeal, 20 Sm. 311.

If the title of an Act do not clearly indicate its subject-matter it is unconstitutional.

Cooley's Const. Lim. p. 177 *et seq.* and notes, and cases cited.
Dorsey's Appeal, 22 Smith, 192.
Beckert *v.* City of Allegheny, 4 Norris, 191.
Craig *v.* First Presbyterian Church, 7 Id. 42.
Dewhurst v. City of Allegheny, 14 Id. 437.
Union Pass. Ry. Co.'s Appeal, 32 Smith, 91.
Road in Phoenixville, 13 Out. 44.
Sewickly Borough *v.* Sholes, 3 Crumrine, 165.

The principle must also be kept in view, that tax laws are construed most strongly against the government, and most favorably to the taxpayer.

Dwarris on Statutes, 742, 749, and cases there cited.
United States *v.* Watts, 1 Bond, 580.

The practical difficulties in enforcing the imposition and the collection of the tax are almost insurmountable, and render the law inoperative. The second proviso in section 3 is as follows: "*And provided further*, That the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid." Each State is an independent sovereignty, and regulates the transmission, transfer, and conveyance of property, real and personal, within its own territorial limits. No State can pass any laws

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which have extra-territorial effect in imposing liens on property, real or personal, in another State. The effect of so doing would be to interfere with and seriously embarrass the transmission of such property, by sale, gift, or otherwise, and would be contrary to the comity existing between States, recognizing the right of each one to regulate its own internal affairs.

The power of taxing this real estate is undoubtedly a right vested in the State of Maryland in her sovereign capacity.

The taxing power rests upon necessity, and inheres in every sovereignty, and is unlimited except by constitutional prohibition; in amount it is co-extensive with the wants of the government. But it cannot be imposed upon, or enforced against, persons not amenable to, or protected by, the laws of the State.

The Pitts., Ft. W. & Chi. Ry. Co. *v.* Com'th, 16 Smith, 73.

The person must have a domicile in the State in order to be taxed, and the thing must have a *situs* therein.

Hays *v.* Pacific Mail Co., 17 Howard, 596.
Morgan *v.* Parham, 16 Wallace, 471.
Com'th *v.* Standard Oil Co., 5 Out. 119.

When the property is out of the State there can be no tax upon it. The tax laws of Pennsylvania can have no extra-territorial operation.

State Tax on Foreign Bonds, 15 Wallace, 300.
McCullough *v.* Maryland, 4 Wheat. 318; 4 Curtis, 415.

The tax is laid upon the property, and not upon the right of succession or the person taking it.

Com'th *v.* Smith, 5 Barr, 142.
In re Short's Estate, 4 Harris, 63.

The real question is the *situs* of the real estate.

Commonwealth's Appeal, 11 WEEKLY NOTES, 492.

In support of our position see—

Del Busto's Estate, 23 WEEKLY NOTES, 111.

June 28, 1889. THE COURT. The facts of this case, as we gather them from the paper-books, are substantially as follows: William Bittinger resided in Adams County, Pennsylvania, and died there March 3, 1888, testate. He left a widow but no children. His will was made October 6, 1886, and probated by the register of wills of Adams County, March 9, 1888. He died seised of a farm and mill property, situated in Frederick County, Maryland, which by his will, he devised to the corporation of "The Trustees of Pennsylvania College of Gettysburg, in the county of Adams." The college accepted the devise. The Commonwealth of Pennsylvania caused an appraisement to be made of this real estate for taxation, under the provisions of the Act of Assembly of May 6, 1887, entitled, "An Act to provide for the better collection of collateral inheritance taxes." (P. L. 79.) It was valued at $15,000, from which the appraiser deducted $5000, as the value of the widow's dower. From this appraisement the college appealed to the Orphans' Court, which Court sustained the appeal. The Commonwealth then appealed to this Court, and assigned as error the ruling of the Orphans' Court.

It was contended by the appellees, upon the argument at bar, that the Act of 1887 is unconstitutional in this, that the title of said Act does not clearly indicate its subject-matter. The title is as follows: "An Act to provide for the better collection of collateral inheritance taxes." The title of an Act of Assembly is now deemed a part of the Act. This has been the law since the Amendment to the Constitution of 1864. (Pennsylvania Railroad Co. *v.* Riblet, 66 Pa. 164; Eby's Appeal, 70 Id. 311.) If the title of an Act does not clearly indicate its subject-matter it is unconstitutional. (Dorsey's Appeal, 72 Pa. 192; Craig *v.* The Church, 88 Id. 42; Dewhurst *v.* City of Allegheny, 95 Id. 437; Beckert *v.* City of Allegheny, 85 Id. 191; Road in Borough of Phœnixville, 109 Id. 44; Sewickley Borough *v.* Sholes, 118 Id. 165.) The title of the Act of 1887 refers solely to the collection of collateral inheritance taxes. This presupposes that an estate had previously been made subject to such tax, whereas it was contended that said Act imposed a tax upon property not theretofore subject thereto. The Act of 1826 (P. L. 227), (the first upon the subject), imposed a collateral inheritance tax upon "all estates, real, personal, and mixed, of every kind whatsoever, passing from any person who may die seised or possessed of such estate, being within this Commonwealth, either by will or under the intestate laws thereof, or any part of such estate or estates, or interest therein," etc. None of the supplements to the Act of 1826, or subsequent legislation upon this subject, attempted to bring real estate situate outside of the State within the operation of the collateral inheritance laws until the passage of the Act of 1887, the first section of which enacts, "that all estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seised thereof be domiciled within or out of this State, and all such estates situated in another State, Territory, or country, when the person or persons dying seised thereof shall have their domicile within this Commonwealth, passing from any person who may die seised or possessed of such estate, either by will, or under the intestate laws of this State, or any part of such estate or estates, or interest therein transferred by deed, grant, bargain, or sale, made or intended to take effect," etc., shall be subject to a tax, etc.

The collateral inheritance tax imposed by the Act of 1887, upon real estate, is a tax upon the property itself. This clearly appears from the

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second proviso in the 3d section of the Act, which is as follows: "And *Provided further*, That the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid." It has not been made to appear how the State of Pennsylvania can impose a tax upon real estate situate in Maryland; and not only impose a tax upon it, but also charge it with a lien for such unpaid tax. While it is conceded that the powers of the State for taxing purposes are very great, they are necessarily limited to either property or persons within her borders. All property of the citizen within the State may be taxed, and all such property outside the State as is drawn to or follows in law the person or domicile of the owner, such as bonds and mortgages, moneys at interest, etc., no matter where situate. But real estate is not drawn to the person or domicile of the owner for taxation or any other purpose, and hence cannot be taxed outside of the jurisdiction where it is situate. The taxation of property involves the reciprocal duty of protection on the part of the State levying such tax. This real estate, as before said, is situate in the State of Maryland, and is subject to taxation by the laws of that State. If it had been devised to a citizen of Maryland it could not have been seriously contended that the Act of 1887 could have been enforced against him. Does it make any difference that the devisee is a Pennsylvania corporation? We think not. It may be that the State might impose a succession tax upon every citizen of the State who succeeds to either real or personal estate, from whatever source received. This is not such tax, however. (Com. *v.* Smith, 5 Pa. 142.) It is a direct tax upon the thing devised in the hands of the devisee, a tax which the State is powerless to enforce. The executor cannot, as in the case of the legacy, deduct it from the legacy. He has nothing to do with it, and the State itself cannot exercise extra-territorial taxing power as to real estate, and carry into another State and enforce there its remedies for the collection of taxes. Without further discussion, we are of opinion that this Act of 1887, so far as it imposes a collateral inheritance tax upon real estate situate in Maryland, transcends the power of the State and cannot be enforced. The constitutional question raised by its title is, therefore, unimportant.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, C. J. H. C. O.

Jan. '87, 428. January 10, 1888.

Heft v. Ogle.

Competency of witnesses—Assignment by distributee, and release of all interest—Action by executor or administrator.

In an action by an administrator to recover money loaned by his decedent, his mother, his sister, who has assigned to him individually, in writing, "all her right, title, and interest" of every kind, and discharged him "from all liability or accountability in any form whatever," is a competent witness to prove the claim in suit, and no policy of law excludes her.

The tendency of modern legislation, as well as judicial decision, is to let questions of policy, interest, etc., go to the credibility rather than to the competency of witnesses.

In an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee.

Error to the Common Pleas No. 1, of Philadelphia County.

Assumpsit by Frank E. Ogle, administrator of Mary F. Ogle, deceased, against Jacob D. Heft, surviving partner of Jacob D. Heft and Harry S. Ogle, late trading as Heft & Ogle, to recover the sum of $5000 loaned by Mary F. Ogle to the firm of Heft & Ogle.

The following facts appeared at the trial, before BIDDLE, J.: On May 2, 1873, Mary F. Ogle loaned to Heft & Ogle $5000. She afterward died, in July, 1876, intestate, leaving to survive her as her only next of kin, four children, Maria S., Harry S., Frank E., and Caroline Ogle. Harry S. Ogle, since deceased, was a member of the firm of Heft & Ogle, and Frank E. Ogle was duly appointed administrator of his mother's estate.

The loan of $5000 not having been paid, Frank E. Ogle, as administrator of his mother's estate, brought this suit to recover the same, with interest, on September 20, 1884.

To prevent the bar of the Statute of Limitations, plaintiff offered in evidence an agreement in writing executed by Heft, as surviving partner of the firm of Heft & Ogle, on June 11, 1881, wherein it was admitted that the sum of $45 had been paid on account of interest on this loan on September 21, 1878.

Plaintiff offered as a witness to prove the loan Maria S. Ogle, a daughter of decedent. Upon objection to her competency as a witness, Frank E. Ogle produced the following assignment to him individually of all her interest in her mother's estate:—

Know all men by these presents, that I, Maria S. Ogle, do hereby for myself, my heirs, executors, and adminis-

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trators, absolutely release, assign, transfer, and discharge unto Frank E. Ogle all my right, title, and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered in or which may result from the action of Frank E. Ogle, administrator, against Jacob D. Heft, surviving partner, now pending in the Court of Common Pleas No. 1, of September Term, 1884, No. 446, and do discharge him from any liability or accountability to me in any form whatever, for any sum or sums of money which may be recovered in said action.

Witness my hand and seal the twentieth day of September, A. D. 1884.

(Signed) MARIA S. OGLE. [L. S.]

Upon her *voir dire*, Maria S. Ogle testified that there was no other agreement than the foregoing between her brother and herself, and that she had received full consideration for the assignment.

Defendant further objected generally to witness as incompetent to testify. Objection overruled —witness admitted. Exception for defendant.

Various other facts in connection with the loan in suit were brought out at the trial, but are not essential to an understanding of the case.

Verdict for plaintiff for $9115.88 and judgment thereon, whereupon defendant took this writ, assigning for error, *inter alia*, the action of the Court in allowing the above-named witness to testify.

George Junkin (*Joseph DeF. Junkin* with him), for plaintiff in error.

Angelo T. Freedley and *Wm. Henry Rawle*, for defendant in error.

June 28, 1889. THE COURT. This suit was brought by Frank E. Ogle, administrator of Mary F. Ogle, deceased, against Jacob D. Heft, who survived Harry S. Ogle, late partners as Heft & Ogle, to recover money alleged to have been loaned to said firm by plaintiff's intestate, Mary F. Ogle, who died leaving, as her only heirs-at-law, four children, viz., Maria S., Harry S. (deceased member of Heft & Ogle), Frank E. (the administrator), and Caroline Ogle.

On the trial, plaintiff below called his sister, Maria S. Ogle, to substantiate the claim in suit. The witness being objected to as incompetent, he proved and put in evidence a paper, signed and sealed by her, wherein she absolutely releases, assigns and transfers to her brother, Frank E. Ogle, individually, all her "right, title, and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered or which may result from" this suit, and discharges "him from all liability or accountability . . . . in any form whatever, for any sum or sums of money which may be recovered in said action." The witness also testified, on her *voir dire*, that there was no other agreement between herself and her brother, and that she then had no interest in the fund. The objection was overruled, and bill sealed for defendant below.

The question thus presented in the first specification is, whether the learned Judge erred in ruling as he did. We are of opinion that he did not. The witness was not a party to the record. She was neither the owner nor the assignor of the claim in suit; nor could she, individually, in her own right, ever have been plaintiff in an action to recover the same. She was not a party in interest, because, prior to suit brought, she absolutely released and transferred to her brother, individually, all the interest she ever had or could have in the amount that might be recovered. She was therefore competent to testify; and no policy of law excluded her. On the contrary, the policy of the law is rather to favor the admission of witnesses who are divested of all interest. Whenever it is practicable to do so, the tendency of modern legislation, as well as judicial decision, is to let questions of policy, interest, etc., go to the credibility, rather than to the competency of witnesses.

On principle as well as authority, it ought to be considered settled that in an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment, or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit. (1 Greenl. Ev., sects. 419, 430; Miller on Witnesses, 58; Scott *v.* Lloyd, 12 Peters, 145; Gebhart *v.* Shindle, 15 S. & R. 235; Dollone *v.* Rehmer, 4 Watts, 9; Com. *v.* O. & P. Railroad Co., 1 Grant's Cases; Connell *v.* Van Arsdalen, 4 Pa. 364; Carter *v.* Trueman, 7 Pa. 315; Steininger *v.* Hoch, 42 Pa. 432; Forrester *v.* Torrence, 64 Pa. 29; Brant *v.* Dennison, 3 East'n Rep. 9.)

In some of our cases there is more or less confusion of thought, arising from the failure to properly distinguish those of the class to which the one now before us belongs, from cases in which the proffered witness was either actually or substantially a party to the suit, or in which he was the assignor of the thing or contract in action, a party to a negotiable instrument, or otherwise incompetent on the ground of public policy. In Hans *v.* Palmer (98 Pa. 296); Montgomery *v.* Grant (57 Id. 243); Grayson's App. (5 Id. 395); Bailey *v.* Knapp (19 Id. 193); Hartz *v.* Snyder (26 Id. 511); Frost's App. (105 Id. 258, 266), and kindred cases, witnesses were excluded for one or other of the reasons above stated. Some of those grounds of exclusion are now greatly restricted by legislation of comparatively recent date.

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In Commonwealth *v.* O. & P. Railroad Co., *supra*, Mr. Justice BLACK notices the distinction between an interest that is collateral and one that is direct, as follows: "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule in Post *v.* Avery applies only to persons who have assigned choses in action on which the recovery would have been for their own use, if no assignment had been made. Its object is to prevent a party from transferring himself into a witness by the magic of a bit of paper. It forbids one who assigns a claim to sell his oath along with it. But a person who has a merely incidental interest in the result, an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest, and if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock and become a witness for the company; a legatee may dispose of his interest in the estate and testify for the executors; an attorney who has a contingent fee may release it and give evidence in favor of his client. The rule in question is not levelled against interested witnesses, but is founded in the policy of stopping a disinterested party from testifying in favor of one who sues in his right."

Brant *v.* Dennison, *supra*, was an action of ejectment against a mortgagor by the administrators of the mortgagee who died intestate, unmarried and without issue. On the trial, a niece and heir-at-law of the intestate, and wife of one of the administrators, was called by them to sustain the mortgage on which the action was based. Being objected to as incompetent, because she was the wife of one of the plaintiffs and also a distributee of the estate represented in part by her husband, and therefore interested, it was shown that she had previously executed and delivered to a third party an assignment of all her interest in the mortgage in controversy; and on the authority of Carter *v.* Ineman, Steininger *v.* Hoch's Ex'r (*supra*), and kindred cases, it was held that inasmuch as she was not a party to the suit, either actually or substantially, and her interest as distributee, so far as the claim in suit was concerned, having been divested by the assignment, she was a competent witness. In principle, that case is not essentially different from the one under consideration. The first specification of error is not sustained.

There was no error in rejecting the offer of evidence recited in the second and last specification.

Judgment affirmed.

Opinion by STERRETT, J. H. S. P. N.

Jan '89, 19. May 22, 1889.

Miller v. Rohrer.

Two personal actions for same cause—Judgment in one a bar to second suit—Evidence—Attachment under Act of March 17, 1869—A personal action.

Where two personal actions are instituted between the same parties for the same cause of action, a recovery of judgment in one extinguishes the right to recover in the other, and gives to the plaintiff in lieu thereof a security of a higher order.

A proceeding under the Act of March 17, 1869 (P. L. 8) is to be regarded as a personal action. The attachment is intended to secure the plaintiff by a lien in advance of judgment, but the efficacy of that security depends on the recovery of a final personal judgment.

The record of a judgment recovered in a former suit between the same parties is competent evidence for defendant, especially when taken in connection with other testimony it shows that both suits were for precisely the same cause of action.

Error to the Common Pleas of Lancaster County.

Attachment under the Act of March 17, 1869, by Jeremiah Rohrer against S. R. Miller and John A. Brake, trading as S. R. Miller & Co.

The following facts appeared at the trial, before PATTERSON, J.: Plaintiff brought an action on a book account against the defendants before an alderman, on October 20, 1885, and recovered judgment for $143.81. On October 26, 1885, the case was appealed to the Common Pleas, and on August 23, 1887, judgment by consent was entered in open Court for $160.57. An attachment under the Act of March 17, 1869—the present proceeding—was issued by plaintiff against defendants on December 31, 1885. This case was called for trial on April 30, 1888. The plaintiff testified that the proceeding under the attachment was for the same claim as the suit before the alderman, and the judgment in that suit was for the same amount.

The defendants offered in evidence the record in the former suit, but the Court refused the offer, and instructed the jury, *inter alia*, "to bring in a verdict for the plaintiff, if you believe the testimony of the plaintiff, which seems to the Court not to be contradicted."

Verdict for plaintiff for $163.94 and judgment thereon. Whereupon defendants took this writ, assigning for error the action of the Court in refusing the above offer of evidence, and the foregoing portion of the charge to the jury.

Marriott Brosius (*H. M. North* with him), for plaintiffs in error.

A proceeding under the Act of 1869 is a personal action. A record of a former judgment recovered for the same cause of action is compe-

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tent evidence, and is a bar to a recovery in a second action.

Brenner, Trucks & Co. *v.* Moyer, 98 Pa. 274.
Lieberman *v.* Hoffman, 2 Penny. 211.

G. C. Kennedy (*H. C. Brubaker* with him), for defendant in error.

A judgment recovered in any form of action is only a security for the original cause of action until it is productive of satisfaction to the party, and cannot operate to bar a collateral or concurrent proceeding.

Drake v. Mitchell, 3 East, 251.
Bantleon *v.* Smith, 2 Binney, 146.
Gordon *v.* Coney, 5 Id. 552.
Shetsline v. Keehrull, 1 Ash. 29.
Chapman *v.* Martin, 18 Johns. (N. Y.) 240.
Case of John Thompson, 2 Browne, 297.

June 28, 1889. THE COURT. Two personal actions appear to have been pending between the parties to this contention at the same time and for the same cause of action. In the first suit final judgment was entered for plaintiff before the second was called for trial.

The first action was commenced before Alderman Forney, from whose judgment defendants therein appealed, and filed their appeal to No. 46 of November Term, 1885. On December 31, 1885, while that appeal was pending, this suit—attachment under the Act of 1869—was commenced. In August, 1887, more than eight months before it was tried, judgment in the appeal case was entered in favor of Rohrer, the plaintiff, for $160.57 and costs. On the trial of this case, in April, 1888, he testified in substance that his claim in both cases was the same. On cross-examination he was shown the bill that was presented before the alderman, as the foundation of his claim, and said, "it is the same money that suit was entered for there, the same amount exactly, $143.81." Again, on being shown the record of the first suit, Jeremiah Rohrer *v.* S. R. Miller & Co., No. 46 November Term, 1885, he said, "this judgment is for the same amount as that in suit; it was entered August 23, 1887, for plaintiff." After plaintiff rested, defendants offered that record in evidence, but it was rejected. The Court was then requested to instruct the jury that, under the evidence before them, their verdict should be for defendants. That was refused, and the jury was substantially directed to find for the plaintiff if they believed his evidence. The result was a verdict in his favor for $163.94.

The assignments of error are to the action of the Court: 1st, in rejecting the record of the first suit, No. 46 November Term, 1885, and 2d, in directing the jury to find in favor of the plaintiff if they believed his testimony.

As to the first specification we have no doubt the record was competent evidence for defendants below. It tended to prove, still more conclusively, the fact, elicited from plaintiff himself, that the cause of action in both suits was the same, etc. As we have seen, the plaintiff below, on cross-examination, testified without objection to every essential fact that would have been shown by the record, if it had been received in evidence. It was of course the best evidence, and as such defendants were entitled to it. In connection with other testimony it would have shown very clearly, if not conclusively, that both suits were for precisely the same cause of action; and, inasmuch as final judgment was entered in the first, before the second was called for trial, that judgment was necessarily a bar to recovery in the latter case.

The learned Judge of the Common Pleas appears to have assumed that the proceeding by attachment under the Act of 1869 was in no sense a personal action. In that he was mistaken. In Lieberman *v.* Hoffman (2 Penny. 211) it was held that such proceeding is to be regarded as a personal action. In the class of cases to which the Act applies the attachment is intended to secure the plaintiff by a lien in advance of judgment, but the efficacy of that security depends on the recovery of a final personal judgment. It was also held that the recovery of a final judgment for the same cause of action is a bar notwithstanding the attachment was issued and served before the commencement of the suit on which the judgment was obtained, and though defendant in the attachment filed no bond.

It is well settled that where two personal actions are instituted between the same parties for same cause of action, a recovery of judgment in one extinguishes the right to recover in the other, and gives to the plaintiff, in lieu thereof, a security of a higher order. (Brenner *et al. v.* Moyer, 98 Pa. 274.)

It follows from what has been said that the learned Judge erred in charging the jury as he did. Aside from the excluded record evidence, the defendants, on the evidence of the plaintiff alone, had a right to insist on a verdict in their favor; and, if the case had been submitted to the jury on the questions of fact which that evidence alone tended to establish, the jury would have been warranted in finding in favor of plaintiffs in error. The assignments of error are both sustained.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J. H. S. P. N.

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July '88, 230. April 15, 1889.

Commonwealth v. Wilkes-Barre and Kingston Street Railway Co.

Railroads—Streets—Nuisance—Evidence.

A street railroad company required by its charter to procure the assent of borough council to its occupancy of the streets, obtained such assent, provided that the track was laid in the centre or middle of said street in such manner that vehicles could conveniently cross and recross said street without hindrance. The track was laid in the centre of the street up to an open space caused by the intersection of several streets, where the track deflected slightly from a straight line to enter upon the private property of the company. On an indictment for nuisance for maintaining this deflection, the Commonwealth offered to prove above facts:

Held, that in the absence of any offer to show that the track interfered with public travel, its mere location as above was in no sense a violation of the resolution of borough council and was therefore not a nuisance.

Held, accordingly, that the evidence was inadmissible and that the indictment must fall.

Error to the Quarter Sessions of Luzerne County.

Indictment against the Wilkes-Barre and Kingston Street Railway Company for unlawfully obstructing a public street in the borough of Kingston with the company's tracks, which was claimed to amount to a nuisance.

On the trial, before WOODWARD, J., the Commonwealth put in evidence the Act of incorporation of the company containing, *inter alia*, the following provision:—

SECTION 4. That before the said company shall commence to use any street or streets in the boroughs of Wilkes-Barre and Kingston, the consent of the councils of said boroughs shall first be obtained.

The Commonwealth then put in evidence a resolution of the council of the borough of Kingston allowing the company to lay down its track on Railroad Street.

Provided: That the track of said railway shall be laid in the centre or middle of said street with a street rail in such a manner that wagons, sleighs, vehicles of every description can conveniently cross and re-cross said street without hindrance at any time and at any point.

The Commonwealth then put in evidence a map showing the location of the track as described in the opinion of the Supreme Court, and then made the following offer of proof:—

"By the map already in evidence, it appears that the street in question is a public street, and that the track of the defendant is located thereon, and that it is not located along the whole route of said street, in the centre thereof. Commonwealth now proposes to show by the minutes, that in March, 1866, the borough of Kingston consented to the location and construction of the defendant's railway upon the centre of Railroad Street. To be followed by evidence that a certain portion of the track in question in said borough, and upon said street, is not upon the centre line thereof, and that the same is an obstruction and inconvenient to the public travel, and a nuisance, and erected without authority or warrant in law—the nuisance consisting in so much of the track as diverges from the centre of the street to the southerly side thereof."

THE COURT. "While the particular offer now before us is that simply of the minute book of the borough of Kingston showing the action of the borough council in regard to this railroad, there is also a general explanation accompanying this offer, showing the theory of the prosecution, accompanied by a statement of the evidence to be offered to sustain the allegation of a nuisance. From these offers and explanation, it appears to us that the charge of nuisance in this case must be sustained, if at all, by showing that while the charter permitted this railroad to be built and while the assent of the borough of Kingston was secured as early as the year 1866, this assent contemplated the occupancy of the centre of a certain street, while the actual location made in 1866, and maintained since, has not been in the centre thereof at a certain point. But it appears from the indictment that nothing of this kind is alleged therein as constituting the nuisance complained of. The indictment is couched in the most general phraseology and alleges a public nuisance without any particular specification of its nature, or of its effect upon the public—in other words, while alleging that the railroad in question is a nuisance because of a mislocation, the fact of mislocation is not set forth. Therefore we cannot admit this testimony. The indictment is defective. The objection is sustained and the evidence is rejected." Exception.

The Court charged, *inter alia*, as follows: "We instruct you that in our opinion as matter of law this indictment is defective and will not sustain the evidence which is offered to show a nuisance at the point in question."

Verdict "not guilty." Whereupon the Commonwealth took this writ, assigning for error the rejection of the above offer of evidence and the portion of the charge above cited.

William S. McLean (*Alfred Darte*, district-attorney, with him), for the Commonwealth.

A railroad laid out over a highway, so as to obstruct it, without express statute authority or necessary implication, renders the company liable to indictment for nuisance.

Dillon on Municipal Cor., sec. 561.
Com. *v.* Railroad Co., 14 Gray (Mass.), 93.
Com. *v.* Erie & N. E. R. Co., 3 Casey, 358.

The indictment was sufficient.

Com. *v.* Boyer, 1 Binn. 207.
Spangler *v.* Com., 3 Id. 537.
4 Sharswood's Blacks. Com. 301.
Respublica *v.* Arnold, 3 Yeates, 420.

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Allan H. Dickson (*John Lynch* and *Joseph D. Coons* with him), for defendant in error.

June 28, 1889. THE COURT. At the time of the rejected offer of testimony the Commonwealth had already given in evidence the map showing the location of the railway upon Railroad Street at the point in controversy, and this map and the location which appeared upon it were made part of the rejected offer. At the end of the offer also the nuisance complained of was defined as follows, viz: "the nuisance consisting in so much of the track as diverges from the centre of the track to the southerly side thereof." The only manner in which it is claimed that the part of the track complained of was a nuisance at all was in its not being laid in the centre of the street. It was not alleged nor offered to be proven that the structure of the track, or its position, in point of fact interfered with public travel in any respect. The alleged unlawful location of this small piece of connecting track was the only element set up as establishing a nuisance at all. But it is very evident that this element is not established by any or all of the matters contained in the offer. The resolution of council, which it is said was violated, only provides that the track "shall be laid in the centre or middle of the said street, with a street rail *in such a manner* that wagons, sleighs, vehicles of every description can conveniently cross and re-cross said street without hindrance at any time and at any point," etc. A mere inspection of the map shows conclusively that if the track is properly laid as to its structure, it does not interfere with the public travel in any manner whatever. Its mere location cannot interfere in any degree with its being conveniently crossed and re-crossed. It is simply a continuation of the track of the railway just as it is laid through the street, without any complaint of the manner of the structure.

In addition to this the place in which this particular piece of track is laid is not Railroad Street or any part of it. It is a wide open space formed by the intersection of five streets in which the individuality of each street is lost. The track is laid on the centre of Railroad Street up to the point at which that street enters the open space constituting the intersection of the several streets, and from that point the track is laid not upon Railroad Street but upon the open ground of the intersection. On the opposite side of this space where the track continues there is a slight deflection from a straight line to enter upon the private property of the company. But this cannot be regarded as in any sense a nuisance in itself, since the company has a necessary right to reach a track upon its own land as plainly as if it were a car house or a horse stable.

In the absence of any evidence, or any offer of proof, to show that the track complained of in fact interfered with the public travel, we are clearly of opinion that its mere location in the manner indicated on the map was not in any sense a violation of the resolution of council, and therefore not a nuisance.

Judgment affirmed.

Opinion by GREEN, J. L. L., Jr.

Jan. '89, 24. January 28, 1889.

Plumly's Appeal.

Partnership—Dissolution—Profits—Interest—Costs.

A father owning a paper box factory with machinery and fixtures, took his son into partnership, the latter contributing some cash to the assets of the firm, under an agreement that the son should receive one-third of the profits upon the dissolution of the above firm:

Held, that the son was entitled to a return of the money he had put into the business and his undrawn profits, but that he could not claim that the real estate, machinery, and fixtures should be treated as firm assets and should be sold and distributed as such.

A delay and litigation having occurred in the winding up of the affairs of the above firm owing to a difference of opinion on the above matter, the father continued the business with said real estate, machinery, and fixtures, and with the son's share of the capital and undrawn profits:

Held, that he was not, under the circumstances, liable to account to the son for profits on the son's share after the dissolution of the firm, but only for interest from the date of such dissolution.

In the above case the father was not entitled to credit in his account with the son for disbursements made for the renewal of machinery and amount charged off for depreciation thereof nor for interest paid upon incumbrances on the real estate. The son was entitled to the benefit of these with interest from the date of dissolution.

In the above case costs were properly divided between the parties.

Appeal of Eugene K. Plumly from a decree of the Common Pleas No. 4, of Philadelphia County.

Bill in equity, wherein Eugene K. Plumly was complainant and George W. Plumly was defendant, praying for an injunction, the appointment of a receiver, an account, and the conveyance of real estate. A preliminary injunction was granted and a receiver was appointed. An answer was then filed and the case referred to E. Coppee Mitchell, Esq., as Master, and upon his death to E. Hunn Hanson, Esq., from whose report the following facts appeared:—

Prior to 1875 George W. Plumly, the respondent, was engaged in the business of manufacturing paper-boxes in the city of Philadelphia. The factory in which the business was carried on, together with the machinery and fixtures, belonged to said George W. Plumly.

Eugene K. Plumly is the son of George W. Plumly, and from 1871 was employed by his father in the business at a salary. In July,

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1875, the father offered and the son accepted a partner's interest in the business of one-fourth of the profits, and the business from that time to its ending was carried on under the name of George W. Plumly & Son.

In the summer of 1879 Eugene K. Plumly, from a source disconnected with the business, became possessed of $8628.98. This, at the suggestion of George W. Plumly, he contributed to the partnership; it was entered on August 27, 1879, in the books of the partnership to his credit, and by reason of the contribution it was agreed between the partners that Eugene K. Plumly should be entitled to one-third of the profits of the partnership from January 1, 1879. This contribution and the proportion of profits not used by the plaintiff were treated in the ledger account of each year, and in the yearly balance-sheets, as the plaintiff's capital. There was no written agreement of partnership, and no other oral agreement between the partners with respect to their interest in it than that stated.

In November, 1884, George W. Plumly informed Eugene K. Plumly that the partnership would be dissolved, and to this the latter assented, and upon the 31st of December, 1884, it ended. Upon its dissolution George W. Plumly publicly announced himself as its successor, took charge of the entire business, including all of its assets, and conducted it individually as before the partners had done jointly.

The complainant demanded that in settling up the affairs of the firm the real estate, machinery, and fixtures should be valued and sold and distributed as an asset of the business in which he claimed an interest. The respondent denied that complainant was entitled to this, whereupon the present bill was filed.

A receiver having been appointed defendant exhibited to him a balance-sheet as of the 1st of April, 1885, by which it appeared that of the assets of the firm in the custody of the respondent there was in cash $9383.30; on the 13th of May, 1885, pursuant to an order of the Court, the respondent paid to the receiver one-third of this sum, to wit, $3127.76. From the 13th of April, 1885, until the 10th of June, 1886, when the receiver filed his account, there had been received by him various sums including the monthly rent for the machinery and fixtures which were leased by him to respondent under authority of the Court, said sums and rent amounted to $8236.84. The receiver made various disbursements, and among others the following to the complainant: on May 25, 1885, $2500; on October 3, 1885, $1500; on March 13, 1886, $1000, and after filing of the account, $1500 on July 17, 1886. All of these payments were made pursuant to the orders of the Court.

In making up the above statement respondent did not include as assets real estate, fixtures, or machinery, but claimed credit for various sums paid out and charged off prior to the dissolution of the partnership for repairs and improvements to machinery and for depreciation thereof, and for interest on incumbrances upon the real estate amounting to $3493.27.

The Master was of opinion that the real estate, machinery, and fixtures were not to be considered partnership assets, and that respondent was not entitled to credits for the amount spent and charged off on repairs, improvements, depreciation, and interest as above. He further reported that at the time of dissolution it was the right of the complainant to have the firm's assets converted into money, to have the partnership debts paid, and to receive the balance of capital due him; that the defendant not having permitted the assets to be so converted an account should be stated by ascertaining the complainant's share of the partnership assets on December 31, 1884, and the entire profits made by the respondent's use of the assets of the firm up to the date of the defendant's payment of $3127.76 to the receiver, and that as the entire capital should be to the entire profit, so should be the complainant's share in the entire profit to his share of the capital, and from the time of the payment of the $3127.76 aforesaid, and thereafter, as payments were made by the receiver to the complainant, deductions of his capital should be made, and the profit earned by the capital still remaining in the respondent's hands should be ascertained, and in addition to this sum there should be added the sum of $3498.15, and the total sum should stand as that due and payable from the respondent to the complainant.

Exceptions were filed by both parties to the report. The case was thereupon referred back to the Master to state an account. The Master found that the amount of complainant's capital in the firm on Dec. 31, 1884, was $15,927.97, and further reported as follows:—

"The plaintiff's share of the profits from 31st of December, 1884, to 21st of June, 1887, was		$13,860.24
To which add the capital to which he was entitled		15,927.97
And the sum mentioned in the report .		3,498,15
"The total sum due him 21st of June, 1887, was		$33,286.36
On account of which he has been paid		
May 25th, 1885, . .	$2,500.00	
Oct. 3rd, 1885, . .	1,500.00	
March 13th, 1886, . .	1,000.00	
July 17th, 1886, . .	1,500.00	
June 21st, 1887, . .	10,619.22	
		17,119.22
		$16,167.14
"The defendant has paid to the receiver $1,736.84 above the sums paid to and received by the plaintiff deducting this . .		1,736.84
"There is due from the defendant to plaintiff with interest thereon from 21st of June, 1888.		$1 .,430.30

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"With respect to the sum of $3498.15, the plaintiff requested that it be added to his capital of $15,927, and that the total of $19,426.12 be treated as that used by the defendant.

"The sum of $3498.15 has been found to be that due the plaintiff as the result of the correction of the profit and loss account between him and the defendant while partners, as is explained in the report. It was not, therefore, a fund known by the defendant to belong to the plaintiff and used by the defendant as was the sum of $15,927.97, and he should not therefore have imposed upon him a duty to account with respect to it; all the more should this be so when it is remembered that had the contention of the bill been sustained as the plaintiff sought to sustain it with respect to the real estate, fixtures, and machinery, neither $3498.15 nor any part of it would have been decided to belong to the plaintiff."

The Master further reported that the costs should be borne equally by the parties.

Exceptions were filed to the report by both complainant and respondent. The Court, ARNOLD, J., delivered the following opinion thereon:—

"It is shown by the evidence that in the year 1846 the defendant established himself in the business of manufacturing paper boxes; that in 1871 he put the business into a stock company, called the American Paper Box Company, and that in the year 1875 that corporation was dissolved, and the defendant continued the business in his own name, using the name of the American Paper Box Company in connection therewith.

"The plaintiff (who is a son of the defendant) entered into the service of the defendant sometime about the year 1870. On July 1, 1875, his father gave him an interest of one-fourth of the profits of the business, and in 1879 increased it to one-third. On August 27, 1879, the plaintiff placed the sum of $8628.98 in the business. The real estate in which the business was conducted belonged to the defendant. It was fitted up with machinery and fixtures adapted to the use made of it by the defendant, and rent therefor was regularly paid out of the profits of the business. On November 29, 1884, the defendant notified the plaintiff that the business relations between them would cease on December 31, 1884, and tendered a settlement and division of the assets according to their respective interests. To this the plaintiff replied on December 9, 1884, acquiescing in the dissolution, but demanded that the real estate should be valued or sold, and distributed as an asset of the business in which he claimed an interest. As the defendant denied the claim of the plaintiff to any part of the real estate, an amicable settlement (which ought to have been effected between father and son) was prevented, and this litigation ensued.

"On June 6, 1887, by an interlocutory decree the Master was directed to state and report an account between the parties, upon such principles as might appear to him to be just and equitable. The Master has allowed the plaintiff a share of the profits of the business carried on by the defendant after December 31, 1884. This we think was an error. There are no doubt cases in which a partner continuing a business after dissolution may be required to account to the retired partner for the profits made by using the partnership property, or perhaps the capital of the partner who has retired. But we do not conceive that this is such a case. When it is the duty of the partner in possession to sell the concern and distribute the proceeds, and he does not do so, but, on the contrary, carries on the business with partnership property, the profits must be divided as before the termination of the partnership. Parsons *v.* Hayward (31 Beavan, 199), cited by the plaintiff, proves that. And the converse is equally true, that where there is no duty to sell and distribute, the retired partner will have no right to a share of the profits earned by the other partner, who carries on his own business in his own property, although it may have been previously occupied by the partnership. Here the defendant was under no duty to sell his property; it was his individual property. He was not bound to permit it to remain idle; he had a right to carry on any kind of business in his own property that pleased him; or he might have leased it for a consideration based on the good will of the stand, and not be accountable for the amount received therefor (Elliot's Appeal, 60 Pa. 161). What he gave his son was an interest in the profits of the business so long as they continued together, but the business was and continued to be the defendant's. On the cessation of business relations the plaintiff was entitled to a return of the money he put into the business and his undrawn profits. The total of these sums, when ascertained, was a debt due to the plaintiff by the defendant. The relation of partners in profits had ceased, and that of debtor and creditor had taken its place. There was no such relation as trustee and *cestui que trust* between them. Interest is the penalty for not paying promptly an amount which is due; the debtor is not a trustee, and he is not liable to account for the profits which he may earn in his own business, by reason of having the use of money due to another. Especially is this so where, as in this case, the amount due is not ascertained at the termination of the partnership, and much time is necessarily occupied in settling the account. The defendant owned ample means to pay the amount which might be found to be

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due the plaintiff, and he has made large payments on account while this proceeding has been before the Master. To hold him under these circumstances to be a trustee instead of a debtor would be inequitable. We know of no rule of law which requires us to do so.

"The injustice of charging the defendant as a trustee was manifest to the Master, who doubted the wisdom of his previous action, recommending that the defendant be so charged. The result of that method of accounting is that while, as partners, the plaintiff received one-third of the profits and the defendant retained two-thirds, yet after the plaintiff had ceased to be a partner, he would, on the basis of capitalization urged by him, be entitled to more of the profits than the defendant. To avoid this result, the Master included the value of the real estate as part of the capital contributed by the defendant, although it is not a partnership asset, and has thus called forth the protest and exception of the plaintiff.

"Another exception, if allowed, would result in a like wrong. The Master awarded the plaintiff an item of $3498.15 made up of errors in charging the general business account with allowances for renewal and depreciation in machinery prior to the dissolution. As the fixtures and machinery were the exclusive property of the defendant, the plaintiff was improperly charged with losses on them. The Master having found the amount so charged to the plaintiff, awarded it to him in the accounting with interest instead of profits. To this the plaintiff excepts and insists that it should be considered as a part of his capital, and that he should be allowed profits on it instead of interest merely since the dissolution. We think the Master treated this claim properly.

"Another exception shows the practical impossibility as well as the injustice of allowing the plaintiff to share in the profits of the defendant's business after the dissolution. The real estate, machinery, and fixtures, as before stated, belong to the defendant. They are not to be sold so as to bring the business to a close, and by that means establish a time when the calculation of profits should cease. The Master adopted a day near to the date of the decree for an account, to wit, June 21, 1887, as the time when the allowance of profits should cease, and substituted interest thereafter. This meets with objection by the plaintiff, on whose behalf it was urged that the profits should be calculated to a period more approximate to the accounting. But it is plain that as the business of the defendant cannot be brought to a close by any decree entered in this case, it will be necessary to fix upon some time when the calculation of profits should cease and the computation of interest begin. We have before shown that the time legally and equitably appropriate for the purpose is the day when the plaintiff's interest in the profits of the business ceased, to wit, December 31, 1884, the day on which he became a creditor and the defendant became his debtor. In short, the claim of the plaintiff for the return of his capital and undrawn profits before dissolution, is a claim for debt on which interest only should be allowed.

"The defendant has been making payments to the receiver, nearly all of which have been paid over to the plaintiff, and the defendant had also paid a very large sum of money directly to the plaintiff. These sums received by the plaintiff may amount to as much as he is entitled to, or nearly so; yet if the plaintiff's contention is correct, all these payments are to be charged to him as profits merely, thus leaving his capital intact. We cannot approve of this method of settling the accounts. We therefore sustain the exception of the defendant and order the account to be re-stated by allowing the plaintiff interest instead of profits on his money since the date of the dissolution.

"The plaintiff's eighth exception is sustained. The sum of $1736.84 yet in the receiver's hands should not be charged to the plaintiff. It is there to pay costs and expenses, and the residue will be distributed by the Master in accordance with the rights of the parties. It will be noticed that a part of the money paid by the defendant to the receiver, was paid as rent for machinery which belonged to himself, and so far as it had been withdrawn by the plaintiff on the order of this Court, it goes in relief of the obligation of the defendant to the plaintiff. But we see no reason why the defendant should be required to continue paying rent for his own property.

"We approve the Master's decree that each party should pay one-half the costs of the proceedings.

"The first seven exceptions of the plaintiff are dismissed and the eighth is sustained. The defendant's exception, except as to costs, is sustained. The report is referred back to the Master to state the account between the parties in accordance with this opinion, and the Master is directed to call for a final account from the receiver and proceed to settle and adjust it and report distribution of the balance."

The Master stated an account in accordance with above principles and a decree was entered accordingly. Whereupon complainant took this writ, assigning for error the action of the Court as above and the entry of said decree.

Henry Budd and *John G. Johnson*, for the appellant.

One who for his own profit uses money or property of another which does not constitute a loan, and which the other does not agree shall be

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so used, must account to the owner of the money or property for the profits made by the use thereof unless the profits amount to less than legal interest on the money or value of the property, in which case legal interest must be paid. This rule applies in cases of partnership, and therefore when upon dissolution of a firm, one partner retains all the assets, he is liable as a trustee and accountable for profits.

Parsons *v.* Hayward, 31 Beav. 199.
Clemments *v.* Hall, 2 DeG. & J. 173.
Turner *v.* Major, 3 Giff. 442.
Pine *v.* Omsbee, 2 Abb Pr. (N. S.) 375.
Shiddell *v.* Merrick, 4 B. Mon. 157.
Durbin *v.* Barber, 14 Ohio, 311.
Fithian *v.* Jones, 12 Phila. 201.
Taylor *v.* Hutchinson, 25 Gratt. 536.

Silas W. Pettit (*John R. Read* with him), for appellee.

February 11, 1889. THE COURT. This decree is affirmed upon the opinion of the learned Judge of the Court below.

Decree affirmed, and the appeal dismissed at the costs of the appellant.

PER CURIAM.

February 14, 1889. *Budd* moved for a re-argument, and assigned the following reasons:—

(1) The appellee's counsel admitted in his oral argument that the appellee had taken and sold the manufactured stock remaining in the possession of the firm at the time of dissolution, and for this he has not accounted except at the cost of manufacture, whereas the real value of the stock to the firm was the selling value.

(2) In the state of the record it is left undecided whether any partnership relation whatever existed between the appellant and appellee. This becomes of importance, because if no partnership existed certain charges made both before and after the dissolution, which have been carried into the account approved below, are unsustainable, except upon the theory of the existence of a partnership, and the Court should declare the status of the parties in order that any rights which would belong to the appellant as a creditor may not be prejudiced.

(3) There are several important questions of partnership law, some of them of first impression in this Commonwealth, properly arising in this case, which, in the present state of the record, are left undecided, and which if left so undecided may cause the case to be misleading as an authority.

February 25, 1889. THE COURT. Re-argument refused.

PER CURIAM. L. L., Jr.

Jan. '88, 444. May 6, 1889.

Taylor v. Wright.

Selling liquor to intemperate person—Responsibility for injuries resulting therefrom—Liability where liquor is bought from different parties—Quoting to jury opinion of Supreme Court.

Where a person buys liquor from different parties and while intoxicated meets with an accident which occasions his death, all the parties furnishing him with the liquor are responsible for the accident which resulted therefrom. It would be impossible for the jury to say which particular glass of liquor was the proximate cause of his death.

It is not error for the Court below to repeat to the jury the language of the Supreme Court in another case which is still the law, and its application to the case in point could have done no legal injury to the party complaining.

Error to the Common Pleas of McKean County.

Case, by Clarissa Wright, widow of Pardon Wright, to recover from Frank N. Taylor damages for the death of her husband.

On the trial, before OLMSTED, P. J., the following facts appeared: On October 22, 1885, Pardon Wright, a man of intemperate habits, residing some distance from the borough of Smethport, went into the borough and while there bought drinks at the hotel of Frank N. Taylor, a duly licensed vendor, and also at another hotel. Taylor was not at home on that day nor was his regular bartender; the liquor was sold to Wright by the porter who was put in charge of the bar for the day. Taylor testified that he did not know that Wright was an intemperate man. Wright afterwards drove home in a state of intoxication, put his horses in the stable, and then went up into the haymow. He was afterward found by his wife lying on the barn floor where he had fallen. He was able to walk to the house, and a doctor was summoned who discovered a scalp wound and a bruise on his cheek. A hypodermic injection of morphine was given by the doctor, but the patient sank into a comatose condition and died in the afternoon of the next day. On the morning of the day Wright died the doctor discovered that he was suffering from compression of the brain caused by effusion of blood. The doctor also administered some remedies to counteract the effect of the morphia as some fears had been expressed that the dose had been too large. The doctor testified that he had not given more than half a grain, but there was other testimony that it was as large as two grains. The widow then brought this suit to recover damages for the death of her husband.

The defendant presented, *inter alia*, the following point:—

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"That if the deceased, on the day he was injured, obtained liquor from others than the defendant, as well as from the defendant, and the jury is unable to determine which was the proximate cause of his death, the plaintiff cannot recover."

Answer. "We cannot affirm this point in just the language in which it is clothed. To affirm it just as it stands would be, as we understand it, in effect to make the whole legislation upon this question nugatory and of no account whatever, because we cannot shut our eyes to the fact that in nine cases out of ten of this character the person who purchases the liquor, purchases it in more than one place. It could hardly be the law that a man could furnish liquor to a person until he was in an extreme state of intoxication, and great injury arises to some one thereby, and avoid the effect of the legislation upon the subject by simply saying that the plaintiff may have purchased a drink or drinks of some other person that mingled with the liquor which he drank of the defendant, but we answer this point in this way: In answer to this point we say to you that if you believe from the evidence that the defendant sold whiskey to the deceased, Wright, knowing that he was a person of intemperate habits, or that he was intoxicated at the time of the sale, whatever his habits may have been, and that his death followed from and was caused by his intoxication, you may find that the act of the defendant was the proximate cause, although you should believe from the evidence that the deceased got whiskey from other persons on that day."

The Court further charged the jury, *inter alia*, as follows: "I cannot, in this connection, forbear a quotation from the opinion of one of the most eminent Judges of this Commonwealth, now deceased, delivered in a case like the one at bar: 'I care not how distinctly it is understood by all who deal in intoxicating drinks, that not only public policy but statute law forbids that they be furnished to him who is intoxicated, or who is habitually intemperate, though not presently intoxicated. There is no excuse for ignorance or mistake where the law is so plainly written. If men will disregard it they must accept the consequences. As the judicial tribunals did not make the law they have no power to lessen its exactions; and looking to the humane purposes of the legislation they have no disposition to thwart it by glosses and refinements.'"

Verdict for plaintiff for $100 and judgment thereon. Whereupon defendant took this writ, assigning for error, the answer to the foregoing point, the portion of the charge to the jury above quoted, and that the Court in its charge had given undue prominence to the testimony of plaintiff's witnesses, and had not directed the jury's attention sufficiently to the testimony on part of defendant to show that death was the result of the improper administration of morphine.

J. M. McClure (— *Mullin* and *Backus & Gorton* with him), for plaintiff in error.

It is the duty of the Court in its charge to the jury to bring all the facts to their notice that have any bearing on the case.

Parker *v.* Donaldson, 6 W. & S. 132.
Nieman *v.* Ward, 1 Id. 68.
Heilbruner & Co. *v.* Wayte, 1 Smith, 259.
Harrisburg Bank *v.* Forster, 8 W. 304.
Relf *v.* Rapp, 3 W. & S. 21.
Youngman *v.* Miller, 2 Out. 196.
Garrett *v.* Ginter, 6 Wr. 143.

M. F. Elliott and *J. W. Bouton*, for defendant in error, were not called on.

May 27, 1889. THE COURT. If Pardon Wright, whose death gave rise to the present controversy, was a man of known intemperate habits, and the defendant below, with others, furnished him liquor while intoxicated, and with knowledge of his habits, I do not see why they are not all responsible for the accident which resulted therefrom. In such case it would be impossible for the jury to say which particular glass of liquor was the proximate cause of his death. Each glass did its share of the work. We do not see, therefore, any error in the answer of the Court to the defendant's third point. As was well said by the learned Judge: "To affirm it just as it stands would be, as we understand it, in effect to make the whole legislation upon this question nugatory, and of no account whatever, because we cannot shut our eyes to the fact that in nine cases out of ten of this character the person who purchases the liquor purchases it in more than one place." Nor do we think it was error in the Court below to repeat to the jury the language of Justice WOODWARD in Fink *v.* Garman (40 Pa. 95). It was good law as well as good morals, and its application to this case could have done the defendant no legal injury. The last assignment is without merit.

Judgment affirmed.

PER CURIAM. H. S. P. N.

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Orphans' Court.

Dugan's Estate.

Wills—Construction of—Legacies to charitable uses—Mistake in name of legatees—Latent ambiguities—Parol evidence—Admissibility of, to explain latent ambiguities in will.

A testator bequeathed "to the Old Man's Home, located in Walnut Hills, Cincinnati, Ohio, $5000; to the Old Man and Old Woman's Home, located at Walnut Hills, Cincinnati, Ohio, $5000." It appeared that there are no charities located there with names exactly corresponding with the language of the will; but there are two institutions called the "Old Men's Home," and the "Widows' Home and Asylum for Aged and Indigent Women," located at Walnut Hills, and under the same roof, though under separate management. Upon the above facts:

Held, that as the ambiguity in the will was latent, parol evidence was admissible to explain it.

Held further, it being proved that the testator intended to benefit several charities in Cincinnati, and that the names used in the will were the names given him by a resident of Cincinnati, and were the names commonly applied to the institutions above named, that therefore the Old Men's Home was entitled to the whole of the first legacy, while the second legacy should be divided equally between the "Old Men's Home" and the "Widow's Home and Asylum for Aged and Indigent Women."

Sur exceptions to adjudication of the account of the executors of John A. Dugan, deceased.

The facts of the case are fully set forth in the adjudication of the Auditing Judge (ASHMAN, J.), which was as follows:—

"In the distribution decreed to be made under the account filed by the executors the sum of $10,000 given by the will as legacies to the Old Man's and Old Woman's Home at Cincinnati, was directed to be retained to await the determination of the question as to what charities were intended.

"On April 12, 1889, testimony having been duly taken, W. W. Porter, Esq., appeared for the Old Men's Home and the Widows' Home and Asylum for Aged and Indigent Women, claiming to be the charities designated by the will, and S. G. Thompson, Esq., for the residuary legatee.

"The clause containing the bequests was in these words: 'Fifteenth—I will and bequeath to the Old Man's Home, located in Walnut Hills, Cincinnati, Ohio, the sum of $5000; to the Cincinnati Orphan Asylum, located at Mt. Auburn, Cincinnati, Ohio, the sum of $5000; to the Old Man and Old Woman's Home, located at Walnut Hills, Cincinnati, Ohio, the sum of $5000.'

"Two institutions are situated at Walnut Hills, named respectively the Old Men's Home, and the Widows' Home and Asylum for Aged and Indigent Women. These institutions are under separate corporate management, of which the personnel happens to be in both cases the same; but they are located under the same roof, the dividing line between the two lots owned by the corporations respectively running through the centre of the building. They are popularly known in Cincinnati by various names, among others as the Old Men's Home, and the Old Women's Home, and the place itself is commonly called the Old Men's and Old Women's Home. No other charity answering to their character is at Walnut Hills.

"The case is not free from some doubt, but the doubt does not arise from the question of the admissibility of evidence to explain the meaning of the testator. There is no patent ambiguity in the will, concerning which the general rule may be said to be that no testimony can be received to explain it away. An instance of that sort would be found where a blank was left for the name of a beneficiary (Baylis *v.* Att'y-Gen., 2 Atk. 239; Hunt *v.* Hort, 3 Bro. C. C. 312), and an example of latent ambiguity would be where only the initials of the legatee were given, in which latter case parol testimony was admitted (Abbot *v.* Massie, 3 Ves. 148). Circumstances outside of the present will disclose a latent ambiguity in the instrument, which latter is on its face explicit enough. The testator gave a fund to a charity by a designated name, and the fact is that there is no charity of that identical name. Certainly parol testimony may be adduced to explain the ambiguity, and the only doubt is whether the evidence has explained it. The testator intended to give to three charities in Cincinnati; his will shows that, and the testimony shows it; and as to two of these legacies no question is raised that he sufficiently indicated the objects of his gifts. He had lived at one time in Cincinnati, but had removed therefrom about fifteen years before he drew his will. In a conversation with a friend who resided in Cincinnati, and was visiting him in Philadelphia, he said that his purpose was to give five thousand dollars to each of three charities in the former city similar in character to three which he intended to benefit in Philadelphia. That gentleman gave him, in answer to his request for the names of deserving charities in Cincinnati, the names: 'The Cincinnati Orphan Asylum,' 'The Old Men's Home,' and the 'Old Man's and Old Woman's Home.' The testator took a memorandum of those names and reproduced them in his will, locating the objects at Walnut Hills. Two institutions and the only ones corresponding in any respect with the designations of the homes in the will are located

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at Walnut Hills. The building occupied by both, and in which physically they appear as one charity, is popularly called the Old Man's and Old Woman's Home. But that two separate institutions exist there, and that one part of what may be termed the joint establishment is devoted to women, just as the other part is devoted to men, is also popularly recognized; the place being frequently described by the titles of the Widows' Home, Old Men's Home, Widows' and Old Women's Home. Old Women's Home, Widows' Home and Asylum, Old Women's Asylum, and Old Men's and Old Women's Home. The titles which the testator assigned to the object of the two gifts under review are therefore and unquestionably the popular titles of the joint charities in Walnut Hills. It is conceded that the bequest to the Old Men's Home by its popular name of the Old Man's Home is a valid gift, which should go to one of these joint charities. Why should not the other gift go to the two institutions which are embraced in the popular title of the Old Man's and Old Woman's Home? The only objection to the proposition is that having given $5000 to the Old Man's Home, he would not be likely in the same clause to give it $2500 more. But practically this is exactly what he did intend, if the titles which he gave to the objects of his charity indicate his meaning. He intended by his gift to the Old Man's Home to benefit, to the extent of $5000, an institution exclusively devoted to men; and he intended by his gift to the Old Man's and Old Woman's Home to benefit to an equal amount an institution devoted to both sexes. He must therefore have intended that the object of his former bounty, to wit, Men's Home, should receive an additional $2500. To place any other construction on his will would render the second gift of $5000 void. Another objection went on the ground that no charity in existence corresponds with the charity he had designated. Yet a joint charity actually located at Walnut Hills exactly answers to the description he has given. The same answer is given, but can scarcely be seriously pressed that the testator could not have meant a joint charity because he had already given to one of its members. But it was said he could not have had in mind the joint institution when he used the word 'Home' in the singular. It was apparently forgotten that the joint institution is known as the Old Man's and Old Woman's 'Home,' not 'Homes.' If this legacy shall fail it will be the first case of which there is a record where a gift which exactly describes a charity by its proper appellation was set aside on the ground that the legal title was not given. In Domestic and Foreign Miss. Society's Appeal (6 Cas. p. 433), STRONG, J., said that bequests to religious and charitable uses 'have always been pre-eminently favored in Pennsylvania.' He cited the language of Witman *v.* Lex (17 S. & R. 93), that 'it is immaterial whether the person to take be *in esse* or not, or whether the legatees were at the time of the making the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether their corporate designations have been mistaken.' He also cited 1 P. Wms. 674, where a gift to a charity was upheld, although its description was equally applicable to two, and it was wholly uncertain which of the two was intended.

"Lee *v.* Pain (4 Hare, 253) was cited by the residuary legatee. It was the case of a gift by will to Highbury College and a gift by codicil to Hoxton Academy, the Academy having before that time been merged into Highbury College. The latter claimed the legacy given by the codicil and was refused. But the Vice-Chancellor said that if it could have been shown that the testatrix did not know of the merger, the Court would have gone a great way to support the bequest and award it to the college; that the fact, however, was that two other societies had occupied the premises of the academy after its removal, and the testatrix may have referred to one of those societies when she spoke of Hoxton Academy. It is clear that that case makes in favor of the construction suggested in the present instance where no such obstacles are in the way of the claimants. The Auditing Judge has examined a number of cases which bear upon the construction of gifts respecting which the descriptions of the donees were more or less vague, and where in every instance in which the evidence could be made to explain what was otherwise ambiguous, the gifts were upheld. It is unnecessary to rehearse these authorities, because they can only illustrate the principle that a latent ambiguity may justify explanatory evidence, while the weight of the evidence is a question to be determined in the particular case.

"And now, April 18, 1889, he awards one legacy to the Old Men's Home of Cincinnati, Ohio, and one legacy of $5000 equally to the Old Men's Home of Cincinnati, and the Widows' Home and Asylum for Aged and Indigent Women of Cincinnati."

To this adjudication exceptions were filed on behalf of Fanny Holton, the residuary legatee under the testator's will.

S. P. Holton and *Samuel Gustine Thompson*, for the exceptant.

William W. Porter, contra.

June 1, 1889. THE COURT. Exceptions dismissed.

PER CURIAM. C. K. Z.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, AUG. 23, 1889.* [No. 17.

Supreme Court.

Jan. '89, 155. May 21, 1889.

Wilson et al. v. Van Leer et ux.

Issue devisavit vel non— Competency of witness as to handwriting— What constitutes—Is prima facie for the Court—Almanac—Need not be offered in evidence—Court will take judicial notice of dates in.

A witness called to prove the handwriting of a testator to an alleged codicil to his will testified that he had seen the testator write once or twice, some thirty-one years before the trial, when witness was about twelve years old, and once afterwards saw him indorse a check, about twenty-three years before the trial. He had not seen him write afterwards. The Court admitted him as a competent witness, and instructed the jury that the Court was the sole judge of his competency, but it was for them to judge of his credibility:

Held, that the competency of the witness was in the first instance clearly a matter for the Court and the facts upon which the Court held him *prima facie* to be competent, not having been denied or contradicted, the instruction was correct; although had the facts been contradicted, it might have been proper to submit the whole matter to the jury.

It is said that a witness is competent to testify to handwriting if he has seen the party write but once, and then only his name, but such evidence must be guarded with great caution; nor can any arbitrary limit of time be fixed within which the witness must have seen the writing done.

After one of plaintiff's counsel had concluded his address to the jury, one of counsel for defendants in his address offered to show the jury by reference to an almanac for 1865, that August 13th was Sunday, for the purpose of contradicting, upon a material point, one of plaintiff's witnesses. Objection being made on the ground that the almanac had not been offered in evidence, the Court refused to allow it to be used:

Held, to be error.

It is not necessary to prove the coincidence of days of the week with days of the month; it is one of the matters of which judicial notice is taken.

Matters of which judicial notice is taken, including the dates in the almanac, need not be put in evidence.

Where an almanac has been brought forward for the purpose of contradicting a witness upon a material point after one of the counsel has concluded his address the only relief, as in all cases of surprise incident to every contest, is the discretion of the Judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply or to grant a new trial.

Error to the Common Pleas of Lancaster County.

Issue *devisavit vel non* in which Joseph Van Leer and Caroline his wife, in right of said Caroline, were plaintiffs, and Sidwell T. Wilson and Needham M. Wilson, executors of Needham Wilson, deceased, were defendants, to determine the validity of a certain paper offered for probate as a codicil to the will of Needham Wilson, deceased.

Needham Wilson died September 22, 1872, in Little Britain Township, Lancaster County. His will, of which defendants were executors, having been duly executed on March 2, 1865, was admitted to probate on September 28, 1872. On August 18, 1877, nearly five years after his death, suit was brought in the Court of Common Pleas of Lancaster County by Caroline Van Leer, formerly Carman, upon the following instrument of writing:—

August 13th, 1865.

I give these fiew lines to Caroline Carman to show that I want her to have the sum of twelve hundred dolars at my death she livd with mee A number of years And got verry little for it so i thought it rite to leave her This little sum to be paid to her out of my home property

from NEEDHAM WILSON.

The executors of Needham Wilson knew nothing of this paper until the suit was brought. At that time it was contended for Caroline Van Leer that the paper was a promissory note, and the Court below so held, but the Supreme Court, reversing the lower Court, held that it was of a testamentary character and would not support an action of assumpsit. (Wilson *v.* Van Leer, 7 Out. 600.)

Subsequently, on June 23, 1883, this paper was offered for probate before the register of Lancaster County as a codicil to the will of Needham Wilson, and, having been admitted, upon an appeal taken by the plaintiffs in error, this issue *devisavit vel non* was directed, which was tried before PATTERSON, J.

There were no subscribing witnesses to the execution of the paper. One witness, a sister of plaintiff, testified that she saw Wilson write and sign the paper, and the only other witness called in support of it was Cornelius Carman, a brother of plaintiff, who undertook to testify to his signature from an acquaintance with his handwriting. This witness testified that he had seen Wilson write once or twice when he, the witness, was a boy twelve years old, thirty-one years before the trial, and once afterwards, twenty-three years before the trial, at a tavern in Lancaster. It was contended that his testimony was not competent to prove the execution of the paper. On cross-examination he testified that the name of Needham Wilson appearing on four papers was the latter's signature in each case, whereas none of them

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were genuine, all having been written by an expert witness for defendants a few hours previously. The paper was admitted in evidence. (First assignment of error.)

In commenting upon the testimony of the other witness, who said she saw Wilson write and sign the paper, one of the counsel for defendants was about to show the jury, by a reference to the almanac for 1865, that August 13th was Sunday, which was in direct conflict with what the witness had testified to. On objection instantly made by counsel on the other side that as the almanac had not been formally offered in evidence no reference could be made to it, the Court refused to allow it to be used. (Fifth assignment of error.)

Defendants requested the Court to charge, *inter alia*:—

(3) If the jury do not believe Cornelius Carman is a competent witness to prove the execution of the alleged codicil, the verdict must be in favor of the defendants. *Answer*. We deny that point as stated. The belief of the jury as to Cornelius Carman being a competent witness has nothing to do with his competency. Competency means the legal fitness of a witness to be heard on the trial of a cause. It is a legal question, and the Court is the sole judge of his or her competency. The jury has nothing to do in deciding whether they are competent. If the Court think they are so interested, or in a position that they cannot testify, they will rule him out, but if they decide he is a competent witness, then that makes his testimony come before you, like that of any other witness. The Court is the sole judge of his or her competency. The Court admitted Cornelius Carman as a competent witness; his testimony, however, is for the jury, like any other witness, his credibility is for them to determine. (Second assignment of error.)

(4) Unless the jury believe that two competent witnesses have proved the execution of the alleged codicil, the verdict must be in favor of the defendants. *Answer*. Yes. Two competent witnesses; that is so. As we have already stated, competency means a legal witness, and the Court is the sole judge of his or her competency. In this case the Court has received him and permitted him to testify as a competent witness. The jury's belief of his testimony cannot determine his competency. That is a duty to be discharged by the Court. They may, however, or may not believe his testimony. You may or you may not believe it. His testimony and that of Mrs. Manahan constitute the two witnesses to this little will. (Third assignment of error.)

The Court in the general charge said: "The paper before you is signed, as you have been shown, by the name Needham Wilson. Now the question for you is, is the name of Needham Wilson to that paper the genuine signature of Needham Wilson. The plaintiffs called two witnesses, whose evidence you heard, who swore that that signature is genuine, that one of them testified that she saw Needham Wilson sign the very signature to that paper. [These two witnesses, Margaret Manahan and Cornelius Carman, have been admitted by the Court and held to be competent witnesses. They are competent witnesses.] (Fourth assignment of error.) Of course, their credibility is for you, the jury. The credibility of all witnesses in every case tried by a jury is for the jury. That is, whether they are truthful or whether you will believe them. The two competent witnesses need not be subscribing witnesses; that is, their names need not be subscribed to the will or paper. The signature of the alleged maker of the paper may be proved by witnesses who have knowledge of his handwriting and who were well acquainted with it (as one witness was who was called here in this case)."

Verdict for plaintiffs, and judgment thereon, whereupon defendants took this writ, and assigned error as above.

J. Hay Brown (*Samuel H. Reynolds* with him), for plaintiffs in error.

Admitting, for the sake of argument, that Margaret Manahan's testimony was sufficient, as far as it went, it is plain that Cornelius Carman was not such a competent, "complete" witness as is contemplated by the Act of Assembly.

Two or more competent witnesses are required in all cases. Each witness must be independent of the other. "Each must separately depose to all facts necessary to complete the chain of evidence, so that no link of it may depend on the credibility of but one."

Derr *v.* Greenawalt, 26 P. F. Sm. 239.

Carman was competent to testify, but not competent to prove the fact he was called on to establish.

Carson's Appeal, 9 P. F. Sm. 493.

The Court should take judicial notice of an almanac, and it need not be formally offered in evidence.

Starkie on Evidence, *738.

D. G. Eshleman and *A. Herr Smith*, for defendants in error.

As to the competency of the witness, see—

1 Greenleaf Ev., § 577.
Shitler *v.* Bremer, 11 Har. 413.
Taylor *v.* Sutherland, 12 Id. 335.

Judicial notice has never been taken of an almanac, and the offer was not made in time.

June 28, 1889. THE COURT. The competency of Cornelius Carman was in the first instance clearly a matter for the Court, and no

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subsequent evidence having raised any dispute of fact upon it, the learned Judge was right in saying that the Court was the sole judge of competency, and refusing to allow the jury to review the ruling. Had the facts upon which the Judge held him *prima facie* competent been denied or contradicted, it might have been proper to submit the whole matter to the final decision of the jury (Lee *v.* Welsh, 1 WEEKLY NOTES, 453), but there was no such conflict as made that course necessary.

The learned Judge was also within the line of authorities, in holding that Carman had sufficient knowledge of Wilson's handwriting to make him competent to testify concerning it. It is said to be sufficient if the witness has seen the party write but once, and then only his name (1 Greenleaf on Ev. sec. 577), and probably no higher standard can be fixed for a definite rule, though considering the untrustworthiness of opinions on handwriting in general (see note of Chief Justice REDFIELD to his edition of Greenleaf, vol. 1, sec 578), such evidence ought to be guarded with great caution. Nor in the nature of things is it possible to fix any arbitrary limit of time within which the witness must have seen the writing done. That must depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial Judge. Carman's knowledge seems not only to have been extremely stale, but of the narrowest extent, and if the learned Judge had held that it was too remote and unreliable to qualify him, we should not have been disposed to disagree with him. But the matter was within his discretion, and his conclusion was, as already said, within the line of the authorities. It was therefore for the jury and not for us to determine the weight to which the testimony should be entitled. The assignments of error in relation to Carman's testimony are therefore not sustained.

We are obliged however to hold that the Court erred in refusing to permit the counsel for defendant below to refer to the almanac to show, in support of his argument against the testimony of Margaret Manahan, that a certain date in 1865 fell upon Sunday. All of the authorities agree that this is one of the matters that do not require to be proved, but are taken judicial notice of, without evidence. "Neither is it necessary to prove . . . . the coincidence of days of the week with days of the month" (1 Greenleaf, sec. 5), and see Starkie on Evidence, pt. 3, sec. 20 (p. 738 of 10 Am. ed.). "It is wholly immaterial whether the facts of public and general history, and their dates, are recognized by the Court, *sua sponte*, the chronicles or almanacs being used merely to aid the memory; or whether they will remain unnoticed until suggested by the parties and verified by the books; or whether the books themselves are adduced by the parties as instruments of evidence; the process and the result being in each case the same." (3 Greenleaf, sec. 269).

The mere mode of introducing the almanac seems to vary, as indicated by the last extract from Greenleaf, but as all the authorities agree that no proof is necessary it follows that it is not required to be put in evidence at all. "The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the Court and jury." (State *v.* Morris, 47 Conn. 179.) "The almanac is part of the law of England," POLLOCK, C. B., in Tutton *v.* Darke (5 H. & N. 649.)

In Hanson *v.* Shackleton (4 Dowling, 48), there was a rule to set aside a writ, on the ground that it was dated on Sunday, and the report proceeds:—

"COLERIDGE, J. Have you an affidavit showing that the day on which this writ is dated was a Sunday?

"BAYLY. The affidavit does not state that it was Sunday but the day of the month being given the Court is bound to take judicial notice on what day of the week that day fell. C. A. V.

"COLERIDGE, J. I have consulted the other Judges and they are of opinion I ought to take judicial notice of what the day was on which this day of the month fell. Rule absolute."

So in Reed *v.* Wilson (41 N. J. Law, 29), there was a declaration on a note dated August 12, at four months, and on demurrer assigning, *inter alia*, that the narr. showed demand and protest on December 14, one day too soon, the Court took judicial notice that December 15 was Sunday, and therefore that the demand was made on the proper day.

In R. R. Co. *v.* Lehman (56 Md. 226), it was held that "it is the duty of the Court to notice the days of the week on which particular days of the month fall; and hence we know without other averment (on demurrer) that the 28th of July was Sunday."

And in McIntosh *v.* Lee (57 Iowa, 358), it was said by the Court, "the petition alleges that the defendant entered into the written lease on March 10, 1878. Courts take judicial notice that the tenth day of March, 1878, was Sunday. The petition therefore in effect alleges that the lease was executed on Sunday," and it was therefore held that under the pleadings evidence was not admissible that the lease was executed on Monday.

These authorities, and none have been found in opposition to them, show clearly, that however often departed from as a matter of convenience, the rule is that matters of which judicial

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notice is taken, including the dates in the almanac, do not require to be put in evidence at all.

It is argued for the defendant in error that the fact of August 13, having been Sunday did not necessarily contradict Mrs. Manahan, and therefore that even if the Court below committed an error it was an immaterial one for which the judgment should not be reversed. But there was an apparent contradiction, which at least required explanation, and in a case where the evidence in support of the plaintiff's case was so meagre, it is impossible to say that even a slight doubt thrown on the testimony of the main witness, would not have turned the scale in the minds of the jury.

It is also argued that the almanac having been brought forward at so late a stage in the case, deprived the plaintiff below of the benefit of an argument upon it by one of her counsel. But in this respect it was like any other argument or illustration which counsel may make towards the end of a case. If it has not been anticipated it is a surprise, and that is a risk which parties must encounter in every case. If counsel had run the calculation back himself, so as to show that that day was Sunday, no one could have questioned his right to do so. His reference to the almanac was no more than a reference to the multiplication table, as a labor saving mode of refreshing or confirming knowledge legally presumed to be in everybody's mind. This kind of surprise is one of the dangers incident to every contest, and the only relief against it, is the discretion of the Judge, where the new matter or new view may lead to substantial injustice, and is such as could not reasonably have been foreseen, to allow an opportunity of reply, or subsequently to grant a new trial.

Judgment reversed, and venire de novo awarded.

Opinion by MITCHELL, J. H. C. O.

May '89, 31. June 5, 1889.

Reed's Appeal.

Right of Legislature to regulate public objects of a corporation—Powers of Gettysburg Battlefield Commissioners under Act of June 15, 1887—Powers of Gettysburg Battlefield Memorial Association.

Every grant of corporate existence necessarily implies the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created.

Insurance Co. *v.* Needles, 113 U. S. 574, followed.

The Gettysburg Battlefield Memorial Association, incorporated under the Act of April 30, 1864 (P. L. 570). "to promote the erection, by voluntary contributions, of works of art . . . adapted to designate spots of special interest," is a *quasi* corporation, created solely for the public benefit, and not for the profit or advantage of any of its corporators.

The Legislature has an undoubted right to prescribe reasonable regulations, respecting one or more of the public objects which this corporation was designed to accomplish, provided these regulations are such as tend to secure the ends for which its was created.

The appointment of commissioners under the Act of June 15, 1887 (P. L. 408), to act in conjunction with five members of the survivors of the regiments of this State, in selecting suitable monuments for marking the position of such regiments in the battle of Gettysburg, is not an unwarranted interference with the rights of the Gettysburg Battlefield Memorial Association.

Appeal of John Reed, Sylvester Byrne, Frederick Middleton, Julius B. Allen, and Charles W. Devitt, representing the survivors of the Seventy-second Regiment Pennsylvania Volunteers, from the decree of the Common Pleas of Adams County, sustaining the demurrer to their bill in equity filed against the Gettysburg Battlefield Memorial Association and John P. Taylor, Samuel Harper, J. P. S. Gobin, John P. Nicholson, and R. B. Ricketts, Commissioners appointed by the Governor of the State of Pennsylvania, and dismissing said bill.

The facts of the case are fully set forth in the opinion of the Supreme Court, *infra*.

The Court below (McCLEAN, P. J.) having sustained the demurrer of defendants and dismissed the bill, complainants took this appeal, assigning for error this action of the Court.

William W. Wiltbank, *William W. Ker*, and *J. C. Neely*, for appellants.

David Wills, *John M. Krauth*, and *S. McSwope*, for appellees.

June 28, 1889. THE COURT. Appellants aver in their bill that they represent the survivors of the Seventy-second Regiment, Pennsylvania Volunteers; that the Gettysburg Battlefield Memorial Association was incorporated by Act of April 30, 1864, to hold and preserve the battle grounds of Gettysburg, on which were fought the actions of first, second, and third days of July, 1863, and the natural and artificial defences as they were at the time of said battle, and thus by such preservation and such memorial structures as a generous and patriotic people might aid to erect, to commemorate the heroic deeds, the struggles and the triumphs of their brave defenders; also, to erect and promote the erection of structures and works of art and taste thereon, adapted to designate spots of special interest, to commemorate the great deeds of valor, endurance, and

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noble self-sacrifice, and to perpetuate the memory of the heroes and the signal events which render those battle-grounds illustrious.

It is also averred that from time to time large sums of money have been appropriated by the Legislature in aid of the objects above specified; that by Act of June 15, 1887, the sum of $121,500 was specifically appropriated "for the purpose of perpetuating the participation therein, and marking by suitable memorial tablets of bronze or granite, the position of each of the commands of Pennsylvania volunteers engaged in the battle;" that said Act required the Governor to appoint five commissioners to select and decide upon the design and material for monuments to mark the position of each Pennsylvania command upon the battlefield, etc.; that in the discharge of said duties the commissioners were required to co-operate with five persons representing the survivors of the several regimental organizations or commands of this State engaged in said battle, etc.

It is further averred that said commissioners were duly appointed, and appellants were duly selected by the survivors of said Seventy-second Regiment to co-operate with them in the discharge of their duties; that after appellants and said commissioners had agreed upon the true position of the regiment on the battlefield, etc., official notice of their action and conclusion was given to said Battlefield Memorial Association, and a suitable monument to mark the spot was procured, etc., but said Association would not permit its erection at the place agreed upon by appellants and said commissioners, but declared the monument should be placed at a point 283 feet distant therefrom, and not representing the position of said regiment on the battlefield, etc.

The prayer is for a decree declaring that the power to select the location of the monument was vested solely in the five commissioners, appointed by the Governor, co-operating with appellants; that the monument be erected at the place chosen by the commissioners and appellants; and that the Gettysburg Battlefield Memorial Association be enjoined from preventing the erection of said monument at the place so selected, etc., and for further relief.

The bill was demurred to on the ground that the Act of 1887 above referred to does not apply to or in any manner affect said Memorial Association or its officers, nor does it justify the selection of a site or location for said monument by said commissioners and appellants on the ground owned by the Association.

The action of the Court in sustaining the demurrer and dismissing the bill constitutes the subject of complaint in the several specifications of error before us.

The legal effect of the demurrer is to admit the unqualified truthfulness of every averment of fact that is well pleaded in the bill. It admits, among other things, that the commissioners appointed by the Governor co-operated with appellants, the duly constituted representatives of the 72d Regiment of Pennsylvania Volunteers, in determining the position of that regiment on the field during the battle of Gettysburg, and also in deciding upon a suitable monument or memorial tablet of bronze to mark said position and to perpetuate the participation of the regiment in said battle. It further admits that the location thus fixed by the commissioners, in conjunction with appellants, accurately represents the true position of the regiment while actively engaged in the battle, and also, that after being officially notified of such joint action, the Memorial Association, appellee, refused to permit the erection of the monument on the site designated and fixed as aforesaid.

It was urged, argumentatively, by counsel for appellees, that inasmuch as the commissioners are made parties defendant in the bill, their action in the premises was not definitive, but must have been subject to the approval of the Association. No such inference can be legitimately drawn from the pleadings. The only question is whether, assuming all the averments of fact, well pleaded in the bill, to be true, the appellants have presented such a case as entitles them to equitable relief? That is the only question that can properly arise on the demurrer.

The proceedings of the commissioners, as averred in the bill and admitted by the demurrer, were clearly within the scope of their authority, vested in them by the Act of 1887, under which they were appointed. That being the case the action of the Memorial Association in refusing to recognize their authority in the premises can only be justified on the ground virtually assumed by counsel, that the Commonwealth, acting through the agency of the commission or otherwise, has no right either to designate the position where any of her regiments specially distinguished themselves during the battle, or, at her own expense, to mark the same by the erection of a suitable monument. We are not prepared to admit the correctness of this proposition. On the contrary, we think it is wholly untenable. It is not in harmony with the purposes evidently intended to be accomplished by and through the Memorial Association as expressed in the Act incorporating it. Those purposes, as we have seen, were mainly "to hold and preserve the battle-grounds of Gettysburg, with the natural and artificial defences, as they were at the time of the battle, and by such perpetuation and such memorial structures as a generous and patriotic people may aid to erect, to commemorate the heroic deeds, the struggles, and triumphs of their brave

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defenders;" and also, "to erect and promote the erection, by voluntary contributions, of structures, and works of art and taste thereon, adapted to designate the spots of special interest, to commemorate the great deeds of valor, endurance," etc.

The people of this Commonwealth, through their representatives, saw fit to appropriate a large sum of money for the purpose of designating and, by suitable monuments, marking "spots of special interest" conspicuously occupied by their own regiments while engaged in battle, etc. That was all clearly in furtherance of one of the very objects for which the Association appellee was incorporated, and not in any manner in violation of any right or authority vested or intended to be exclusively vested in that corporation. Indeed, it is expressly made its duty to "promote the erection, by voluntary contributions, of works of art . . . adapted to designate spots of special interest," etc. In view of this and other facts in regard to which there can be no dispute, the action of the Association complained of in the bill was obstructive and wholly unwarranted. Unlike other corporations, either public or private, created for profit in connection with the advancement of certain public interests, the Association appellee is a *quasi* public corporation created solely for the public benefit, and not for the profit or advantage of any of its corporators. But, aside from that, there is nothing in any of the provisions of its charter that precluded the Legislature from doing what it did. It had undoubted right to prescribe reasonable regulations respecting one or more of the public objects which the corporation was designed to promote and accomplish, provided those regulations were such as tended to secure the ends for which the Association was created, and did not materially interfere with the rights and privileges granted by its charter. Every grant of corporate existence necessarily implies "the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created." (Ins. Co. *v.* Needles, 113 U. S. 574, 580.) The provisions of the Act of 1887 are clearly within the letter as well as the spirit of this well-recognized principle. There is nothing in any of them of which the appellee has any just reason to complain as an improper interference, on the part of the Commonwealth, with any of the rights and privileges granted by its charter. The provision for a commission to act in conjunction with the survivors of each regiment, etc., was at most a reasonable and proper regulation, tending to secure historical accuracy, and generally in furtherance of one of the purposes for which the Association was incorporated, and one that did not improperly interfere with any of its rights and duties.

In view of the facts as presented to us, we think the learned Judge erred in sustaining the demurrer and dismissing the bill.

Decree reversed and bill reinstated, and it is ordered that the record be remitted for further proceedings, in accordance with equity practice, costs of this appeal to be paid by the appellees.

Opinion by STERRETT, J. H. S. P. N.

May '89, 2. June 3, 1889.

Zimmerman v. Zimmerman.

Decedent's estate—Child's claim for nursing parent—Evidence required to prove contract.

The law regards the services performed by a son in nursing an aged parent during his last illness as but the performance of a filial duty which every man owes his parents, and implies no contract for compensation therefor; but a recovery may, of course, be had on an express contract.

A child's claim for services against his deceased father's estate, based on declarations made by the decedent in his last sickness, will not be countenanced by the Supreme Court, unless accompanied with clear proof of an agreement not depending upon idle and loose declarations, but on unequivocal acts of the intestate, as, for example, a settlement of an account, or money paid by the father to the son as wages, distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant.

Error to the Common Pleas of Dauphin County.

Assumpsit, by Elias Zimmerman against Levi Zimmerman, executor of the will of Samuel Zimmerman, deceased, to recover the sum of $1200 for nursing and attending his father, the decedent, from January 1, 1883, to February 10, 1885.

The facts of the case are set forth in the opinion of the Supreme Court, *infra*.

The Court below directed the jury to render a verdict in favor of defendant. Verdict accordingly, and judgment thereon; whereupon plaintiff took this writ, assigning for error, *inter alia*, this instruction of the Court.

David Fleming and *Samuel J. M. McCarrell*, for plaintiff in error.

Josiah Funck, for defendant in error.

June 28, 1889. THE COURT. This belongs to a class of cases which unfortunately are becoming too frequent. It was an action brought

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below by the plaintiff against the executor of his father's estate, to recover compensation for the care and nursing of his aged father for the last two years of his life. It appears that the plaintiff and his father lived upon the same farm, though occupying separate houses a few feet apart. The farm belonged to the father, the son worked it as tenant. For the last two years or so of his life the old man became feeble and required more or less attention; sometimes would fall down and his son would have to be called in to help him; he had little control of his bowels or urine, and needed to be helped when he wanted to move about or change his position. The plaintiff was occasionally compelled to remain at his father's house all night in order to take care of him. There is no doubt he performed many duties to his father, some of which were disagreeable. This, however, was a duty which he owed to his father, and was a return for like duties rendered him in his infancy by his parents. The law regards such services as but the performance of a filial duty which every man owes his parents, and implies no contract for compensation therefor. A recovery may, of course, be had upon an express contract, and this is what was attempted in this case. The learned Judge below was of opinion that no express contract had been proved, and gave the jury a binding instruction to find for the defendant. This is the matter of which the plaintiff complains.

The testimony did not prove a contract in the clear and unequivocal manner required between parent and child. It was vague and uncertain and consisted of loose declarations of the testator. As a specimen, and it is perhaps the strongest one I can select, I will refer to the testimony of Frank Zimmerman, a son of the plaintiff:—

Q. "Now what was said when your father was present?"

A. "Grandfather asked him (plaintiff) for water; and he said, 'Come and get me water and you shall be paid for what you do, if it takes all I have; shall be well paid if it takes all I have.'" The witness was seventeen years old at the time of the trial; the conversation occurred in 1883. There were several other witnesses examined, and the scope of their testimony was that the testator had declared that if the plaintiff would take care of him he should be well paid. All this is very unsatisfactory; it would be so, to prove a contract between strangers, and it does not measure up to the standard required between parent and child. Such loose declarations can always be proved in a contest between a man and his father's estate. In Leidig *v.* Coover's Executors (47 Pa. 534), it was held that the declarations of a testator that his daughter should be paid for what she had worked over age are not sufficient evidence of a contract as would enable her to recover; nor was it material that during a part of that time she had resided away from the homestead upon another farm belonging to him. In that case it was said by Mr. Justice AGNEW: "The declarations of a parent may admit the filial devotion and real worth of his child and the profit he may derive from her services. They may reach farther and disclose his own sense of obligation and his settled purpose to compensate. But all this is insufficient to raise a promise." This is in the direct line of our cases. (See Candor's Appeal, 5 W. & S. 513; Hertzog *v.* Hertzog, 29 Pa. 465; Mosteller's Appeal, 30 Id. 473; Hack *v.* Stewart, 8 Id. 213; Lynn *v.* Lynn, 29 Id. 369; Ulrich *v.* Arnold, 120 Id. 170.) In Candor's Appeal, *supra*, it was said by Justice ROGERS: "In Walker's Estate we took occasion to express our reluctance with which we listen to claims for wages by a son against the estate of a deceased parent, and subsequent experience has not changed or modified the opinion then entertained. It is pregnant with danger, as we verily believe, as well to the rights of creditors as to the other heirs, and cannot, of course, be entitled to countenance from the Court, unless accompanied with clear proof of an agreement not depending upon idle and loose declarations, but on unequivocal acts of the intestate, as, for example, a settlement of an account, or money paid by the father to the son as wages, distinctly thereby manifesting that the relation which subsisted was not the ordinary one of parent and child, but master and servant." The cases cited by the plaintiff do not conflict with this view. Longenecker *v.* R. R. Co. (105 Pa. 328) and Ott *v.* Oyer's Executrix (106 Id. 6) have no bearing upon the case, while in Neel *v.* Neel (59 Pa. 347) and Titman *v.* Titman (64 Id. 483) a contract much more distinct in terms had been proved. The amount of compensation was shown in each case. There was nothing of the kind in the case in hand. How much was to be paid, when and for what services? Nothing of this kind appears. And it is one of the remarkable facts incident to this class of cases that the claim for compensation is seldom or never presented to the decedent during his life, but is always left to vex his legal representatives and heirs after his death. It is not too much to say that this testator, who was the owner of a small estate, would probably have been astonished had his son presented a claim before his death of $1200 for his services for the two years preceding. Where a contract of this nature is expressly proved, both as to the nature of the services and the amount to be paid, or can be shown by circumstances which are unequivocal in their nature, such as the settlement of accounts, it is all very well. A

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man has a right to do what he will with his own. But when a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged parent, he must come here with some better proof than loose declarations of gratitude, and an intention to compensate made by an old man in the extremity of his last sickness.

Judgment affirmed.

Opinion by PAXSON, C. J. H. S. P. N.

July '89, 74. May 29, 1889.

Pomeroy's Appeal.

Award of Auditor in favor of creditor—What constitutes payment—Insolvency of executor—Orphans' Court practice.

Creditors who have been awarded their claims out of funds in the hands of an executor, but who have not been paid on account of the insolvency of the executor, are entitled to come in upon a second fund raised in the same estate and claim a *pro rata* share thereof.

An award and decree in favor of a creditor do not constitute actual payment.

The claim against an executor in such a case is not analogous to a claim against a sheriff. An execution creditor would have to look to the sheriff for his money. The sheriff is an officer of the law who has given bond for the faithful performance of his duty, and the creditor has made him his agent by placing the execution in his hands. An executor, however, is not an officer of the law, but acts only by virtue of the authority given him in the will under which he is appointed.

Appeal of William R. Pomeroy and Jane E. Campbell, creditors of the estate of Joseph Pomeroy, deceased, from the decree of the Orphans' Court of Juniata County, distributing the assets of the said estate.

The following facts appear from the report of Robert McMeen, Esq., Auditor: Joseph Pomeroy died September 21, 1874. His will was proved on the 24th of the same month, and letters testamentary thereon granted to J. Nevin Pomeroy, the executor therein named, on the same day. On August 14, 1883, the executor filed his first account, which was duly referred to Jeremiah Lyons, Esq., as Auditor, who filed his report on February 1, 1886, awarding to William R. Pomeroy and Jane E. Campbell $13,836.15, and $204.80 respectively. Exceptions to this report, not affecting these two claims, were filed by other creditors of the estate, but they were afterward dismissed by the Court, on February 9, 1888, and the report confirmed. While the exceptions to this report were pending, about the middle of April, 1886, the executor became insolvent, and never paid the amounts awarded to the creditors by the Auditor's report. He was then removed from his office of executor and J. Howard Neely, Esq., duly appointed administrator with the will annexed.

At the audit of the account of the administrator, William R. Pomeroy and Jane E. Campbell presented their claims for the amounts awarded them by the Auditor on February 1, 1886, with interest from that date, and produced evidence that these amounts had never been paid.

The Auditor allowed the claims of William R. Pomeroy and Jane E. Campbell, and awarded them a *pro rata* share with the other creditors. Exceptions, *inter alia*, to the allowance of these claims were filed. The Court below (BARNETT, P. J.), sustained the exceptions and referred the matter again to the Auditor, "to distribute the fund in the hands of the administrator de bonis non among those entitled, who did not have an appropriation made to them in full of their respective claims by the former Auditor."

In his supplemental report, the Auditor excluded William R. Pomeroy and Jane E. Campbell from participation in the fund in the hands of the administrator. To this finding of the Auditor appellants excepted; their exceptions, however, were dismissed by the Court, and the supplemental report confirmed, whereupon they took this appeal, assigning for error, *inter alia*, the action of the Court in dismissing their exceptions and in confirming the supplemental report of the Auditor.

Benj. F. Junkin and *Alfred J. Patterson* (*J. Howard Neely* with them), for appellants.

The case of *Ex parte* Powell, *In re* Prodgers (1 Montagu & MacArthur, 283), was under the English Bankrupt Law, and is in no way analogous to the case in hand.

Jeremiah Lyons, for appellees.

June 28, 1889. THE COURT. This record presents the question whether creditors of an estate whose claims have been awarded them by an Auditor, and confirmed by the Orphans' Court, out of the funds of an estate in the hands of the executor, but who have not received payment owing to the insolvency of said executor, are entitled to come in upon a second fund raised in the same estate, and claim a *pro rata* share thereof. In other words, is the award of an Auditor in favor of a creditor, and a decree in his favor, actual payment? The Auditor held that it was not, but he was reversed by the learned Judge below, who held that the award amounted to payment so far as to exclude the creditor in whose favor it was made from participating in the second fund. It would have been more satisfactory if some authority had been cited to sustain so novel a proposition. Kittera's Estate (17 Pa. 416), and Sergeant's Executors *v.* Ewing (30 Id. 75), are not in point. No such

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question as the one before us was raised in either of those cases. *Ex parte* Powell (1 Mont. & MacArthur, 283), is equally wide of the mark. That was a case arising under the English Bankrupt Law; the creditors were allowed to select the bank where the money was to be deposited when received by the assignee; a dividend was declared and the creditors notfied to call at the bank, get their checks, and draw their money; some of the creditors neglected to do so, and in the meantime the bank failed. The distinction between that case and this can be seen at a glance. The Auditor finds the fact that the executor became insolvent before the final confirmation of his account, and pending exceptions filed thereto by other parties. It is true the appellants might have applied to the Court for an order upon the executor to pay them pending the exceptions. Such order, however, would have been in the discretion of the Orphans' Court, and it is not a practice prevalent in all the counties of the State. I do not see how these appellants can be punished by the loss of their claims for this omission. The Court below, however, evidently regarded the case as analogous to that of a sheriff, who has collected money on an execution, and fails, or neglects to pay it over. It is true in such case the debt is discharged and the execution creditor must look to the sheriff for the money. But I am unable to see the analogy. The sheriff is the officer of the law, and has given security for the faithful performance of his duty. Moreover, the execution creditor placed his execution in the hands of that officer for collection, has in a manner constituted him his agent for that purpose, and has the right to sue upon his official bond in case of default. But an executor is not an officer of the law, nor in any sense the agent of the creditor. He is appointed by the testator, and derives his authority to act from the will. The granting of letters testamentary by the register of wills is a *pro forma* act to give effect to the will of the testator.

If there was any laches here it appears to have been participated in by all parties connected with the estate, creditors, legatees, and distributees alike. Nor do I see upon what grounds other creditors, who did not present their claims until the second audit can charge those creditors with laches who presented their claims before the first. The residuary legatees also could have pressed this estate to an earlier settlement as well as the appellants could. Any person interested in an estate can cite the executor to file his account. That the great loss to this estate is due in a great measure to the supine negligence of nearly every one interested in it I have very little doubt, but I do not see that the appellants are entitled to a larger share of the blame, if there be any, than the others. We see no ground upon which the principle that an award is payment can be sustained. I know of no decided case which so holds and none such has been cited in either the printed or oral argument.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with this opinion.

Opinion by PAXSON, C. J. H. S. P. N.

July '89, 58. May 29, 1889.

Mumma's Appeal.

Agreement as to professional compensation by next of kin of decedent—Rights of creditors—Compensation for collecting claims against speculative insurance companies.

A charge of fifty per cent. of the amount realized is not unreasonable for collecting sums due upon certain speculative policies of insurance on the life of a decedent held by third parties, and paid to them by the insurance companies.

An agreement for such compensation made by the next of kin of the decedent is not necessarily invalid. *Prima facie* they had a right to make it subject to the rights of creditors.

Creditors cannot wholly repudiate such an agreement made by the next of kin in good faith. They have a right to object if it was unreasonable and in fraud of their rights.

Creditors are bound as well as heirs and distributees for expenses incident and necessary to the conduct of the administration of the estate; they can only be heard to object that such charges are excessive.

Appeal of David Mumma, a creditor, and John C. Nissley, administrator of the estate of Patrick Evers, deceased, from the decree of the Orphans' Court of Juniata County, modifying the report of the Auditor and making distribution of the estate of said decedent.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*.

The Auditor (F. M. M. Pennell, Esq.) to whom the account of the administrator was referred reported, *inter alia*, that the accountant's commissions should be reduced from $100 to $75, that the accountant's counsel should be allowed a fee of $150, and that the accountant should not be surcharged with the one-half of the amount collected, paid to David Mumma under the agreement with the next of kin.

Upon exceptions to this report the Court sustained the reduction of the accountant's commissions, reduced the counsel fee to $100, sustained the exception to the allowance of one-half the amount collected to David Mumma, and directed the accountant to pay the sum of $591.28 to the overseers of the poor of the borough of Mifflintown.

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Whereupon appellants took this appeal, assigning for error the action of the Court in dismissing and sustaining the exceptions above set forth.

Benj. F. Junkin and *Alfred J. Patterson* (*J. Howard Neely* with them), for appellants.

Jeremiah Lyons, for appellee.

June 28, 1889. THE COURT. We can only consider in this case the questions affecting the parties who have entered an appeal. Said parties are David Mumma, whose claim to retain one-half the fund collected from the different life policies was disallowed by the Court below, and the administrator of Patrick Evers, the deceased pauper, whose commissions have been reduced, as well as the amount expended for counsel fees. The heirs of Patrick Evers have not appealed, hence the relative rights of said heirs and the overseers of the poor of the borough of Mifflintown are not before us. We are, therefore, spared the discussion of this interesting subject.

The main question is whether Mr. Mumma was entitled to retain one-half the sum collected by him. It appears from the report of the Auditor that Patrick Evers, the decedent, was, at the time of his death, and had been several years prior thereto, a pauper, and a charge upon the borough of Mifflintown. It further appeared that during his life he was induced by certain parties to take out life policies in certain speculative insurance companies. These persons paid all expenses, took assignments of the policies, maintained them, and after his death drew money thereon, and kept it as their own. After the decisions of this Court in other cases that such insurances enure to the benefit of the estate of the assured, an agreement was made between the heirs of said Patrick Evers and David Mumma, of Harrisburg, that said Mumma was to raise up an administration upon the estate, ascertain what policies existed on his life, who held them, to whom money had been paid thereon; collect by suit or otherwise the money so paid by the insurance companies to the policy holders; bear all expenses and pay all charges out of his own pocket, if no money was obtained; and if any money was recovered the said Mumma was to receive as his compensation one-half of the gross amount so obtained. In pursuance of this agreement letters of administration were taken out upon the estate, and the administrator ratified the agreement before made by the heirs. Mr. Mumma succeeded in collecting the sum of $1031.00, one-half of which he paid to the administrator, and retained the other half under the agreement as his compensation. Up to this time no one had knowledge of a claim on the part of the overseers of the poor for the maintenance of the pauper. The overseers made no effort to collect this money from the parties who had received it, and the Auditor distinctly finds that had there been no such agreement with Mr. Mumma there would have been no estate to distribute. The Auditor further finds, and in this he is sustained by the evidence, that fifty per cent. was the usual charge of attorneys for this class of cases. It must not be overlooked that the fee was contingent, no recovery, no compensation, and the expenses to be borne by the attorney. When we look at the character and amount of the claims we are not prepared to say that the charge was unreasonable or the agreement *ultra vires*. We are not discussing a question of professional ethics but an agreement as to professional compensation. The said agreement was not necessarily invalid because made by the heirs. *Prima facie* they had a right to make it subject to the rights of creditors. But the latter having made no move towards collecting the money, they cannot wholly repudiate the agreement made by the heirs in good faith by means of which the money was received. They would have a right to object if it was unreasonable and in fraud of their rights, and neither appears to be the fact in this case, and we think it was error to surcharge the accountant with any portion of the money retained by Mr. Mumma.

The Auditor reduced the accountant's claim for compensation from $100 to $75. In this he was sustained by the Court below, and we think they were both right. This question does not require discussion.

The Auditor allowed a fee of $150 to counsel for professional services. This the Court reduced to $100. The Auditor found as a fact that the charge was not excessive for the services rendered. The learned Judge does not give a satisfactory reason for reversing him upon this point. He does not say that the amount was excessive or that it was not fully earned. That the estate when collected belonged to the overseers of the poor, and that they were not bound by an agreement to which they were not a party, is aside from the case. The administrator had a right to collect this money and to administer the estate. Creditors are bound as well as heirs and distributees for expenses incident and necessary to the conduct of the business; they can only be heard to object that such charges are excessive, and this has not been shown in this case. We are of opinion that the fee of $150 to counsel should have been allowed.

The decree is reversed at the costs of the appellees, and it is ordered that distribution be made in accordance with this opinion.

Opinion by PAXSON, C. J. H. S. P. N.

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July '88, 114. May 21, 1889.

Baer's Appeal.

Trusts and trustees—Investments—Decedents' estates—Evidence—Written agreement—Variation by parol.

A trustee can only protect himself by investing trust funds in real or government securities, or by making investments in pursuance of an order of Court.

An administrator deposited the funds in his hands in a private bank, taking a certificate in the following form:—

"1354\frac{11}{100}$. No. 1549.
"BANKING HOUSE OF A. S. HENDERSON.
"LANCASTER, Pa., June 25, 1884.
"D. M. Harman, Administrator of the estate of John M. Harman, deceased, has deposited in this office thirteen hundred and fifty-four $\frac{11}{100}$ dollars, payable to his order, or the order of D. G. Eshleman, his attorney, on the return of this certificate, twelve months after date, with interest at the rate of four per cent. per annum.
"A. S. HENDERSON.
"No interest allowed after due. W. H."

At the time the said deposit was made and the certificate taken it was agreed between A. S. Henderson and D. G. Eshleman that the money could be drawn out at any time within the year on the return of the certificate, but in that case no interest to be paid thereon. The bank subsequently failed, and at the adjudication of the administrator's account:

Held, (1) That the loaning of the money was properly an investment and not a deposit, and that the administrator should be surcharged for the loss occasioned thereby.

(2) That the parol contemporaneous agreement made by the counsel of Harman with the banker was incompetent to change the written agreement from an investment to a deposit, in the absence of proof of its omission from the written contract, by fraud, accident, or mistake.

Appeal of Reuben A. Baer, executor of the will of Susanna Harman, deceased, from a decree of the Orphans' Court of Lancaster County, sustaining exceptions to the report of the Auditor in the matter of the account of D. M. Harman, administrator of the estate of John M. Harman, deceased.

The following were the substantial facts of the case, as found by the Auditor, William Leaman, Esq.: After a citation had issued, D. M. Harman filed his account as administrator of the estate of John M. Harman, deceased, in which he charged himself with receiving $1374.61. After certain credits are asked, amounting to $195.23, the following entry and item appear on the credit side of the said account, viz:—

The funds of the estate, after deducting the expenses of administration notices, etc., were on the 25th day of June, 1884, deposited in the bank of A. S. Henderson, in the city of Lancaster, for safe keeping until such time as they might be wanted for distribution. The said bank being at that time in undoubted credit, in January, 1885, the said A. S. Henderson died, when it was first discovered that he was insolvent. His estate is now in due course of settlement, but it is yet uncertain what amount of dividend the depositors will receive. Accountant therefore claims credit, for the present, for the balance, $1179.38.

The distributees filed exceptions to the credit claimed for $1179.38, and the Auditor was appointed to pass upon the exceptions. The evidence produced before him showed that the administrator was a resident of Baltimore, Maryland, and had left the moneys belonging to the estate in the hands of his counsel, D. G. Eshleman, Esq. The latter left the money at the banking house of A. S. Henderson, taking a certificate therefor in the following form:—

1354\frac{11}{100}$. No. 1549.
BANKING HOUSE OF A. S. HENDERSON.
LANCASTER, Pa., June 25, 1884.
D. M. Harman, Administrator of the estate of John M. Harman, deceased, has deposited in this office thirteen hundred and fifty-four $\frac{11}{100}$ dollars, payable to his order, or the order of D. G. Eshleman, his attorney, on the return of this certificate, twelve months after date, with interest at the rate of four per cent. per annum.
A. S. HENDERSON.
No interest allowed after due. W. H.

Mr. Eshleman also testified that at the time the deposit was made and the certificate taken, it was agreed between Henderson and himself that the money could be drawn out at any time within the year on the return of the certificate, but in that case no interest was to be paid.

A. S. Henderson died on the 13th of January, 1885. At the time said deposit was made and up to the time of his death, A. S. Henderson was reputed solvent, his bank was in good credit, and considered and dealt with by the community generally and by business men as in a perfectly safe and sound condition. Mr. Eshleman kept all his individual deposits in Mr. Henderson's bank, and also the funds of several trusts which were under his control. A. S. Henderson was doing a banking business as an individual in June, 1884, and up to the time of his death. A few days after Mr. Henderson's death, the disclosure came, suddenly and without premonition, that his estate was insolvent, and that the claims of depositors in his bank could not be paid in full. Further examination into the affairs of his estate made it apparent that Mr. Henderson had been insolvent for several years prior to his death.

The administrator presented his claim against the estate of A. S. Henderson upon the above certificate and received a dividend $357.42. It was contended on behalf of the accountant that he should be charged only with this sum, against which all credits should be allowed.

The Auditor was of opinion that the agreement with Henderson amounted to a loan or investment, and that the administrator was liable for the loss incurred; relying upon Frankenfield's Appeal (11 WEEKLY NOTES, 373).

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The accountant filed exceptions on the ground, *inter alia*, that he should have been allowed the credit claimed by him. The Court, PATTERSON, J., was of opinion that the accountant was not, under the facts of the case, liable for the loss occasioned by the failure of Henderson, and sustained the exceptions and restated the account in accordance with that opinion. Whereupon this appeal was taken, specifying for error this action of the Court.

Eugene G. Smith and *L. Ellmaker* (*G. C. Kennedy* with them), for appellant, cited—

Frankenfield's Appeal, 11 WEEKLY NOTES, 373.

D. G. Eshleman, for appellee.

Trustees will not be held responsible when acting in good faith and under the advice of counsel.

Calhoun's Estate, 6 Watts, 189.
Spering's Appeal, 21 P. F. S. 25.
Van *v.* Emery, 5 Ves. 144.

It is the hardest demand that can be made in equity, to compel trustees to make up a deficiency not owing to their wilful default.

Witmer's Appeal, 6 Norris, 120.
Jackson *v.* Jackson, 1 Atk. 513.
Johnson's Appeal, 12 S. & R. 317.
Neff's Appeal, 7 P. F. S 91.

The measure of diligence and care required of a trustee is that which a man of ordinary prudence would practise in the case of his own estate.

Fahnestock's Appeal, 8 Out. 46.
Eyster's Appeal, 4 Har. 372.
Witmer's Appeal, 6 Nor. 120.
Lewin on Trusts, 122.

June 28, 1889. THE COURT. The certificate of deposit in this case is of the same form as the one in Frankenfield's Appeal (11 WEEKLY NOTES, 373), and it was undoubtedly evidence of a loan for twelve months at four per cent. interest, of the amount deposited. Upon the considerations mentioned in the opinion in that case the administrator, D. M. Harman, who made the loan, must suffer the loss resulting from the insolvency of Henderson, unless there is something in the present case to take it out of the operation of the decision in Frankenfield's Appeal. The only matter set up to work this result is a parol contemporaneous agreement made by the counsel of Harman with Henderson, the banker, that the money might be drawn out at any time within the year on the return of the certificate, but in that event without interest. As such a contract is entirely contrary to the written agreement it is incompetent to change the latter by means of the parol testimony except upon proof of its omission from the written contract by fraud, accident, or mistake. An examination of the testimony of Mr. Eshleman disproves the possibility of any such theory. He simply says that such a verbal agreement was made at the time of the deposit. He does not say that he was induced to make the deposit and accept the certificate upon the faith of any promise that the money might be drawn out at any time within the year, nor that there was any kind of fraud, accident, or mistake in the transaction. It is unnecessary to cite the numerous authorities that unless these elements are present the written contract must stand as it is, unaffected by the parol proof. The question of good faith on the part of the administrator and his counsel in making the deposit does not arise, because it cannot change the result. No one can doubt that so far as they were concerned the highest integrity and utmost good faith characterized the transaction. It is simply an instance of misplaced confidence, unfortunate in its consequences, but which must nevertheless be disposed of according to the plain legal rules which govern all similar cases.

The decree of the Orphans' Court is reversed and record remitted, with instructions to restate the account in accordance with the foregoing opinion, the costs of this appeal to be paid by the appellee.

Opinion by GREEN, J. W. M. S., JR.

May '89, 21, 32. June 5, 1889.

Boyer's Appeal.
Boyer v. Bolender et al.

Equity—Torts—Joint tortfeasors—No contribution among.

Where a decree is entered jointly against the officers and directors of a company, upon a bill charging them with fraudulently appropriating the company's money to their own use, one of the defendants, who pays more than his proportion of the decree, cannot use the decree for the purpose of enforcing contribution from his fellow wrong-doers.

Nor is the son of such wrong-doer, who, with money obtained from his father, has paid more than his father's quota and taken an assignment of so much of the decree, in any better position to enforce contribution.

Error to and appeal from the Common Pleas of Dauphin County.

Sur rule to show cause why execution should not be stayed.

The facts of the case are sufficiently stated in the following opinion by SIMONTON, P. J.:—

"The Mahoney Mutual Assessment Life Association was incorporated under the Act of May 1, 1876, and on May 11, 1882, at the suit of the attorney-general, on behalf of the Commonwealth, the corporation was dissolved, and on June 5, 1882, Henry S. Boyer was appointed receiver of its assets. Thereupon, on the 7th

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day of May, 1883, said receiver filed a bill in equity, in the Dauphin Common Pleas, against Philip Hillbish, Daniel Bolender, S. H. Yoder, and others, in which he set forth that they were, and for some years had been, directors, and some of them officers, of said company, and that, as such, they had fraudulently converted to their own use large sums of money belonging to the company. [As the result of this suit, a decree was entered October 7, 1884, jointly against said defendants for the sum of $18,853.73 and costs. A testatum fi. fa. was thereafter issued upon this decree and placed in the hands of the sheriff of Snyder County, where the defendants resided, who proceeded to execute the same. Thereupon, the defendants, after conference among themselves, all except two, paid certain portions of the amount to the sheriff, until the whole was paid, except the sum of $3400. This amount was handed to the sheriff by W. P. Hillbish, a son of Philip Hillbish, one of the defendants, and an assignment of that amount of the sum mentioned in the decree was made by Boyer, the receiver, to said W. P. Hillbish. Afterwards, one of the defendants, who had not yet paid anything, A. C. Simpson, paid to Philip Hillbish $2500, which was credited on account of the balance of $3400, which had been assigned.] Subsequently, an alias testatum fi. fia. was issued from the office of the prothonotary of Dauphin County for the balance of the $3400, yet unpaid, and placed in the hands of the sheriff of Snyder County with directions to collect the amount thereof from Daniel Bolender and S. H. Yoder. Thereupon they presented their petitions to this Court, asking for a rule on said W. P. Hillbish to show cause why said fi. fa. should not be stayed, and the judgment upon which it was founded be declared satisfied.

"A mass of testimony has been taken both on behalf of the petitioners and the respondent to this rule, and it has now come before us for final decision.

"[We are convinced, after a careful perusal of the evidence, that the real party in interest in the proceeding upon this fi. fa. is Philip Hillbish, one of the original defendants in the equity proceeding, who is the father of W. P. Hillbish. The $3400 paid to the sheriff, to make up the amount due upon the testatum fi. fa. then in his hands, was either the money of Philip Hillbish, or borrowed upon his credit and afterwards repaid by him. This is distinctly shown by the testimony, which further shows that W. P. Hillbish, his son, was not possessed of means to purchase the judgment, nor of credit to enable him to raise the amount. The assignment, it is true, was made to the son, but there is nothing in the rules of law which determine when parol evidence may and when it may not be received to vary, alter, or contradict a written agreement, which prevents us from finding the fact to be what it really was. In doing this we do not alter the terms of the writing, as counsel contend; we simply find that the consideration expressed in it came from Philip Hillbish, and that he is therefore the real party in interest.]

"[Philip Hillbish, therefore, stands in the position of one of several wrong-doers, who has paid a judgment obtained jointly against himself and others because of the wrong done, and is now seeking to obtain contribution from the others. The law is well settled that this cannot be done. The leading case is Merryweather *v.* Nixan (8 T. R. 186), where it was held that no contribution could be claimed between joint wrong-doers. The principle has been restricted by subsequent decisions to cases where the person seeking contribution knew, or must be presumed to have known, that he was doing an unlawful act. This is the ground upon which Armstrong *v.* Clarion County (66 Pa. St. 218) was decided, and it is illustrated by Betts *v.* Gibbins (2 Ad. & El. 57), Jacobs *v.* Pollard (10 Cush. 287), and Wooley *v.* Batte (2 Carr. & Pa. 417).

"The case before us does not come within this exception.] [The judgment now sought to be enforced, by way of contribution, by Philip Hillbish, in the name of his son, against his fellow defendants, is a joint judgment obtained against them on the ground that they had in concert fraudulently appropriated to their own use the funds of the company of which they were officers and directors; there was no other basis for the giving of the judgment. The case is therefore in its facts substantially the same as Miller *v.* Fenton (11 Paige Chanc. 18), in which the bill was filed by the receiver of a bank against two of its officers, for a fraudulent abstraction of the funds of the institution, committed by them jointly or in concert; and one of them, having paid the amount of the decree obtained against them, sought to enforce contribution against the other, when it was held by Chancellor WALWORTH that 'in a case of wrong-doers, such as these defendants by this bill are charged to have been, the complainant may recover from any one of them for the whole loss, and he will have no claim against the others for contribution.' This is a direct authority for our ruling that the real party in interest being Philip Hillbish, one of several joint wrong-doers, he cannot enforce contribution against his fellows, and therefore the rules, as heretofore granted, are made absolute."]

Boyer then took an appeal and a writ of error, assigning for error in each the portions of the above opinion inclosed in brackets.

William A. Sober, for plaintiff in error and appellant.

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Charles Hower, for defendants in error and appellees.

June 28, 1889. THE COURT. There appears to have been a writ of error as well as an appeal in the above case. We need not say which was the proper remedy, as both lead to the same result. To state the case briefly, it was an attempt on the part of one wrong-doer to enforce contribution from the others who participated in the wrong. This under all the authorities cannot be done. We need not refer to them as they are cited in the opinion of the learned Judge below, which so fully covers the ground that we may well decline any extended discussion of the case. It was contended, however, that because the judgment had been marked to the use of William P. Hillbish, the authorities referred to do not apply. It is true he was not one of the original wrong-doers, but the Court below has found upon sufficient evidence that he is a mere man of straw, and that the real actor is his father, who was admittedly one of the wrong-doers. Nor were the defendants below compelled to set up their own turpitude in order to entitle them to relief. If such had been the case the learned Judge below might, perhaps, have hesitated to interfere. Nor did it need any astuteness in the Court below to discover the fraud; it appeared upon the face of the proceedings; the record was saturated with it, and it came within his judicial knowledge.

The case is affirmed both upon the writ of error and the appeal, and the latter is dismissed at the costs of the appellant.

Opinion by PAXSON, C. J.

MITCHELL, J., dissents. W. M. S., JR.

Jan. '89, 364. March 21, 1889.

Appeal of the James H. Hawes Manufacturing Company.

Taxation of manufacturing companies—Taxation of real estate—Act of June 30, 1885—Act of April 15, 1834.

The Act of June 30, 1885, § 20 (P. L. 199), which provides "that the taxes laid upon manufacturing corporations by and under the revenue laws of the Commonwealth, be, and the same are hereby abolished as to such corporations," does not abolish the tax laid upon the real estate of "manufacturies of all descriptions," by the Act of April 15, 1834 (P. L. 512).

The revenue laws of the Commonwealth, referred to in the Act of June 30, 1885, § 20, are those which provide revenue for the Commonwealth, as distinguished from those which provide revenue for county, borough, school, and township purposes.

Appeal of the James H. Hawes Manufacturing Company from the decree of the Common Pleas of Bradford County, entering judgment against it for certain taxes upon a case stated between the Commonwealth of Pennsylvania, for the use of the County of Bradford, Bradford County Poor District, Towanda Borough School District, and the Borough of Towanda, plaintiffs, and the James H. Hawes Manufacturing Company, defendant.

The following facts appear from the case stated: The defendant was incorporated as a manufacturing company, April 18, 1887, with a capital stock of $50,000. The company owned certain real estate in the borough of Towanda, Bradford County, and had erected thereon certain buildings and improvements, which were used solely for manufacturing purposes, and were included in the capital stock of the corporation.

On December 31, 1887, the assessors of the borough of Towanda assessed and returned the said property at a valuation of $8000. The proper authorities levied taxes thereon for county, poor, school, and borough purposes. The company claimed that it was exempt from such taxation, and this case stated was framed. If the Court should be of opinion that defendant was liable for the taxes so assessed, then judgment to be entered for plaintiffs for the sum of $134.40, but if not, judgment to be entered for defendant.

The Court (SITTSER, P. J., of the Forty-fourth Judicial District), delivered the following opinion upon the case stated. [After stating the facts.]

"The defendant's claim of immunity is founded on the 20th section of the Act of June 30, 1885 (P. L. 199), which provides 'that the taxes laid upon manufacturing corporations by and under the revenue laws of the Commonwealth, be, and the same are hereby abolished as to such corporations, and the laws under which such taxes are laid and collected, be, and the same are hereby repealed, so far and so far only as they apply to and affect manufacturing corporations.'

"This Act is entitled, 'A further supplement to an Act to provide revenue by taxation.' This title, we think, fairly embraces the subject-matter of the 20th section. In an Act *to provide revenue by taxation*, new subjects of taxation may be enumerated, the taxes may be increased or diminished, or entirely abolished upon property already subject to taxation.

"*The revenue laws of the Commonwealth* referred to in this section are those which provide revenue for the Commonwealth, as distinguished from those which provide revenue for county, borough, school, and township purposes. This, we think, is the plain meaning of the Act, and it does not, therefore, offend against the 2d section of Article IX. of the Constitution by at-

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tempting to exempt the property of these corporations from all taxation.

"By the Act April 15, 1834 (Purd. 1583), 'manufacturies of all descriptions' are subject to taxation as real estate. This Act has never been repealed, and it justifies the taxes complained of by the defendant.

"We direct judgment to be entered for the plaintiffs for $134.40."

Whereupon defendant took this appeal, assigning for error the entry of said judgment.

Rodney A. Mercur (*John W. Mix* and *Henry Streeter* with him), for appellant.

The Act of June 7, 1879 (P. L. 112), imposes the State taxes, the Act of April 15, 1834 (P. L. 509), the county taxes, the Act of April 5, 1851 (P. L. 320), the borough taxes, the Act of May 8, 1854 (P. L. 623), the school taxes, and the Act of June 4, 1879, the poor taxes; these are "the revenue laws of the Commonwealth." The Act of June 30, 1885, is too broad and comprehensive in its language to be restricted to the repeal of only those laws relating to State tax.

Prior to the Act of 1885, corporations were held liable to taxation for State and county purposes.

Whitesell *v.* Northampton County, 49 Pa. 526.
Carbon Iron Co. *v.* Carbon Co , 39 Id. 251.
Lackawanna Co. *v.* Luzerne Co., 42 Id. 424.

The Act of 1885, § 20, has been declared constitutional.

Fox's Appeal, 112 Pa. 337.
Van Nort's Appeal, 121 Id. 118
Sanderson's Appeal, 17 WEEKLY NOTES, 456.
Laughlin's Appeal, 19 Id. 517.
Com. *v.* Del. Div. Canal Co., 23 Id. 216.
McKellar *v.* Com., 2 Pa. S. C. Dig. 236.
Com. *v.* Atlantic Refining Co., 2 Pa. C. C. R. 62.
Com. *v.* Quaker City Dye Works, 5 Id. 94.
Com. *v.* Mahoning Rolling Mill Co., Id. 95 [*ante*, p. 194].

I. McPherson (*E. J. Angle*, *John N. Califf*, *James H. Codding*, and *John W. Codding* with him), for appellees.

The lands of corporations for private purposes are taxable just as the land of individuals.

Carbon Iron Co. *v.* Carbon Co., 39 Pa. 251.
Lackawanna Iron & Coal Co. *v.* Luzerne County, 42 Id. 424.
Northampton County *v.* Glendon Iron Co., Lehigh Valley Law Rep. 81.

The Act of 1885 is unconstitutional, as it embraces more than one subject in its title, and it also exempts certain property from taxation.

Dorsey's Appeal, 72 Pa. 195.
Union Pass. Ry. Co.'s Appeal, 81 Id. 91.
Beckert *v.* City of Allegheny, 85 Id. 196.
In re Road in Phœnixville, 109 Id. 44.
Rogers *v.* Manufacturers' Imp't Co., Id. 109.
Sewickley Borough *v.* Sholes, 118 Id. 165.
Hatfield *v.* Com., 120 Id. 395.
Ruth's Appeal, 10 WEEKLY NOTES, 500.
Fox's Appeal, 112 Pa. 355.
Cooley on Const. Lim. 177.
County of Erie *v.* Com'rs of Erie, 113 Pa. 368.

March 25, 1889. THE COURT. We affirm this decree upon the opinion of the learned Judge of the Court below.

Decree affirmed, and the appeal dismissed at the costs of the appellants.

PER CURIAM. H. S. P. N.

Quarter Sessions.

Q. S. of Beaver County. August 5, 1889.

In re Hamilton's Application.

Liquor licenses—Jurisdiction of Quarter Sessions in granting—Rehearing of applications for—Act of May 24, 1887—Practice—The mere fact that a full term has elapsed between the entry of an order refusing a liquor license and the making of a motion for a rehearing does not prevent the Court from revoking the order and granting a license.

Sur motion to open order refusing a wholesale liquor license.

The facts fully appear in the opinion of the Court, *infra*.

J. F. Reed, for the motion.

E. B. Daugherty, *W. H. S. Thomson*, and *F. H. Agnew*, contra.

August 5, 1889. THE COURT. At the hearing of this application in March last, it was established that the petitioner was a citizen of the United States and was of temperate habits and of good moral character. In addition, the applicant filed a sufficient bond and otherwise complied with the law. License was refused him simply because the Court was of the opinion that his place was unnecessary.

The decision of the Supreme Court rendered June 28, 1889, *In re* Applications of Pollard and The Prospect Brewing Company (24 WEEKLY NOTES, 177 and 181), clearly shows that this Court erred in not granting the petitioner a license.

On June 29, 1889, his counsel moved the Court to open the order previously made in the case and award the license.

The counsel for the remonstrants, while forced to concede that the Supreme Court will grant the petitioner relief if he applies therefor, deny the power of this Court to now do anything for him. This view of the law is based on the fact, that a full term had elapsed between the time of the entry of the order refusing the license and the making of the motion for the rehearing. If the order were in the nature of a common law judgment or decree, it would doubtless be too

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late to interfere with it. But it is not of that character. The jurisdiction of the Quarter Sessions in granting licenses is purely statutory, as much so as are the powers of the Orphans' Court. The mode of procedure is similar to that followed in Courts of Equity and the Orphans' Court, the petition and remonstrance serving the same purposes that the bill and answer or the petition and answer serve in the Courts last mentioned.

These Courts have always claimed and exercised, without question, the right to re-examine, modify, or altogether reverse their own decrees, untrammeled by the common law rule, which forbids any interference with a judgment after the term at which it is rendered has passed.

The Act of 24th May, 1887, relating to wholesale liquor licenses provides that the "Court shall fix, by rule or standing order, a time at which application for said licenses shall be heard." Although a contrary view has been asserted, I can find nothing in this language binding the Court to adhere to its first application of the law to the facts developed at the hearing when the decision is palpably erroneous, and no vested rights can be affected by doing what should have been done originally. The Act requires that a regular hearing shall be had at a time fixed, but, for that matter, a similar rule, written or unwritten, governs the practice of the Equity and Orphans' Courts and all other legal tribunals in disposing of every question of law or fact, that is or may be disputed. The Act does not even require that the hearing shall be during a term. Any *time* may be fixed. Evidently, the main reason for inserting this provision in the statute was to avoid confusion and save time by bringing all original applications before the Court together instead of allowing the license seekers to appear singly or in squads every day in the year that the Court might be in session.

The present proceeding is in effect in the nature of a bill of review to correct error apparent on the face of the record, and I am convinced that this Court has a discretion analogous to that possessed by a Court of Equity to modify, within any reasonable time, the order complained of, it being erroneous on its face.

It will scarcely be asserted that a plainly illegal refusal to grant the prayer of a petition for naturalization, for license to peddle, for a decree making a married woman a feme sole trader, or the like, cannot be rectified by the lower Court, simply because a term has gone by.

It is contrary to public policy, common sense, and justice to strain a technical rule with no better results than to add to the costs and delay of legal proceedings and the work of the Supreme Court.

And now to wit, August 5, 1889, the order refusing license to W. H. Hamilton is hereby revoked, and the license prayed for by the said applicant is granted. The term of the said license shall be computed from the first day of April, 1889, as provided by the standing rule of Court.

Opinion by WICKHAM, P. J. A. R. H.

Common Pleas.

C. P. No. 4. November 24, 1888.

Steen v. Smucker et al.

Costs—Judgment—Act of March 20, 1810—An averment in the statement filed under the Procedure Act of 1887, that the plaintiff claims to recover an amount greater than $100, is not sufficient to prevent the judgment being entered without costs, where the verdict is for less than $100.

Sur rule to show cause why plaintiff should not satisfy the judgment upon payment of the verdict, without costs.

Assumpsit upon an alleged agreement by the defendants that they would sell plaintiff goods to the amount of $300. The suit was begun on October 1, 1887, and the statement which was sworn to February 17, 1888, and filed on February 20, 1888, alleged that there was due the plaintiff $300.

Upon the trial of the cause, a verdict was rendered for the plaintiff for only $79.98. A motion was made for a new trial, but before hearing the present rule was taken.

Leoni Melick, for the rule, cited—

Act of March 20, 1810, Purd. Dig. 978.
Sneively *v.* Weidman, 1 S. & R. 417.

Joseph A. Abrams, contra.

The allegation in the statement, filed under the Act of 1887, that the claim was for $300, rendered it unnecessary to file a special affidavit under the Act of 1810.

Sadler *v.* Slobaugh, 3 S. & R. 388.
Bartram *v.* McKee, 1 Watts, 39.
Manning *v.* Eaton, 7 Id. 346.
Shirley *v.* Entricken, 3 WEEKLY NOTES, 51.

November 24, 1888. THE COURT. Rule absolute.

[See Parrott *v.* Thompson, 19 WEEKLY NOTES, 548; Lukens *v.* Ferguson, 21 Id. 271.]

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, AUG. 30, 1889.* [No. 18.

Supreme Court.

Jan. '89, 242, 371. May 28, 1889.

Appeal of Priestley, Administratrix. Appeal of Cutter, Administrator.

Bill of review—When granted—Notice—Laches—Act of October 13, 1840.

An account settled and confirmed can only be reviewed for error of law apparent on the face of the record or for new matter which has arisen since the decree. As a matter of grace a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made. A review cannot be granted for a matter of fact, an objection to which could have been taken before the entry of the decree. The Act of October 13, 1840 (P. L. 1), is to be construed as subject to the above principles.

A trustee filed his account in 1882 which was confirmed and the trustee discharged. In 1883 he died. In 1887 the *cestui que trust* presented an application for a review, stating that she lived in another State, that she had no notice of the filing of the account, and only recently learned of its existence. She claimed that the trustee was not entitled to any commissions by reason of the fact that the funds had not passed through his hands. The answer of the trustee's administratrix set forth that the account "was filed with the actual and legal knowledge of the petitioner." The Court proceeded to review, open, and restate the account. On appeal:

Held, that the petitioner had been guily of laches and that the allegations of the answer as to notice, not being contradicted by any evidence, were conclusive, and that the review was improperly allowed.

Whether in a proper case for a review the above facts, as to laches and notice, would have barred a right thereto under the Act of October 13, 1840 (P. L. 1), within five years, not decided.

Simpson's Appeal, 18 WEEKLY NOTES, 175, reviewed and distinguished.

Appeals of Hannah H. Priestley, administratrix of Dr. Joseph Priestley, deceased, and of Ephraim Cutter, administrator *c. t. a.* of Ann C. Rodrigue, deceased, from a decree of the Orphans' Court of Northumberland County.

Hugh Bellas died October 26, 1863, leaving a will duly admitted to probate, whereby he devised to certain trustees a certain portion of his property in trust for his daughter Ann C. Rodrigue,

"to apply all the proceeds and profits thereof to her personal use and support and benefit, from time to time as she may have need and require, when by her demanded in writing for herself and her children, but not to be applied or used otherwise."

The trustees declined to act, and on petition of Ann C. Rodrigue, Dr. Joseph Priestley was appointed by the Court as substituted trustee. Letters of administration *c. t. a.* on Bellas's estate were granted to S. P. Wolverton, Esq.

In 1882 Priestley filed his account as trustee, claiming credit for commissions on funds passing through his hands as trustee the sum of $1522.24, being at the rate of two per cent. The account was confirmed absolutely December 6, 1882, and on December 11, 1882, Priestley, on his own petition, was discharged from the office of trustee. On March 10, 1883, he died, and on March 28, 1883, letters of administration were granted upon his estate to Hannah H. Priestley.

On April 11, 1887, Ann C. Rodrigue presented a petition to the Orphans' Court setting forth the fact that she resided in New Jersey, and that she had no notice of the filing of the account of Priestley, and had only recently heard of its existence. That Priestley was not in fact entitled to any commissions whatever inasmuch as he did not receive nor disburse any money, all funds being in reality paid to the petitioner directly by Mr. Wolverton. The prayer was that the account be reviewed, reversed, and corrected. An answer was filed by Hannah H. Priestley denying the allegations of the petition.

The Auditor (J. Nevin Hill, Esq.), to whom the case was referred, found as a fact that all the money received by Priestley as trustee was paid to him directly by Wolverton. Up to 1872 the funds so received were paid over in turn by Priestley to Ann C. Rodrigue. In 1872 a disagreement took place between Priestley and Mrs. Rodrigue and the former threatened to resign the office of trustee. He did not at once carry out this threat, but thereafter all payments of income were made directly by Wolverton to Mrs. Rodrigue, receipts being taken in the name of Priestley as trustee. On April 9, 1878, a paper was signed by Mrs. Rodrigue and her children and placed of record, exempting Wolverton from any liability for and on account of the payment of the income directly to Mrs. Rodrigue without the intervention of a trustee. In 1882 Priestley filed his account claiming commissions upon all the income paid to Mrs. Rodrigue to date whether by himself or by Wolverton.

The Court, ROCKEFELLER, P. J., was of opinion that the account should be opened and reviewed. He thought that Priestley was entitled to full commissions prior to 1872. That from that date to 1878 he was entitled to two per cent. commissions for responsibility, and that for the period from 1878 to 1882 he was entitled to no commissions whatever. A decree was entered accordingly.

Priestley's administratrix thereupon took this

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appeal, assigning for error the opening and reviewing the account and the reduction of the commissions. The administrator of Ann C. Rodrigue, who had in the meantime died, also appealed, assigning for error the action of the Court in allowing any commissions whatever.

Harold M. McClure, for Priestley's administratrix.

A bill of review can only be granted for error of law apparent on the face of the record or where there is newly discovered evidence.

Riddle's Estate, 7 Harris, 431.
Hartman's Appeal, 12 Casey, 74.
Bishop's Appeal, 2 Id. 470.
Stevenson's Appeal, 8 Id. 318.
Russell's Appeal, 10 Id. 258.
Yeager's Appeal, Id. 173.
Heckman's Estate, 2 Woodward's Dec. 165.
Green's Appeal, 9 Smith, 235.
Milligan's Appeal, 1 Norris, 389.
Hosfeld's Estate, 4 Pa. Co. Court Repts. 260.
Scott's Appeal, 2 Amerman, 427.
Putnam *v.* Day, 22 Wall. 60.
Simpson's Appeal, 18 WEEKLY NOTES, 175.

The learned Court in saying that Mrs. Rodrigue "had no actual notice of the filing of the account" has overlooked or ignored one of the first principles of equity pleading, that an answer responsive to the allegations of the bill is conclusive, unless overcome by evidence adequate for the purpose. No evidence at all was offered by the petitioner to rebut this answer, and therefore it is conclusive.

Cremer's Estate, 7 WEEKLY NOTES, 544.
Daniel's Chan. Prac. 843.
Appeal of Rowley, 5 Amerman, 150.
Eaton's Appeal, 66 Pa. St. 483.

Mrs. Rodrigue was guilty of gross laches.

Wetherill's Estate, 8 WEEKLY NOTES, 238.
Scott's Appeal, 2 Amerman, 427.

S. P. Wolverton (*L. H. Kase* with him), for Mrs. Rodrigue's administrator.

It is within the sound discretion of the Orphans' Court to withhold or grant a bill of review.

Appeal of Stevenson's Exr's, 8 Cas. 318.
Hamill's Appeal, 7 Norris, 363.
Parker's Appeal, 11 Smith, 478.
Simpson's Appeal, 18 WEEKLY NOTES, 175.
Young's Appeal, 3 Out. 74.
Whelen's Appeal, 20 Smith, 428.

PRIESTLEY'S APPEAL.

June 28, 1889. THE COURT. The account of Dr. Joseph Priestley, which is the cause of the present contention, was confirmed absolutely December 6, 1882, and on the 11th day of the same month he was discharged as trustee by the Court on his own petition. He died on the 10th of March, 1883, and letters of administration were granted to Hannah H. Priestley, the appellant, on March 28, 1883. More than four years after Dr. Priestley's death Mrs. Rodrigue, the appellee, presented the petition in this case for a review of his account as trustee. The whole contention was about a matter of commissions, the trustee having charged $1522.24—being two per cent. upon the money passing through his hands for a number of years. It was alleged that for a number of those years Dr. Priestley did not actually receive and disburse the money, owing to differences between himself and Mrs. Rodrigue, which it is not necessary to refer to in detail; that during this time he refused to act as trustee, or to have any business intercourse with his *cestui que trust*, and the money was paid by S. P. Wolverton, Esq., the administrator, directly to Mrs. Rodrigue. The receipts therefor were taken in the name of Dr. Priestley as trustee. The Court referred the petition to an Auditor, who took a large amount of testimony, resulting in the granting of the review, a subsequent restatement of the account, with a decree of the Court below reducing the commissions to $930.84. The principal question raised upon this appeal was the propriety of granting a review. This underlies the entire case.

After a man has been dead for four years, and more than four years after the confirmation of his account as trustee, the reasons should be weighty to induce a Court to grant a review, and open the account to further litigation. Especially should the delay be clearly and satisfactorily accounted for. In such case there should be no laches (Scott's Appeal, 112 Pa. 427). In her petition the appellee alleges that "she resides in New Jersey, had no notice of the filing of the account, and only recently learned of its existence." This averment is evasive. It should have stated when she learned of it. The appellant in her answer distinctly avers that the account "was filed with the actual and legal knowledge of the petitioner." It was conceded she had legal notice; there was no evidence as to actual notice before the Auditor, and this point must be disposed of upon the pleadings. As no evidence was offered to contradict the answer, it must stand as conclusive. This is the rule in equity, where, as here, the answer is responsive (Eaton's Appeal, 66 Pa. 483; Rowley's Appeal, 115 Id. 150). Aside from this, legal notice was sufficient. "The notice directed by law must be good and effectual, and we ought not to hear any complaints on that subject" (App *v.* Driesbach, 2 Rawle, 287). It was urged, however, that a review is a matter of right under the Act of October 13, 1840 (P. L. 1), if applied for within five years, and that in such cases no question of notice or laches arises. If we concede the truth of this position it does not affect the case. I have not referred to those matters for the purpose of showing that they would bar the right to a review within five years.

It is not necessary in this case to decide such a point or discuss it at length; where, however,

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there has been laches, and the party complaining had both legal and actual notice of the filing of the account, it would be a persuasive reason why a Court, exercising equity powers, should move slowly, and see that the case clearly comes within the Act of 1840, and refuse it altogether where the application is *ex gratia*.

It has been ruled in a line of cases that an account settled and confirmed can only be reviewed for error of law apparent on the face of the record, or for new matter which has arisen since the decree. As a matter of grace a review may be granted for new proof, discovered after the decree, which proof could not possibly have been used at the time when the decree was made (Story's Equity, sec. 104; Riddle's Estate, 19 Pa. 431; Russell's Appeal, 34 Id. 258; Hartman's Appeal, 36 Id. 70; Milligan's Appeal, 82 Id. 389; Scott's Appeal, 112 Id. 427.) This Court early adopted these principles of equity as applicable to the Act of 1840, and they have never been departed from in a single instance to my knowledge. It was said by Mr. Justice STRONG, in delivering the opinion of the Court in Hartman's Appeal (*supra*): "The construction given by the Court below to the Act of October 13, 1840, was entirely accordant with that which this Court has given in numerous cases. It was first announced in Riddle's Estate (7 Harris, 433), repeated in Bishop's Appeal (2 Casey, 470). It was also recognized in Stevenson's Appeal (8 Casey, 318), and in Russell's Appeal (10 Casey, 258). The construction is now too firmly settled to be disturbed by us." And the authorities I have cited show that the same construction has been maintained to the present time. The rule in equity is that a bill of review will not lie for an error of law, unless such error appears on the face of the decree. Mr. Justice STORY in commenting upon this rule in Whiting *v.* Bank of the United States (13 Peters, 13), said: "That is true in the sense in which the language is used in the English practice. In England the decree always recites the substance of the bill and answer, and pleadings, and also the facts on which the Court founds its decree. But in America the decree does not ordinarily recite either the bill, answer, or pleadings, and generally not the facts on which the decree is founded. But with us the bill, answer, and other pleadings, together with the decree, constitute what is properly considered the record; and, therefore, in truth the rule in each country is precisely the same in legal effect, although expressed in different language, viz., that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that you are not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the Court, in its own deduction from the evidence." And in Putnam *v.* Day (22 Wallace, 60) it was said by Mr. Justice BRADLEY: "We think the rule to be well established, and a wholesome one, that the proofs cannot be looked into on a bill of review. This was expressly held in Whiting *v.* Bank (13 Peters, 6)."

It follows from what has been said that when Mrs. Rodrigue presented her petition for a review of Dr. Priestley's account, it was competent for the Court below to examine the entire record, and if it had appeared from the will of Hugh Bellas, and the codicil thereto, the record of the appointment of the trustee, the petitions for discharge and the action of the Court thereon, the account filed by the trustee and the confirmation thereof, that an error in law had been committed, and that such error had been distinctly pointed out in the petition, the Court below would have been justified in granting a review. Unfortunately for the appellee no error of law is set forth in her petition, or appears anywhere in the record. It was a question of fact pure and simple, that the accountant had claimed commissions on money which had not passed through his hands. This was an objection which could as well have been taken when the account was filed as it could several years after its confirmation and the death of the accountant. The Act of 1840 was never intended to open accounts for the re-trial of questions of fact years after they have been passed upon by a competent tribunal. The question of Dr. Priestley's commissions was adjudicated by the Orphans' Court years ago; it was a question distinctly appearing upon the face of the account; it was a challenge to any person objecting to come in and dispute it. As was said in Scott's Appeal (*supra*), "Something is due to the finality of judicial proceedings." As there was no error of law upon the face of this record, the appellee was not entitled to a bill of review as a matter of right; as there was no allegation of after-discovered testimony, she was not entitled to it as a matter of grace.

The learned Judge below evidently relied upon Simpson's Appeal (18 WEEKLY NOTES, 175) as authority for granting this review. An examination of that case, however, discloses the fact that there was one, if not two, errors of law apparent upon the face of the record. The account as guardian was prematurely and illegally filed, and the balance decreed to Mary V. Simpson was not coming to her, under the terms of her father's will, at the time the decree was made, and might never have been due her. It follows that the review in that case was strictly in accordance with our construction of the Act of

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1840. The review in this case was a departure from Milligan's Appeal, Scott's Appeal, and the cases cited.

The decree of the Court below, granting a bill of review, and all proceedings subsequent thereto, are reversed and set aside at the costs of the appellee.

CUTTER'S APPEAL.

June 28, 1889. THE COURT. This was an appeal from the same decree as Priestley's Appeal, just decided. In the latter appeal we reversed the order of the Court below granting a review of the account, and all the subsequent proceedings. The effect of this is to restore the confirmation of the account in controversy. The Court below awarded $980.34 to the accountant as commissions, which, together with some other small credits, left a balance due the accountant of $1042.50. This allowance is assigned for error upon this appeal. All that was said in Priestley's Appeal is applicable here. The question is precisely the same, and it appears that neither party was satisfied with the decree of the Court below. The reversal of the decree in Priestley's Appeal necessarily requires its affirmance in this appeal.

The decree is affirmed upon the appeal of Ephraim Cutter, administrator, and the appeal dismissed at the costs of the appellant.

Opinions by PAXSON, C. J. L. L., JR.

July '88, 218. May 22, 1889.

Martin v. Rutt.

Husband and wife—Rights of, to testify against each other—Admissions and declarations of husband against wife's claim—Sheriff's interpleader—Evidence—Internal revenue certificate.

In a sheriff's interpleader directed to determine the title to certain personal property levied on as the property of the husband and claimed to be the property of the wife, the admissions and declarations of the husband, not even a formal party to the record, adverse to his wife's title, made in the absence of the wife, and after the levy, are inadmissible, being secondary evidence, and not part of the *res gestæ*, and because the declarations of a husband adverse to his wife's interest are always inadmissible.

In a sheriff's interpleader directed to try the title to certain cigars levied on in 1886 as the property of the husband and claimed by his wife, an internal revenue certificate issued in 1876 to a third party is too remote and irrelevant to be admissible in evidence to show that said third party had the right to manufacture cigars at the place where the cigars had been levied on.

In a sheriff's interpleader directed to try the title to certain personal property which had been taken in execution, the execution creditor's judgment is admissible to show the foundation of his title to the property, and in such action it is not error for the Court to instruct the jury that the question was whether the goods were the property of the judgment debtor or of the claimant.

Error to the Common Pleas of Lancaster County.

Feigned issue, wherein Lydia R. Martin and E. G. Hoffman were plaintiffs and Jacob Rutt, Sr., defendant, to try the title to certain personal property which had been levied upon by the defendant in the issue as the property of David G. Martin.

On the trial, before PATTERSON, J., the following facts appeared: Jacob Rutt, Sr., having a judgment against David G. Martin issued execution thereon in 1886 and levied on 100,000 cigars, two wagons, one horse, harness, stable implements, poultry, feed, leaf tobacco, one refrigerator, liquors, beef, bar-room fixtures and furniture, sundries in cellar, one organ, and household and kitchen furniture, as the property of said David G. Martin. These goods were claimed by Lydia R. Martin, the wife of David G. Martin, and by E. G. Hoffman, an employé of said Lydia R. Martin. Lydia R. Martin proved the receipt from her father of considerable sums of money, and claimed that with this she had purchased some of the articles claimed by her, and her testimony was also to the effect that her father had given her tobacco out of which the cigars had been made, and the leaf tobacco was what was left over.

The plaintiffs offered in evidence the certificate from the U. S. Internal Revenue Department, dated January, 1876, to Abraham M. Martin, to show that he had the right to manufacture cigars where the business was carried on. Objected to. Objection sustained and evidence rejected. Exception. (Seventh assignment of error.)

The defendant offered in evidence his judgment against David G. Martin, and also offered to testify as to when he obtained the judgment, and as to whether he had released anything on the judgment. Objected to. Objection overruled, and evidence admitted. Exception. (Third, fourth, and sixth assignments of error.)

The defendant also made the following offer:—

S. Zimmerman sworn for defendant. Q. State to the Court and jury the conversation you had with D. G. Martin with reference to the transfer of this property over to his wife, after this levy.

Objected to by the plaintiffs' counsel, unless the wife were present, or other interested party for her. Objection overruled and evidence admitted. Exception.

A. Shortly after he was sheriffed, I went there and I talked to him about my bill, and he said that he didn't want to cheat me out of my bill, money that I have in him, but he assigned it to

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his wife on account of Jake Rutt. (Fifth assignment of error.)

The Court having stated the nature of the case, and the facts averred in the affidavits claiming property, further charged the jury: "[When they made this affidavit and came into Court, then the Court, inasmuch as it was denied by Mr. Rutt, framed this feigned issue, that it might be inquired into and ascertained who owned these goods, whether they were David G. Martin's the debtor's, or whether they were Lydia Martin's] or Mr. Hoffman's; and hence, what you are to try is the issue, to try by a jury the right to certain personal property levied upon by the sheriff on fi. fa., to April Term, 1886, No. 89. You have heard all the articles enumerated, which were levied upon. [Now, what you are to try is the question, who owns these goods? Your inquiry will go to the question as to whether D. G. Martin owned them;] if he didn't own them, then Mr. Rutt had no right to levy upon them or some of them, or take them as the property of D. G. Martin; because neither Mrs. Martin nor Mr. Hoffman owed Mr. Rutt anything; but if you find they are not D. G. Martin's why then you will find for the plaintiffs, and if you find that they are D. G. Martin's, or any of them, then you will find for the defendant, in this case."

The Court then referred to the evidence in the case and concluded: "[Now, it seems to me that this is about all we have to say to you; because there is a great deal of conflicting evidence, and where there is a dispute and contradiction in the testimony, the jury must decide who is right.] That is the object of the jury. The Court cannot decide a question of fact. The jury have to say, 'Well, the facts made out, I think, are so and so. I believe the testimony.' That is what the jury are for. Now, where there is contradiction, you will weigh the evidence and decide for yourselves which party you will believe, which party has the preponderance of testimony, and you will render your verdict accordingly."

Verdict for plaintiff, Lydia R. Martin, for one-third of the cigars, one horse, poultry, feed, one refrigerator, all the liquors, beef, bar room fixtures and furniture, sundries in cellar, one organ and all the household and kitchen furniture; and for the defendant for the rest of the goods. Thereupon the said plaintiff, Lydia R. Martin, took this writ, assigning for error, the rejection of plaintiffs' evidence, the admission of defendant's evidence, and the portions of the charge included in brackets.

H. M. Houser and *Benjamin F. Davis*, for the plaintiff in error.

H. C. Brubaker (*A. H. Fritchey* with him), for the defendant in error.

June 28, 1889. THE COURT. The only assignment of error in this case, which has any merit, is the fifth. The testimony admitted under that assignment consisted of certain declarations of the husband, D. G. Martin. They were offered by the defendant in the issue against the title of Martin's wife who was the plaintiff. The husband was not even a nominal party to the record. The wife was not present when the declarations were made and they were not part of the *res gestæ* of the transaction to which they related. They were inadmissible upon any theory. As declarations they were secondary only, not being the declarations of the plaintiff herself. As the declarations of an agent they were incompetent because they were not part of the *res gestæ*. But they were fatally incompetent for the entirely independent reason that they were the declarations of a husband offered against his wife. It is enough to know that the law does not permit the direct testimony of the husband against his wife, and as a matter of course it cannot permit his indirect testimony in the form of declarations adverse to her interest. The very point was decided in Burrell Twp. *v.* Uncapher (117 Pa. 353), where we held the husband's declarations to be inadmissible although he was a party to the record. We said, "He is a formal and not a real party, and as the purpose of the offer was to elicit from him testimony adverse to the claim of his wife, he must be regarded as incompetent to deliver such testimony. "The same is true as to declarations made by him. They could not be given in evidence against his wife." Neither the theory of a conspiracy nor the fact that the husband was the defendant in the execution under which the goods were sold, helps the question in the least degree. It is still the testimony of the husband against the wife and is interdicted.

The fifth assignment of error is sustained and on that the judgment is reversed. The other assignments have no merit. As a matter of course Rutt's judgment against D. G. Martin was admissible as it was the foundation of his execution process under which he claimed title. The internal revenue certificate to A. M. Martin in 1876 was altogether too remote and irrelevant to be admitted. Whether the goods in question were the property of Lydia R. Martin was no doubt the true issue of the cause, but as the defendant alleged they were the property of her husband, D. G. Martin, and evidence was given in support of that proposition, it was certainly not error in the Court to say to the jury that the question was whether they were David G. Martin's, the debtor's, or whether they were Lydia Martin's.

Judgment reversed and new venire awarded.

Opinion by GREEN, J. C. K. Z.

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May '88, 44. June 4, 1889.

Snively's Appeal.

Partition—Recognizance—Lien of—When given by a married woman, distributee in the partition—Judgments—Conclusiveness of.

When in proceedings in partition in the Orphans' Court, land is awarded to one of the heirs, a married woman, and she executes a recognizance to the other heirs to secure their shares of the bid made by her, such recognizance is a lien upon the whole of the real estate awarded to said married woman, including the undivided part to which she is entitled under the intestate laws; it is not a lien only upon the part which she acquired by the decree of the Court.

When in proceedings in partition in the Orphans' Court, land has been awarded to an heir who gives a recognizance to the other heirs, and the proceedings are confirmed by the Court and no appeal taken from the decree of confirmation, such decree is conclusive, and on a subsequent sale of said real estate by the executrix of the heir to whom it was awarded, objections cannot be made, before the Auditor appointed to distribute the proceeds of said sale, to the right of such heir to bid, to have the property awarded to her, and to give the recognizance in question, upon the ground that she was a *feme covert.*

Appeal of J. Stouffer Snively, husband of Martha J. Snively, deceased, from a decree of the Orphans' Court of Franklin County, in the matter of the distribution of the estate of said Martha J. Snively.

Before the Auditor (W. J. Zacharias, Esq.) appointed to make distribution of the fund, $1806.90, arising from the sale by her executrix of certain real estate belonging to the estate of Martha J. Snively, deceased, it appeared that this real estate was originally the property of Benjamin Eby, who died May 9, 1862. After his death proceedings in partition were begun and so proceeded in that the said real estate was awarded to said Martha J. Snively, a daughter of Benjamin Eby, at her bid of $2905, and she on the same day, November 24, 1884, entered into a recognizance in the usual form to Irene R. Eby, her sister, to secure her portion (one-half) of said bid, less costs, viz., $1411. J. Stouffer Snively had asked to take the said real estate in right of his wife, and had been refused.

Upon these facts the Auditor held that the aforesaid recognizance, having been given by a married woman, was a lien only upon that portion of the real estate which the recognizor acquired by the decree of the Court awarding the same to her, and for the securing of the price of which the recognizance was given, to wit, the one undivided half which formerly belonged to Irene R. Eby, and that only one-half of the proceeds of the sale of said real estate was answerable for the debt secured by the recognizance.

Exceptions to this report, duly filed, were sustained by the Court, ROWE, P. J., who held that the recognizance was a lien upon the whole of said real estate, and decreed distribution accordingly. Thereupon the said J. Stouffer Snively took this appeal, assigning as error, *inter alia*, that conclusion of law, and the decree of the Court.

A. G. McLanahan, Jr., and *O. C. Bowers*, for the appellant.

B. F. Winger and *W. U. Brewer*, for the appellee.

June 28, 1889. THE COURT. This was an appeal from the decree of the Orphans' Court of Franklin County, distributing the estate of Martha J. Snively, deceased. The principal question was the effect of the recognizance given by the decedent about a year before her death for the real estate of her deceased father, awarded to her by the Orphans' Court, under proceedings in partition. The Auditor held that inasmuch as the decedent was a married woman when she took said land and gave said recognizance, the recognizance was a lien only upon that portion of the real estate which the recognizor acquired by the decree of the Court awarding the same to her, and that it was not a lien upon that portion of said real estate which she took in her own right by descent. Distribution was made accordingly. The Orphans' Court, upon exceptions filed, reversed the Auditor and held that the recognizance was a lien upon her whole interest in the land, both as to the share she took under the proceedings in partition and the share she took by descent. In this we think the learned Judge was right. No question arises here as to the respective rights of the husband and wife to bid for the property at the time of the partition. Nor does any other question arise as to the regularity of those proceedings. No appeal was taken and we have, therefore, the definitive decree of the Orphans' Court settling that matter. The only question left is the effect of the recognizance. It was contended that because the recognizor was a *feme covert* she could only bind the interest she acquired; that the recognizance had no greater effect than a judgment given by a *feme covert* for the purchase of real estate, which can only be enforced against the particular real estate thus acquired. We see no analogy between a purchase-money judgment given by a married woman and a recognizance given by her for owelty in proceedings in partition. It is well settled that such recognizance is a lien upon the whole estate thus taken (McCandless's Appeal, 98 Pa. 489; Long *v.* Long, 1 Watts, 265; Cubbage *v.* Nesmith, 3 Id. 314). This is conceded as to such recognizances generally, but it was contended that the rule does not apply to a recognizance given by a married woman. The law makes no such dis-

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tinction. The legal effect of a recognizance in the Orphans' Court is not changed because given by a *feme covert*. We need not discuss her right to bid, the right of the Orphans' Court to award the property to her, and her right to give the recognizance in question. All this is settled, as before observed, by the decree of the Orphans' Court. An error in either of these particulars would render the decree voidable merely. It could not be attacked collaterally. It was held in Painter *v.* Henderson (7 Pa. 48), that where in partition on petition of collateral heirs land was assigned by the Court to the widow at a valuation, and the time for an appeal had elapsed, a purchaser cannot object for the defect, although such decree was not authorized by an Act of Assembly which allows an assignment to heirs only. In the case in hand the wife bid for the property; it was awarded to her by the Court; and the recognizance was given in obedience to the order and decree of the Court. It is idle, now, upon the distribution of the proceeds of the sale of this same real estate after her death, to call in question the regularity of the proceedings of the Orphans' Court or the effect of the recognizance.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

Opinion by PAXSON, C. J. C. K. Z.

Jan. '89, 345. May 15, 1889.

Charlotte Furnace Co. v. Stouffer.

Ore mines—Inclined plane at—Ownership of—Contract as to erection of, construed.

In an action of replevin for an inclined plane, plaintiff proved that he had erected the plane under a written agreement with defendant, wherein defendant agreed that plaintiff should build and operate the plane, and defendant would use it in mining his iron ore which he was to sell to plaintiff at a fixed price, and on all ore sold any other person than plaintiff he was to pay to plaintiff a fixed sum per ton for use of the inclined plane, the agreement to be in force four years. Plaintiff further proved that at the expiration of the four years he had demanded the plane which was refused him; that the plane was built partly on defendant's land and partly on land owned by a third party, which was leased by plaintiff, though it also appeared that a subsequent lease of said land had been made to defendant. A judgment of nonsuit having been entered, on writ of error:

Held, the judgment of nonsuit was error. The evidence did not establish the relation of landlord and tenant between plaintiff and defendant, and therefore the defendant could not claim the plane as a fixture, and the agreement was only consistent with the ownership of the plane being in the plaintiff.

Error to the Common Pleas of Fayette County.

Replevin, by the Charlotte Furnace Company against Cyrus Stouffer, to recover a certain inclined plane located at Mt. Vernon, Pa.

On the trial, before EWING, J., the plaintiffs' evidence was to the following effect: The Charlotte Furnace Co. owned and operated an iron furnace at Scottdale, Westmoreland County, from 1878 to 1883. A part of the ore used in this furnace was produced from what are known as the Mt. Vernon Ore Mines, about six miles away from the furnace, in Fayette County. Cyrus Stouffer owned some ore lands at these mines, and on March 5, 1881, made the following proposition in writing to the plaintiffs, which was, the same day, accepted:—

I agree to deliver the Charlotte Furnace Co. 3000 tons of ore at rate of 15 tons per day at mouth of pit formerly worked by me, and placed conveniently for loading on cars of incline, which is to be built and operated by them. The price of this ore to be $2.50 per ton of 2240 lbs. as weighed on scales of the Greenlick Narrow Gauge Railway Co., and payment to be made from 15th to 20th of each month for previous month's shipments. Twenty cents per ton of the above named $2 50 to be retained by them and paid to J. R. Stouffer—his receipts to be acknowledged as payments for such amount. It is also understood that in case I mine more ore than the quantity above specified, I have the privilege of selling excess amount to other parties, after giving Charlotte Furnace Co. opportunity of purchasing at the same price offered by such parties, and I further agree to pay 5c. per ton for use of incline and tramway on all ore that may be sold to other parties than Charlotte Furnace Co. for the term of four years from this date, and cash advanced for labor are to be made on ore at dump, when shipments have not been made as above specified.

CYRUS STOUFFER.

Accepted,
CHARLOTTE FURNACE COMPANY,
By G. K. MILES.
Mt. Vernon, Pa., March 5, 1881.

In pursuance of the terms of this agreement, plaintiffs purchased the material and built the incline from the "Stouffer Drifts" to the Greenlick Narrow Gauge Railway, a distance of about seven hundred and fifty feet. It was completed in July, 1881.

Plaintiffs operated the incline as provided in the agreement until the 3000 tons of ore had been delivered. This was in April, 1882. After that date, defendant operated the incline during the remainder of the four years, and paid the plaintiffs five cents per ton for the use of it.

At the expiration of four years from the date of the agreement, plaintiffs demanded the possession of their property, but defendant refused to re-deliver it. This action was then brought to recover it.

A witness for plaintiffs testified that about four-fifths of the inclined plane was on the land of D. H. Pershing. There was evidence that plaintiffs had a lease of that land, but it also appeared that defendant had a subsequent lease of the same land. Neither lease was printed in the paper-book.

At the conclusion of the plaintiffs' evidence, the Court directed a judgment of nonsuit, which

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the Court in banc refused to take off, whereupon the plaintiffs took this writ assigning for error the entry of the nonsuit, and refusal to take off the same.

S. L. Mestrezat (*John Boyle* with him), for plaintiffs in error.

R. H. Lindsey (*George D. Howell* with him), for defendant in error.

June 28, 1889. THE COURT. The nonsuit ordered in this case can only be sustained upon the theory that the plaintiff's testimony showed such an interest of the defendant in the inclined plane, to recover which the action was brought, as to deprive the plaintiff of any right of recovery therefor. After a repeated and most thorough reading of the testimony we fail to discover such evidence. By the terms of the contract between the plaintiff and defendant the plaintiff was to build the plane at its own expense and the testimony shows this was done. It was further agreed that the defendant was to deliver the ore conveniently for loading on cars of the incline, which was to be operated by the plaintiff. It was also agreed that if more ore than 3000 tons was mined, the defendant should have the privilege of selling the excess to other parties, and in that event he was to pay five cents per ton to the plaintiff for the use of the incline and tramway for the term of four years. This contract is the only written evidence as to the relation of the parties to the incline and tramway, and so far as it goes it certainly is altogether inconsistent with any ownership of the defendant therein. If the defendant was to pay the plaintiff for the privilege of using it, the structure cannot be regarded as having been considered by the parties as belonging to the defendant, but precisely the opposite. In point of fact Stouffer used the incline to ship ore during the whole of the four years after the 3000 tons were shipped, and it is to be presumed he paid the contract price for the privilege, though there is a singular lack of testimony on this subject. After the four years expired the plaintiff undertook to take possession of the structure, but the defendant refused to allow this to be done, and hence this suit. The defendant now claims title to the structure and in support of his claim alleges that he became owner by virtue of the right which a landlord succeeds to when a tenant voluntarily erects fixtures on the leased premises and leaves them there when he leaves the premises. Even that right is subject to an exception in favor of trade fixtures, but in this case we fail entirely to discern the relation of landlord and tenant between these parties. There was evidence that the incline was erected principally on land of D. H. Pershing, and that Pershing had made an article of agreement in relation to the use of the land with Everson, Knapp & Co., who had assigned the agreement to the plaintiff. We are not permitted to know the contents of this paper because it is not printed and does not appear on the record, and yet we are expected to pronounce upon it. If the case of the plaintiffs in this Court depended upon the contents of this paper, we would be obliged to decide against them for want of knowledge of the paper, but as they have a *prima facie* case without it, and the paper does not purport to confer any right upon the defendant, it is not so material in that regard. The defendant however has shown no title to the land upon which the incline was built so far as we can discover, and no relation of landlord and tenant as between him and the plaintiff.

This agreement to pay for the use of the incline is inconsistent with any ownership therein on his part even if he were landlord, and as he had a right to the possession and use of the incline during the four years no inference of an abandonment of it to him arises from the fact that the plaintiff was out of possession at the time its claim was made. The case was incompletely tried. There was an absence of evidence which ought to be in it. Only the plaintiff's testimony was heard. The agreement made by Pershing though given in evidence is not printed. An alleged lease to Stouffer is referred to, but was never given in evidence and of course we know nothing about it. It is very plain to us that it was error to order a nonsuit upon the state of the record as it comes to this Court.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J.

C. K. Z.

Jan. '89, 374. May 15, 1889.

Smith v. Tuit.

Wills—Testamentary paper—When a contract not revocable at the will of the testator.

A testamentary paper devising real estate to a devisee in consideration of past and future kindness and care, and expressly stating that the devisee is to have immediate possession, and that he should take testatrix with him and take care of her as one of his family, is an agreement which when executed is not revocable at the will of the intended testatrix, and therefore in an action of ejectment brought by a subsequent grantee of said testatrix in her lifetime against the said devisee, in possession, the said devisee may put in evidence the testamentary paper, with parol proof that he had taken possession thereunder, and, that he had at all times performed his part of the contract, and in such case is entitled to judgment.

Error to the Common Pleas of Fayette County.

Ejectment, by Belford J. Tuit against Laura E. Smith, for a certain house and lot in New Salem, Pa.

On the trial the following facts appeared :—

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In the summer of 1884 Sarah Smith, a great aunt of Laura E. Smith, went to live with said Laura E. Smith, and on October 31, 1884, executed a will, *inter alia*, as follows:—

Second. I will and bequeath to Laura E. Smith, all my real and personal property of whatsoever kind or nature, including houses and lot that I purchased of William M. Jones in town of New Salem, adjoining lands of Jacob Allamon, Caleb Antram and others. I desire that the above described property, after the settlement of all my just debts, heretofore mentioned, shall be for his kindness and care toward me in sickness and in health, in watchfulness and care during all my natural life, and at my decease the aforesaid property shall belong to the said Laura E. Smith, his heirs or assigns, with all rights, liberties, and hereditaments, for ever and for ever.

Third. It is my will and desire that the said Laura E. Smith have possession of my house on first day of November, 1884, and he take me with him and that he take care of me as one of his own family. And lastly, as to all the rest, residue, and remainder of my personal estate, goods, and chattels of what kind and nature soever, I give and bequeath the same to Laura E. Smith, his heirs or assigns for ever, hereby revoking all former wills by me at any time made.

In September, 1885, Sarah Smith went to live with Belford J. Tuit, having on August 29, 1885, executed to him a deed for the said property in New Salem, which was recorded on August 31, 1885. Sarah Smith was alive and in Court when the case was tried. The plaintiff rested his claim upon the above deed.

The defendant made the following offer:—

"We offer this paper [the above will], being a written declaration of Sarah E. Smith, to be followed by evidence that under this paper and in pursuance of it, the defendant in this case took possession of the property now in dispute and is still there, and that Sarah Smith herself moved into the premises with him, in pursuance of the intention stated in this paper, and there remained for a long time, and that the defendant has at all times performed his part of the agreement indicated in this paper. Of course it all goes together. We don't offer this paper alone. This paper as a will would have no significance at all, but we offer this paper as the declaration of the plaintiff's grantor, showing that she had agreed that her title should pass from her at her death, the paper being executory." Objected to. Objection sustained and offer rejected. Exception.

The Court directed the jury to find for the plaintiff. Verdict accordingly and judgment thereon. Whereupon the defendant took this writ, assigning as error the refusal of his offer, and the instruction to find for plaintiff.

Edward Campbell (*Howell & Reppert* with him), for plaintiff in error.

A. D. Boyd (*Morrow & Hertzog* with him), for defendant in error.

June 28, 1889. THE COURT. By the terms of the paper called the last will and testament of Sarah Smith she devises all her estate, real and personal, to Laura E. Smith, and expressly states that she does so for the kindness and care toward her in sickness and in health, "and care during all my natural life." She adds that it is her desire that Smith shall have possession of the house on November 1, 1884, and take her with him and take care of her as one of his own family. Without anything more and without possession of the property on the part of Smith and performance by him of the acts mentioned in the will to be done by him, the paper in question could not be regarded as anything more than a will revocable at the mere pleasure of the testator. But the offer of parol proof introduces other facts into the case, and as these were rejected by the Court below they must be regarded as true for the purposes of this case. These facts were that the defendant, the devisee named in the will, took possession of the house and land in dispute under the will, and in pursuance of it, and that he was still there at the time of the trial; that the testatrix Sarah Smith moved into the premises with the devisee in pursuance of the intention stated in the will and there remained for a long time, and that the defendant at all times performed his part of the agreement indicated in the paper.

The offer should have been somewhat more specific and stated the acts which the defendant did in performance of his part of the agreement, but as it does allege an actual performance it should be regarded as made in good faith, and therefore as fairly raising the question for consideration. Viewed in that light the question is what effect is produced upon the testamentary paper if the facts offered to be proved are true. It has long been held that such a case is not affected by the Statute of Frauds, because the terms of the agreement are put in writing, to wit, the will, and this is a sufficient compliance with the requirements of the statute. (Brinker *v.* Brinker, 7 Pa. 53.) The circumstance that it is not to take effect finally until after the testator's death, will not prevent a specific performance during the life of the testator if he has put the other party to the agreement in possession of the land. This was held in McCue *v.* Johnston (25 Pa. 306), where the decree was only refused because there was no provision for possession during the life of the devisor in either the will or written contract, and no sufficient proof of a verbal contract for such possession. But in Johnson *v.* McCue (34 Pa. 180), the same will and agreement were enforced in favor of the first devisee against devisees by a subsequent will, on the ground that the first will and agreement must be treated as an executed contract which the devisor was not at liberty to disregard. It is true in that case the stipulation of

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the devisee was expressed in a written paper, but the decision of the question as to how the will was to be regarded was not put upon that ground, and in Brinker *v.* Brinker the devisee's part of the contract was in parol, but he was nevertheless held entitled to treat the will as a contract and not as a will and to have specific performance. It is true this was before our Statute of Frauds was passed, but the will was held to be a sufficient writing to take the case out of the statute in any event. In McCue *v.* Johnston (*supra*), the Court said, "In point of fact so far as the instrument by which the conveyance is to take place, is involved, it is an executed contract on condition to take effect at the time specified. A devise transfers the legal estate and not an equity to be perfected by another instrument. It is the same as if a deed had been executed to take effect *in futuro*, only that the common law incident of a feoffment forbids the freehold remaining in abeyance and a resort must therefore be had to a devise or a conveyance under the Statute of Uses." It is clear, therefore, upon all the authorities, that the testamentary character of the testator's agreement is not a bar to relief as upon an executed contract. The difficulty in regard to possession by the devisee during the lifetime of the devisor is removed in the present case by the fact that the will itself provides for a present possession to begin the day after the will was executed. Now the offer of proof was that such possession was actually taken by the devisee, and that he literally complied with the terms of the will by taking the devisor in with him and keeping her there a long time, and that he performed all of his part of the contract and is still in possession. The only practical question then is, can he be deprived of his possession because the contract is contained in a testamentary paper. Certainly not, if for no other reason, because depriving him of his possession would disable him from the further performance of his contract, for which purpose his possession is indispensable according to the terms of the will itself.

We think, therefore, the learned Court below was in error in rejecting the offer of proof by the defendant.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J. C. K. Z.

Jan. '88, 86. March 18, 1889.

Garey v. Woodward.

Trespass—Plaintiff's title—Evidence of—Sufficient to support action.

A. sued B. in replevin for a certain large quantity of lumber, and was put in possession. Subsequently judgment was entered in his favor. Some time after A. brought an action of trespass against C. for lumber taken and sold by him. A. claimed that the lumber in dispute was part of the large quantity replevied, and introduced evidence to show that C. was aware that he claimed this lumber by the same title as all the rest. C. denied the lumber was part of that replevied, and maintained that since it was not in the possession of A., trespass would not lie. The Court charged the jury that unless they found that the lumber in dispute was part of that replevied, their verdict must be for the defendant:

Held, that inasmuch as there was evidence from which the jury might have found that the lumber in question belonged to the plaintiff, whether it was included in that replevied or not, the charge of the Court was erroneous.

Error to the Common Pleas of Sullivan County.

Trespass *vi et armis*, by W. C. Garey against N. K. Woodward, to recover damages for the conversion of 11,941 feet of lumber.

On the trial the following facts appeared: W. C. Garey in May, 1883, issued two writs of replevin, directed to the sheriff to replevy 66,500 feet of hemlock lumber at "Dushore Switch." The sheriff returned "replevied as within commanded" and placed Garey in possession. Judgment was entered in replevin for Garey, the plaintiff. (See Seeley *v.* Garey, 13 Out. 301.) Subsequently N. K. Woodward took, shipped, and sold 11,941 feet of lumber lying about 100 rods from "Dushore Switch," and about 25 rods from the railroad. This suit was brought to recover the value of this lumber.

The plaintiff claimed that the lumber in controversy was part of the larger lot embraced in the action of replevin, and put in evidence the record of that suit. He also offered evidence to show that the defendant, Woodward, was aware that he claimed the same title to this lumber as to all that was replevied, and that the defendant, in spite of this knowledge, removed and sold the portion now in controversy. The defendant on the other hand denied that the lumber in dispute was at "Dushore Switch," and that it was among the lumber replevied. He claimed, therefore, that not being in possession of the lumber, the plaintiff could not maintain an action of trespass against him.

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(1) "That under the contract given in evidence in this case between O. A. Seeley and T. J. Jordan, the sawing timber upon the tracts of land therein mentioned became the property of Thomas J. Jordan so soon as the bark was peeled therefrom. And by the sale of the same by Thomas J. Jordan to W. C. Garey, then Garey became the owner of the same." *Answer*. "This we affirm, this part of it."

"And if the jury believe that the lumber in controversy was manufactured from this timber, then the plaintiff is entitled to recover the value

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of the same with interest." *Answer*. "This part of it we do not affirm; for as we have already explained to you there is no evidence in this case to show that N. K. Woodward was a trespasser upon any possession of the plaintiff, unless it is shown by the record in the replevin suit, and by transactions which occurred after he took the delivery of the lumber from Seeley at Dushore." (Fifth assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(2) "That unless the jury find from the evidence the lumber in controversy was a part of the 66,500 at the Dushore Switch, the title was not adjudicated in the replevin suit as against the defendant, and the verdict should be for the defendant." *Answer*. "This we affirm." (Seventh assignment of error).

Portions of the charge of the Court to the same effect formed the third and fourth assignments of error.

Verdict for defendant, and judgment thereon, whereupon the plaintiff took this writ assigning for error the above instructions of the Court to the jury.

E. M. Dunham and *Thomas J. Ingham*, for plaintiff in error

H. F. Maynard and *Rush J. Thomson*, for defendant in error.

June 28, 1889. THE COURT. In May, 1883, at suit of present plaintiff, W. C. Garey, against O. A. Seeley, a considerable quantity of lumber was replevied by the sheriff at Dushore Switch, and delivered to plaintiff in the writ. Issue was joined on a plea of property in N. K. Woodward, defendant in this suit, and the cause was so proceeded in that a verdict in favor of the plaintiff was rendered and judgment entered thereon. That judgment was afterwards affirmed by this Court, and Garey's title to the lumber was thus established (Seeley *v.* Garey, 109 Pa. 301). It is claimed by plaintiff that the lumber in controversy in this suit was part of the larger lot embraced in the action of replevin; but, whether that be so or not, the evidence tended strongly to show that his title thereto was the same as to any part of the lumber that was undoubtedly replevied. It also tended to prove clearly that the defendant, Woodward, with knowledge of plaintiff's title to all the lumber, removed and sold the portion now in controversy. The fact that he took it and converted it to his own use, was not seriously disputed; but his contention was that it was not actually replevied, and therefore an action of trespass could not be maintained against him. At best, this defence is purely technical and without merit; but it was sustained by the learned Judge of the Common Pleas, and he accordingly instructed the jury, as requested in defendant's second point, that unless they found from the evidence that the lumber in controversy was part of the 66,500 feet at Dushore Switch, the title was not adjudicated in the replevin suit, as against defendant, and their verdict should be in his favor. This is the subject of complaint in the 7th specification. Substantially the same instruction is complained of in the 3d, 4th, and 5th specifications. The case was thus made to turn solely on the question, submitted to the jury as a question of fact, whether the lumber in controversy was or was not included in the replevin suit. In that we think there was error, because there was evidence from which the jury might have found other facts sufficient to warrant a verdict in favor of plaintiff. The evidence tended strongly to prove that the lumber in controversy was part of a larger lot, the title to which was in plaintiff, and that defendant with knowledge of the fact, brought home to him in the trial of the action of replevin, removed and converted to his own use the part now in controversy. If the jury had so found, as they might have done from the evidence, their verdict would not necessarily have been for defendant. Under such circumstances a demand on defendant for the lumber would have been an idle ceremony.

The remaining specifications are not sustained. The last clause of plaintiff's first point, the refusal of which is complained of in the 5th specification, could not have been affirmed without qualification. It would have been error to do so, and hence the Court was justified in refusing it.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J. S. H. T.

Jan. '89, 397. May 15, 1889.

Blymyer v. Colvin.

Writ of error—Mistake of Court—Practice—Usury.

The Supreme Court having on a writ of error awarded a venire facias de novo, on the new trial it appeared that an error of date had been made in the plaintiff in error's paper book, by which the Supreme Court were misled, December 24, being substituted for September 24. The Court below, however, refused to correct this error and ruled the case in accordance with the previous opinion of the Supreme Court:

Held, that had this error been called to the attention of the Supreme Court, the opinion would have been modified and judgment entered in accordance with the real facts of the case, and a venire facias de novo was issued accordingly.

A. gave a judgment note to B. for $5000 which was entered up September 24, 1879. At the time it was agreed that A. was to pay to B. $300 as a bonus for the money loaned. On December 19, 1879, A. gave to B. a

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judgment note, not entered up, for $300, being the amount of the bonus, payable in three instalments. After the payment of one instalment, A. gave to B. a mortgage for $5000 in satisfaction of the judgment. Afterwards the two remaining instalments of the bonus were paid. In a subsequent suit upon the mortgage:

Held, that the payment of the entire *usurious* bonus could be set up as a defence *pro tanto*.

Error to the Common Pleas of Bedford County.

Scire facias sur mortgage by William Colvin, assignee of John H. Brice, against John F. Blymyer.

The facts of this case will be found reported in 22 WEEKLY NOTES, 376. In that case the Supreme Court held that the entry of a judgment was conclusive as to the amount of said judgment, and that credit for sums paid prior to such entry, even though usurious, could not be allowed in a suit upon a mortgage given in satisfaction of said judgment. A venire facias de novo was therefore awarded.

Upon the second trial, before BAER, P. J., it appeared that an error had been made in the paper book of the plaintiff in error, by which the Supreme Court were misled, so that they assumed that judgment as above was entered on December 24th instead of September 24th, as it really was, and that the amount for which credit was claimed was paid after the entry of judgment, not before it.

The Court charged the jury, *inter alia*, as follows: "We need not inquire whether the Court above based its ruling upon the fact there appearing—the payment of the $100 before the entry of the judgment—or on the apparent fact that it was paid before the judgment was marked satisfied, because we are not a Court of Error, but that Court is. It can supervise our rulings; we cannot supervise theirs.

"[Therefore, as they held that this Court should have instructed the jury that the defendant was only entitled to a credit for two payments made, namely, one on the 30th of January, 1880, and one on the 1st of March, 1880, of $100 each, we must and now do instruct you that the defendant is only entitled to credit for the two payments of $100 each, which were made, respectively, on the 30th day of January, 1880, and on the 1st of March, 1880; and that, after applying these credits to the amount appearing due after all the undisputed credits have been allowed, the plaintiff will be entitled to a verdict for such sum as remains unpaid, interest being computed until this day.]

"A calculation is made which shows a balance of $185.92. The plaintiff's calculation seems to be correct on the basis of this charge, and your verdict must, therefore, be for the plaintiff for the amount found to be unpaid, which is $185.92.

"If the Supreme Court assumed facts which were erroneous, and if it affected their ruling, the defendant will have a standing in that Court, on motion for modification of its decree, though he may lose his case here."

Verdict for plaintiff for $185.92, and judgment thereon. Whereupon the defendant took this writ assigning for error the portion of the charge given above in brackets, and the instruction to the jury to find for the plaintiff as above.

Alexander King, for plaintiff in error.

John Cessna (*Moses A. Points* with him), for defendant in error.

May 27, 1889. THE COURT. When this case was here before (121 Pa. 582), the paper-book of the defendant in error erroneously stated that the judgment on the original $5000 bond had been entered December 24, 1879, and the judgment of this Court was founded upon the assumption that this was the correct date of its entry. The correction of this error places the $100 paid December 23, 1879, upon the same footing as the succeeding payments of $100 each, made January 30 and March 1, 1880, respectively.

All of these three payments were made after judgment had been confessed on the original bond, and as the $300 note, given as a bonus, must be treated as a device to evade the usury laws, these payments upon it must be treated as payments upon the original debt. The bond and mortgage were given for the same debt as the judgment; the transaction was a mere change of securities for the same loan, and the law will apply the payments of usurious interest as payments upon the principal. Had this error of counsel or of the printer, as the case may be, been called to our attention, we would have modified our opinion, and entered a judgment in accordance with the real facts of the case.

The judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. S. H. T.

July '88, 181. January 24, 1889.

Reiff's Appeal.

Wills—Remainders—Vested and contingent—Life estates—Act of February 24, 1834.

When a life-tenant takes an estate, giving security to protect the remainderman, under the Act of February 24, 1834, sect. 49 (P. L. 82), said life-tenant is not a trustee, and on his death his personal representatives must pay over the whole of said life estate without any deduction for expenses.

When a testator gives personal property to his daughter for life, with remainder at her death to her child or chil-

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dren who may then be living, or their issue, and in default of any child, or issue of any child, then to his surviving children, the interest of said "surviving children" is contingent upon their surviving the legatee for life.

Appeal of Susanna P. Reiff and Letitia P. Reiff from a decree of the Orphans' Court of Philadelphia County, in the matter of the account of S. P. Reiff *et al.*, executors of John Reiff, deceased.

The facts of this case, as they appeared on the audit of the account, and the opinion of the Court by HANNA, P. J., sustaining the exceptions filed to the adjudication, are fully set out in the report of the case in the Court below, *sub tit.* Reiff's Estate (22 WEEKLY NOTES, 62).

A decree having been entered in accordance with the above opinion, Susanna P. and Letitia P. Reiff took this appeal, assigning for error the decree of the Court as above.

Joseph W. Hunsicker (with whom were *William L. Wagner* and *George M. Wagner*), for appellants.

The testator meant by his "surviving children," those who were living at the time of his death.

Johnson *v.* Morton, 10 Barr, 245.
Buckley's Admrs. *v.* Reed, 3 Harris, 83.
Ross *v.* Drake, 1 Wr. 373.
King *v.* King, 1 W. & S. 205.
Reed *v.* Buckley, 5 Id. 517.
Patterson *v.* Hawthorne, 12 S. & R. 112.
Manderson *v.* Lukens, 11 Harris, 31.
Kelso *v.* Dickey, 7 W. & S. 279.
Hopkins *v.* Jones, 2 Barr, 69.
Etter's Estate, 11 Harris, 381.
Womrath *v.* McCormick, 1 Smith, 504.
McGill's Appeal, 11 Id. 46.
Provenchere's Appeal, 17 Id. 463.
McClure's Appeal, 22 Id. 414.
Mull *v.* Mull, 31 Id. 393.
Chess's Appeal, 6 Norris, 362.
Ringe *v.* Kellner, 3 Out. 460.
Pennock *v.* Eagles, 6 Id. 390.
Muhlenberg's Appeal, 7 Id. 587.
Reed's Appeal, 3 Crum. 215.

It is clear that the party acting as trustee was entitled to commissions.

Luken's Appeal, 47 Pa. St. 356.
Biddle's Appeal, 3 WEEKLY NOTES, 326.

J. Warner Goheen (with whom were *Gilbert R. Fox* and *Gilbert R. Fox, Jr.*), for appellees.

February 4, 1889. THE COURT. We affirm this case upon the opinion of the learned President Judge of the Court below.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

PER CURIAM. L. L., Jr.

Common Pleas.

C. P. No. 2. June, 1889.

Specht v. Pennsylvania R. R. Co.

Negligence — Arrest of judgment—Joinder of common law action for injuries and statutory action by parent for loss of a child—Evidence—Evidence that the defendant company commenced to ring bells upon trains approaching crossing after the accident occurred—Measure of damages.

Sur rule for a new trial.

The facts are sufficiently set out in the opinion of the Court.

David W. Sellers and *Gavin W. Hart*, for the rule.

George S. Graham, contra.

July 25, 1889. THE COURT. Henry Specht, the plaintiff in this case, while driving his horse and wagon across the track of the defendant's railroad, on the first of October, 1886, was struck by the locomotive of a passing train and very severely injured. His child, a boy of about four years of age, who was in the wagon with him at the time of the accident, was thrown from it under a coal pile. The case was tried before a jury, who have found a verdict in favor of the plaintiff for twenty thousand dollars. The statement of the plaintiff's demand filed sets forth, *inter alia:* "The plaintiff and his child were violently thrown therefrom to the ground and sustained injuries of the following nature and character, to wit," and after describing the injuries of the plaintiff, adds:—

"His child was greatly bruised about the head and body and has since died from the injuries received."

The defendant moves in arrest of judgment upon the ground that the action for personal injuries to the plaintiff and the action for damages resulting from causing the death of the child are improperly joined.

The plaintiff moves to amend his statement by striking from it all claim for damages arising through the death of the child. Upon the trial of the case all evidence as to what were the injuries to the child was excluded and the jury were instructed that they were not trying its case. Nothing whatever was before them concerning the child except as it was incidental to the accident to the plaintiff. No harm therefore was done to the defendant by this alleged informality in the statement, and it would be unjust to the plaintiff, and a loss of public time, to stay the proceedings because of it. The

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amendment is allowed and the motion in arrest of judgment is refused. (Ganzer *v.* Fricke, 7 P. F. Smith, 316; South Easton *v.* Reinhart, 13 WEEKLY NOTES, 389.)

The defendant also moves for a new trial upon the grounds, *inter alia*, that the Court erred in admitting testimony as to the custom of the railroad company in blowing its whistles, and that the damages are excessive.

At the place where the accident occurred there was no street opened, but there was a crossing which had been used by the public for a number of years. A well-defined roadway led up to it and over the railroad. The defendant company had recognized it as a public crossing by laying planking between the tracks at the place, and by leaving an opening between the fences, which above and below ran along the tracks on each side. Evidence was admitted to show that before the accident no whistle was blown or bell rung by trains of the defendant as they approached the crossing, but that after the accident a bell was rung from the time the engine left Tioga Street, the first street above. The purpose of this offer was not to lead the jury to infer that because the bell was not rung upon other occasions it was not rung upon the day on which the accident occurred, but to show a recognition upon the part of the defendant of a duty to ring the bell for this crossing, and a *quasi* admission of negligence in not having rung it upon this particular occasion. Like testimony has been admitted with the approval of the Supreme Court in a number of cases. (Railroad Company *v.* McIlwee, 17 P. F. Smith, 311; Railroad Co. *v.* Henderson, 1 Id. 315; McKee *v.* Bidwell, 24 Id. 224.

The plaintiff's witnesses had testified that no whistle was blown or bell rung as the train approached upon the day of the accident, and the evidence offered tended to show negligence. It was therefore properly admissible. The plaintiff was a man forty-two years of age. His right leg was broken in such a way as to require amputation at the knee. Three of his ribs were broken and the pressure upon the lungs resulted in pleurisy. There was a compound fracture of the right elbow, so that it is permanently injured, and he cannot extend his forearm or rotate the hand. He was in the hospital for nine weeks, and was attended by a nurse for seven weeks longer. He was a grocer. According to his own testimony he was doing a business of about $33,000 a year, and was earning annually from $3000 to $4000. There is no evidence as to what the expenses of his illness were, and the verdict doubtless represents what the jury believed to be compensation for his pain and suffering and the loss of earning power. There can be no doubt that for the injuries he received, if they resulted from the negligence of the defendant without contributory negligence upon his part, the jury would be justified in giving a reasonably large sum as damages. It appears, however, that after the accident the plaintiff sold his store and the whole business for $800. In his statement filed, in which he claimed both for the injuries to himself and those to his child, resulting in its death, he estimated his entire damages at $20,000. It is believed, therefore, that substantial justice will be done by reducing the verdict to $15,000.

It is ordered that the rule for a new trial be discharged upon the plaintiff's filing a *remittitur* within thirty days for all sums over and above the sum of $15,000, otherwise rule granted.

Opinion by PENNYPACKER, J. J. W. T.

Orphans' Court.

May, 1889.

Hacker's Estate.

Sale of real estate for the payment of debts—Purchase by administratrix at her own sale after leave of Court had—When administratrix surcharged in such case with difference of price between sum at which she purchased and at which she sold—Purchase of claims against estate by accountant at less than face value—When they enure to benefit of estate—When set aside upon the entry of security—Practice.

Sur exceptions to adjudication.

The administratrix of W. H. Hacker, deceased, was directed by the Court to sell certain real estate of decedent for the payment of his debts, and leave was granted to her to bid at the sale and to become a purchaser at a sum not less than $7000. Subsequently she made a return of sale to the Court, setting forth the sale to her for the sum of $7000 clear, she being the highest and best bidder, whereupon the sale was confirmed, and the clerk of the Court was directed to execute a proper deed to her. At the audit of her account certain claimants asked to have the administratrix surcharged with the sum of $1950, being the difference between the price at which she purchased the property ($7000) and the sum for which she almost immediately sold the property ($8950) to another purchaser. The claim, although objected to, was allowed by the Auditing Judge (HANNA, P. J.). Exceptions on behalf of the administratrix were filed to this allowance and also to the awarding of but a *pro*

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rata dividend on the claims of creditors purchased by the administratrix at fifty per cent.

The material facts are set forth in the opinion of the Court, *infra*.

B. F. Fisher, for exceptant, cited—

Lewis's Estate, 1 Chester Co. Rep. 313.
Colgan Estate, Id. 359.
Springer's Appeal, 1 Smith, 342.
Neff's Appeal, 7 Id. 91.
Cadwalader's Appeal, 14 Id. 293.
Armstrong's Appeal, 18 Id. 409.
Chambersburg Saving Fund Association's Appeal, 26 Id. 203.
McBride *v.* Daniels, 11 Norris, 332.
Kollock *v.* Palmer, 5 WEEKLY NOTES, 474.
O'Conner *v.* Weaks, 10 Id. 372.

John H. Colton and *William W. Weigley*, contra, cited—

Story's Equity, 322.
Adams's Equity, 161.
Lewin on Trusts, 277, 474, 489, 490.
Galbraith *v.* Elder, 8 Watts, 81.
Hill *v.* Frazier, 10 Harris, 321.
Grant *v.* Seitzinger, 2 P. & W. 525.
Hammond's Appeal, 23 WEEKLY NOTES, 59.
Bunting's Estate, Id. 159.
Rosenberger's Appeal, 2 Casey, 67.
Beeson *v.* Beeson, 9 Barr, 279.
Baker's Appeal, 5 Crumrine, 33.

June 1, 1889. THE COURT. By obtaining leave to become a bidder at his own sale, especially where the estate is insolvent or the parties interested are not competent to act for themselves, an executor or administrator does not, in the smallest degree, lessen his duty—though its performance may become more difficult—to see that the highest attainable price is secured before the title of the purchaser is permitted to become absolute. Even where the sale is made under the supervision of a Master appointed by the Court, which, perhaps, should always in such cases, be the course pursued (see Campbell *v.* Walker, 5 Vesey, 681-2), great liberality will be exercised in opening the biddings, if there is a probability or even a possibility that a higher price may be obtained, where a trustee acting under an authority to bid is the purchaser (Dundas's Estate, 16 WEEKLY NOTES, 458); and *a fortiori* where the trustee so purchasing is also the seller. This is entirely irrespective of all considerations of the fairness of the sale; and it may be conceded, therefore, in the present case that the accountant acted in perfect good faith, that the price which she offered was, in the opinion of those competent to judge, a good one, and that nothing which she said or did discouraged or was intended to discourage the attendance of other persons willing to give a larger sum: the fact remains that so soon after the delivery of the deed to herself as to render it difficult to believe that the negotiations were not begun before its execution or even before the confirmation of the sale, she resold the property, at an advance of more than twenty-eight per cent., to one with whom she had been in communication before her application for leave to bid, who, as she then had reason to believe, was willing to give the price at which she subsequently sold to her. The estate being insolvent, it was the manifest duty of the accountant to secure this advance for the creditors of whom she was the representative: she certainly cannot be permitted to retain it for herself. It is the well-settled practice to set aside an Orphans' Court sale upon the entry of security that a resale will result in an advance of at least ten per cent. (Demmy's Appeal, 7 Wright, 168; Hay's Appeal, Hamilton's Estate, 1 Smith, 58): and this may be done even though the sale has been confirmed (Brown's Appeal, 18 Smith, 53). So long, therefore, as the accountant had any reason to suppose that a higher price could be obtained than what she had herself offered, she should, at least, have refrained from asking the confirmation of the sale, and duly informed the Court of the fact.

It is true that in Armstrong's Appeal (18 Smith, 409), it was held where the wife of an administrator, who had made sale in partition, became the purchaser (she being one of the heirs) and subsequently sold at an advance, that he was not chargeable with such advance upon the settlement of his account. But there the sale had been confirmed with the entire acquiescence of the parties in interest, all of whom were *sui juris*, and there was no reason to suppose that the price given by the wife was not the highest one that could be obtained. The resale was not made for a year after her purchase. The withholding of information upon this point from the Court was a circumstance which clearly distinguishes the present case from Armstrong's Appeal, and brings it within the principles so fully referred to by the Auditing Judge.

That the purchases by the accountant of claims against the decedent for less than their face value enure to the benefit of the estate and not of herself, is no less clear; and in the absence of evidence of any difference in this respect, it was not error to assume that no more was paid in one case than in another. So far, however, as what was thus paid did not exceed the dividend which the creditors whose debts were extinguished would have been entitled to, the accountant should be credited with the entire sum, and not a mere *pro rata* dividend. The other creditors are benefited by what has been done, and cannot object to paying for it. The total indebtedness was $9965.88, upon which the balance for distribution, $3977.31, would have paid a dividend of not quite 40 per cent. This would have given to the creditors whose claims have been extinguished ($4772.46) about $1900, instead of $1384.02, the sum ac-

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tually paid. There has thus been a gain to the remaining creditors of more than $500.

Deducting the sum thus paid, $1384.02, from the balance as above, $3997.88, leaves for distribution among the other creditors, $2593.86, which, upon the balance of indebtedness, $6193.-42, will pay a dividend of — per cent., which is awarded accordingly.

The exceptions, other than the 6th, are dismissed, and the adjudication, modified as above, confirmed absolutely.

The evidence offered in support of the application to open the adjudication could not have changed the result, and the petition was, therefore, properly dismissed.

Opinion by PENROSE, J. W. C. S.

April 15, 1889.

Bird's Estate.

Decedent's estate—Discretionary power to widow as guardian to apply two thousand dollars towards the education of two minor children—Legacy held not to be adeemed for failure of purpose, although testator died after legatees had reached their majority, and had himself expended money on their education during his lifetime.

Sur exceptions to adjudication.

Matthias Bird, the decedent, died in 1887, and by his will, which was dated in 1872, provided, *inter alia* :—

> I give and bequeath unto the guardian of my daughter Ida Rosa Bird hereinafter named, the sum of one thousand dollars to be expended by the said guardian in her discretion in the education of my said daughter.
>
> I give and bequeath unto the guardian of my son, Samuel Bird, hereinafter named, the sum of one thousand dollars to be expended by the said guardian in her discretion in the education of my said son.
>
> I appoint my wife, the said Letitia J. Bird, guardian of our minor children, the said Ida Rosa Bird and Samuel Bird.

Upon the audit of the account of Letitia J. Bird, the executrix, it was urged in behalf of William Bird and three other children of the testator, residuary legatees under his will, that the above legacies had failed of purpose as both Samuel and Ida were of full age at testator's death; that said legacies were therefore void, and should fall into the residue.

The Auditing Judge (ASHMAN, J.) refused to hold that the legacies were adeemed for the reason above given, but found that Samuel and Ida were entitled to them, since the education of a person does not necessarily end as soon as the age of twenty-one is reached.

To this finding exceptions were filed in behalf of William Bird *et al.*

W. Penn Shipley, for the exceptants.

William C. Hannis, *Joseph Parrish*, and *Ellis D. Williams*, for the accountant.

April 27, 1889. THE COURT. The view taken by the exceptants was argued by their counsel with much earnestness and ingenuity, but we fail to be convinced of any error in the conclusion reached by the Auditing Judge. Testator bequeathed to the guardian of his daughter Ida and his son Samuel two sums of one thousand dollars "to be expended by the said guardian in her discretion in the education" of his said daughter and son. He appointed his wife as their guardian.

At the date of the will, in 1872, testator's children were both minors, and being educated by him. He died in 1887, at which time they had each attained lawful age, and the bequests for their education remained unaltered.

Subsequent to the date of the will testator also executed three codicils, in neither of which was any revocation of the legacies nor any reference made thereto, and two were executed after his children named reached their majority.

It is now contended by the residuary legatees that the legacies being given for the education of children, who long since attained lawful age, and the purpose for which they were intended having failed, they are therefore void, and fall into the residuary estate. And furthermore, as testator, in his lifetime, expended a certain sum towards the education of his son, the legacy for his education is therefore adeemed *pro tanto*.

But we do not think either position tenable. The primary intention of testator, no doubt, was to provide a fund for the education of his children, to be expended for that purpose by their mother, their guardian, at her discretion. If he had died in their minority, there can be no doubt she would have been entitled to receive the legacies either in her own right absolutely or as guardian for her minor children. She and they were the only parties interested, the remaining children having no interest therein.

And as to this we do not think there can be any doubt. The case is the same now that testator survived the minority of his children. The legacy is not direct to the children but to their guardian, and is payable either to her or to them individually. But all difficulty upon this point is removed by the agreement of the widow, that the legacies be awarded immediately to her children. They are the only parties in interest, and we cannot conceive that the other residuary legatees are at all concerned.

The entire subject is fully discussed and well disposed of by the Auditing Judge, and without further addition to what is said by him, the exceptions are dismissed and adjudication confirmed.

Opinion by HANNA, P. J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, SEPT. 6, 1889.* [No. 19.

Supreme Court.

Jan. '89, 414. May 3, 1889.

Lake Shore and Michigan Southern Ry. Co. v. Franz.

Railroads—Negligence—Crossings—Contributory negligence—Stop, look, and listen—Open safety gates—Damages—Practice.

A person driving in the streets of a city approached a broad street upon which several railroad tracks ran side by side. The safety gates, located in accordance with a city ordinance, were up and no watchman or flagman was posted. The party before driving across the tracks stopped, looked, and listened, but saw or heard nothing save a hand-car on one of the tracks, which passed along rapidly as he paused. The view of the track on which this car passed was blocked in both directions by cars standing on the track next adjacent to it, extending over into the street. The party then proceeded to cross but did not pause again to stop, look, and listen before attempting to pass the track the view of which was obstructed as above. While crossing it his team was struck by another hand-car. In a suit brought by him against the railroad company to recover for personal injuries sustained in consequence:

Held, that the question whether or not the plaintiff had been guilty of contributory negligence was for the jury, and that it was not error for the Court to refuse to award a compulsory nonsuit.

In a case such as that above noted the mere fact that the safety gates were open did not exempt the plaintiff from the obligation to stop, look, and listen before attempting to cross, but such fact was undoubtedly some evidence of negligence on the part of the defendant, and the Court had a right in its charge to comment on that fact and to instruct the jury that its tendency certainly was to give to the plaintiff the impression that the crossing was safe and thereby blunt the edge of his caution. The instructions of the Court in the present case were held in substance and as a whole to conform to the principles above laid down.

In the above case the Court charged the jury as to the measure of damages without using the word "compensation," and instructed them that they might consider the pain and suffering the plaintiff "had undergone and might undergo in the future." The idea of compensation was, however, clearly in the Judge's mind and was fairly brought before the jury, in the enumeration of the elements of damage they should award, in answer to a point. The Court also expressly limited the damage for pain and suffering to that "already experienced and likely to be yet experienced:"

Held, that as a whole the instructions of the Court though open to criticism contained no substantial error.

Error to the Common Pleas of Erie County.

Case, by Albert Franz against the Lake Shore & Michigan Southern Railway Co., to recover damages for personal injuries to the plaintiff alleged to have been caused by the negligence of the company defendant.

On the trial, before GUNNISON, P. J., the facts appeared to be as follows:—

Parade Street is one of the main thoroughfares in the city of Erie, and extends north and south. The tracks of the L. S. & M. S. R. R. extend east and west, and cross Parade Street at grade. Here the defendant has several tracks, two main tracks and three sidings. At this point Parade Street is also crossed by the tracks of the P. & E. R. R., two or three in number, the P. & E. tracks being immediately south of defendant's tracks. All of these tracks of both companies run side by side and form one system or belt of tracks. The space between the different tracks is seven feet and two inches, and that is all the distance there is between the north track of the P. & E. R. R. and the south track of the defendant.

On the morning of November 21, 1884, Franz started to walk north, on Parade Street, going to his work. He saw Decknor, a neighbor, driving down the same street with a horse team and double wagon. Franz got into the wagon and sat on the seat with Decknor, and Decknor drove slowly down Parade Street. When they had arrived at the tracks of the P. & E. R. R., and before attempting to cross the tracks of the defendant, Decknor and Franz testified that they stopped the team and looked up and down these different tracks and listened to ascertain if it was safe to cross. They heard no train, but while they stopped a hand-car passed going east on defendant's main track.

Two of the defendant's side tracks are on the south side of the main tracks, and at this time both of these side tracks, west of Parade Street, were occupied with box cars standing thereon, and one of these box cars, on the siding next to the south main track, extended over into the street on the west side. Immediately to the north of these side tracks runs the main track in a straight line in both directions. Owing to the cars standing on the track, it was necessary to approach close to the main track in order to look up and down it. The safety gates, located in accordance with an ordinance of city councils, were up, and there was no flagman or watchman at the crossing. Not seeing or hearing anything at the place where he first stopped, Decknor concluded it was safe to cross, and proceeded to drive his team over the defendant's tracks. According to plaintiff's testimony the team was driven at a walk, but according to defendant's, at a sharp pace. Decknor did not stop again before attempting to cross defendant's main track. Just as the team had reached the defen-

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dant's main track, another hand-car, also going east, on which were eight employés of the defendant, came down the south main track and ran violently against the team.

The plaintiff's testimony was to the effect that the car was running at the rate of about ten miles an hour, and that no warning was given of its approach. The defendant's testimony, on the contrary, was that the car was running at about half that speed, and that as soon as the men on it saw the team they called out, put on brakes, and did all in their power to prevent the collision. When the accident occurred the horses jumped and jerked the wagon over the hand-car. The driver was thrown out, the wagon was upset, the team ran away, and Franz was caught under the wagon box and dragged for some distance along the stone pavement and received serious and permanent injuries.

At the close of the plaintiff's testimony an application by defendant for a nonsuit was refused. Exception. (First assignment of error).

The Court charged, *inter alia*, as follows:—

"The first question for you to decide is, Was there negligence on the part of the railroad company or its employés? Because if there was no negligence on the part of them the plaintiff is not entitled to recover. His right to recover depends on the accident having been occasioned by the negligence of the railroad company or its employés.

"It has been shown in evidence to you that there is an ordinance of the city of Erie which requires the railroad companies, at this street, to erect, and maintain safety gates. These gates should be operated and watched at all times when there is much travel across the tracks on the street. At such times, when there is a good deal of travel, a neglect to operate the gates and lower them across the street when there are cars approaching, would be negligence on the part of the railroad company. Whether at this time it was negligence in not having the gates so operated, at this time of day, depends on how much travel there was ordinarily across the tracks at that time of day. And that is a question for you to decide. I cannot say, that as a matter of law, it was negligence in them not to have the gates in operation at that time. It is for you to decide, as a question of fact.

"[If at that time there was considerable amount of travel, then the fact that the gates were up would be notice to the plaintiff that there was no danger in crossing the track; it would be an invitation to him to cross the track. At the same time it would not excuse him from exercising due care in approaching and crossing the track, and finding out whether or not there were approaching cars. Because the fact—if it is a fact, that the railroad company were negligent—would not excuse him for being negligent. He must use proper care in crossing, irrespective of the fact of whether or not the railroad company used care.]. (Third assignment of error.)

"It is also the duty of the employés of the company to give some warning of their approach—riding on a car—or of other employés of the company, to give some warning of the approach, whether by lowering the gates, or a watchman, or crying out.

"The eight men on this car, or such as testify, tell you that they did halloo at the top of their voices. The plaintiff tells you that he heard nothing of the kind, and Mr. Decknor says he heard nothing of the kind. And now it is for you to say whether they did give such warning, and whether that warning was sufficient to excuse them from any negligence, or relieve them from the imputation of negligence.

"If you find that the employés of the railroad were guilty of negligence it is your duty to inquire whether or not the plaintiff was negligent; for if he was guilty of negligence which contributed to the accident, he cannot recover, no matter how negligent the employés of the railroad company were.

"It was the duty of the plaintiff to use care in approaching the tracks, to stop and look and listen for approaching cars. It was also his duty to keep such lookout as was reasonable while crossing the track, and avoid a car if he could, even after he had started to cross; and it was his duty that the horses should be driven in a careful and cautious manner.

"The plaintiff and the driver both say they crossed on a walk. The witnesses on the other side say they crossed on a smart trot, and that neither the plaintiff nor the driver was looking towards the west, and paid no attention to the warning given them by those on the car.

"These are circumstances for you to consider in determining whether or not the plaintiff was himself guilty of negligence.

"If you find for the plaintiff on this point, and find that the railroad company were negligent, and that this accident resulted from their negligence, and that the plaintiff was guilty of no contributory negligence, it would be your duty to fix the amount of damages. In doing this you should take into consideration the expense of his sickness, although I think there has been no evidence given of the amount for medical attendance, etc. You don't know what that was. You should take into consideration the loss of wages that he has suffered and will suffer during his life in consequence of this injury.

"Upon that point you have the testimony of witnesses who tell you how much he earned before the accident, and also the testimony as to how much he has been able to earn since the

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accident, and as to his disability to work now. In considering the amount it is your duty to consider the probability of his life. Tables of mortality have been shown to you which show that at the age of 23, when he was injured, the probability of life was 40 years.

"Now it is claimed by the defendants that although the plaintiff was injured at the time of this accident, yet his present condition is not wholly the result of that injury, but partially the result of the other misfortune which he has had; this hunch on his back. And the testimony of the physicians as to whether or not this condition was produced by the injury or the hunch, is conflicting. You have only the right, in considering the damages you should award him, if anything, to consider the disability that resulted from this injury. If any part of the disability resulted from the other misfortune that he has you cannot take that into consideration in fixing the damages.

"The defendant is only liable for the injury caused by its negligence, and for no disability that was caused by other causes.

"[You have also the right, in estimating the damages, to consider the pain and suffering that he has undergone and may undergo in the future."] (Fifth assignment of error.) "Take all these matters into consideration, and I need not remind you that it would be improper, in considering this case, to be influenced by any consideration of sympathy for the plaintiff or prejudice against the defendant because it is a corporation. You will do justice and what is right between the parties, irrespective of their condition of poverty or wealth, or anything of the kind. A corporation has the same right to justice as an individual, and you will find your verdict upon the evidence, honestly, as between man and man."

Plaintiff requested the Court to charge, *inter alia*, as follows:—

(1) That if the jury find from the evidence that at the time of the accident the safety gates at the Parade Street crossing were up, and that no warning was given of the approach of the car, then the plaintiff had a right to presume that the track was clear; and unless the jury are satisfied by affirmative evidence that the plaintiff was guilty of contributory negligence, the plaintiff is entitled to recover. *Answer*. "It was the duty of the employés of the railway company to give timely and sufficient warning of the approach to the street crossing. Whether or not in this case there was such warning is a question for the jury. I cannot say that the fact that the safety gates were open on the occasion of the passage of the hand-car was *per se* negligence. [If the jury find that there was no warning given at all, the plaintiff had a right to suppose that the track was clear, and if upon crossing the accident resulted from the negligence of the defendant's employés, without any contributory negligence upon the part of the plaintiff, he is entitled to recover in this suit."] Exception. (Fourth assignment of error.)

Defendant requested the Court to charge, *inter alia*, as follows:—

"It was the duty of the plaintiff to stop, and look, and listen at a point where he could see the main tracks of defendant's railroad, and his failure to do so, his own evidence showing that there was such point, the tracks running straight both west and east, constitutes contributory negligence on his part." Which was overruled, as follows: *Answer*. "The plaintiff, about to cross the tracks of the defendant, was bound to stop, look, and listen, to discover whether or not there was danger in crossing, from approaching trains or cars. If he did not do so he was guilty of contributory negligence. If the jury find that upon tracks near the crossing there were cars standing, obstructing the view of the defendant's main tracks, it becomes a question of fact for the jury whether or not on the occasion of this accident he was guilty of contributory negligence." Exception. (Second assignment of error.)

Verdict and judgment for the plaintiff for $9000; whereupon defendant took this writ, assigning for error the refusal to grant a compulsory nonsuit, the answers to above points, and the portions of the charge included within brackets.

William A. Galbraith, for the plaintiff in error.

The plaintiff below was in fault, as he failed to stop, look, and listen.

Penna. R. R. Co. *v.* Beale, 73 Pa. St. 504.
Penna. R. R. Co. *v.* Ackerman, 74 Id. 265.
McWilliams *v.* Keim, 22 WEEKLY NOTES, 372.
Greenwood *v.* P. W. & B. R. R. Co., 23 Id. 425.

Ordinarily the existence of negligence is a question for the jury, but when the facts are uncontroverted their legal effect is a question of law for the Court.

D. L. & W. R. R. Co. *v.* Cadow, 120 Pa. 559.
P. & C. R. R. Co. *v.* McClurg, 56 Id. 294.
City of Erie *v.* Magill, 101 Id. 616.

There was no right to recover for pain and suffering plaintiff might undergo in the future.

Phila. & R. R. R. Co. *v.* Adams, 89 Pa. St. 31.
Penna. R. R. Co. *v.* Allen, 53 Id. 276.
Collins *v.* Leafey, 23 WEEKLY NOTES, 264.

E. A. Walling (*John P. Vincent* and *Charles M. Lynch* with him), for defendant in error.

There was no obligation to stop, look, and listen a second time.

Penna. R. R. Co. *v.* Garvey, 12 Out. 369.
McWilliams *v.* Keim, 22 WEEKLY NOTES, 372.

It was for the jury to determine whether plaintiff did his duty.

North Penn. R. R. Co. *v.* Heilman, 13 Wr. 60.
Penna. R. R. Co. *v.* Ogier, 11 Casey, 60.
Arnold *v.* Penna. R. R. Co., 5 Amer. 135.

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The charge as to damages was substantially correct.

June 28, 1889. THE COURT. The testimony on behalf of the plaintiff was to the effect that a public crossing in a city street was partially obstructed by standing cars (Pa. R. R. Co. *v.* Ackerman, 74 Pa. 265; Pa. R. R. Co. *v.* Horst, 110 Id. 226), and this crossing, the view of which was thus obstructed, was approached by a hand-car at the rate of ten miles an hour, noiselessly, and without warning of any kind until the collision was imminent, and that the safety gates which were there in accordance with the requirements of the city ordinances, were open, and thus tended to mislead the plaintiff. This evidence made a clear *prima facie* case of negligence for the jury. A nonsuit therefore could only be granted on the ground of manifest contributory negligence of the plaintiff. This we do not find. There were a number of tracks, and the evidence is strong that the plaintiff stopped, looked, and listened before crossing the first. It might still have been his duty to stop again before going upon the track of the defendant company on which the collision took place, but the evidence does not enable us to say so as a matter of law. It is far from clear that the place where plaintiff stopped was not the best, or that there was any safe place for a second and better view. It was proper therefore that the case should be left to the jury, and the nonsuit was rightly refused.

For the same reasons the defendant's first point which assumed as an established fact that "plaintiff's own evidence showed there was such a point" might have been refused entirely, and the qualified answer of the Court did defendant no injury. The first and second assignments of error are therefore not sustained.

The third and fourth assignments have given us more trouble, and on these points this is a very close case. Portions of the charge and of the answer to plaintiff's first point, especially the phrases, "the fact that the gates were up would be notice to plaintiff that there was no danger in crossing the track; it would be an invitation to him to cross the track," and "if the jury find that there was no warning given at all the plaintiff had a right to suppose that the track was clear," are certainly erroneous if applied to the plaintiff's conduct, or used in defining to the jury the standard of contributory negligence. The duty to stop, look, and listen is absolute and unyielding. It is for the protection of the train and its occupants as much or more than for that of travellers on the highway, and no amount of negligence on the part of the defendant can absolve the plaintiff from his obligation. The fact that the safety gates were up did not and could not release the plaintiff from the necessity of observing the imperative rule for all railroad crossings. As said by the present Chief Justice in the closely similar case of Greenwood *v.* R. R. Co. (23 WEEKLY NOTES, 425), a plaintiff "has no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up."

But while the fact that the gates were raised is no excuse for the failure of a plaintiff to stop, look, and listen, yet on the other hand it is some evidence of negligence on the part of the defendant. Its tendency is certainly to give the approaching traveller the impression that the crossing is safe, and thereby to blunt the edge of his caution. It may of course be susceptible of full explanation. As said in Greenwood *v.* R. R. Co. (*supra*), "machinery of all kinds is liable to get out of order, and may do so just at the critical moment of the approaching of a train." But unexplained it is evidence of negligence, and as such is a proper subject of comment in the charge of the Court. The passages already quoted would be clearly erroneous as applied to the plaintiff's negligence, but they would equally clearly be correct if applied to the negligence of the defendant. They must be examined and judged in connection with their immediate context. The passage from the charge that the gates being up was an invitation to cross, follows immediately after a refusal to say that it was negligence in law, and a reference of it to the jury as a question of negligence in fact, and is followed in the same immediate connection by the qualification that "at the same time it would not excuse him from exercising due care in approaching and crossing the track, and finding out whether or not there were approaching cars," and what was meant by due care is defined a few sentences farther on, by the instruction that it "was the duty of the plaintiff to use care in approaching the tracks, to stop, and look, and listen for approaching cars."

The answer to the plaintiff's first point is very similar, and if regarded separately may also be taken as applied either to the plaintiff's or the defendant's conduct, but taken with its context it appears to apply to the defendant, and this is made entirely clear by the unqualified affirmance of defendant's third point that the fact of the gates being open would not excuse the plaintiff from the duty of stopping to look and listen before attempting to cross.

Taking the passages as a whole with what preceded and followed, though the distinction between what was meant to define the plaintiff's own duty and what was said with reference to defendant's negligence, is not so clearly expressed as would be desirable, yet on a fair survey of the general effect we cannot say that it

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did not give the jury correct instruction as to the law.

The same course of remark is applicable to the portion of the charge relating to the damages. The fifth error complained of, is the charge that the jury may consider the pain and suffering the plaintiff "has undergone and *may undergo* in the future." The expression is not felicitous, and there is a notable absence throughout the charge of the word compensation, which should always be made prominent in cases of this class. (See remarks on this subject in Collins *v.* Leafey, 23 WEEKLY NOTES, 268–9.) But the idea of compensation was clearly in the judge's mind and was fairly brought before the jury in the enumeration of the elements of the damages they should award if they should find for the plaintiff. These are stated by the learned Judge in the general charge to be the expenses of plaintiff's sickness, the loss of wages he has suffered and will suffer, and the pain and suffering he "has undergone and may undergo," and in the answer to plaintiff's fourth point, where the pain and suffering are expressly limited to that "already experienced and likely to be yet experienced." Taking all this together the idea of compensation, though not made as distinct and prominent as is desirable, was fairly put before the jury, and it would be hypercritical and unjust to separate the single phrase "may undergo" from its context, and say that it gave the jury an unbridled license in the ascertainment of the damages, or left them without any guide at all as in R. R. Co. *v.* Adams (89 Pa. 29), and Collins *v.* Leafey (23 WEEKLY NOTES, 264).

Though open to criticism in the several points reviewed, the charge as a whole contained no substantial error.

Judgment affirmed.

Opinion by MITCHELL, J. L. L., Jr.

Jan. '89, 377. May 22, 1889.

Martin v. Frantz.

Accord and satisfaction—What constitutes—Contribution between co-promisors—When liability not affected by Statute of Limitations.

An agreement to accept a smaller sum in satisfaction of a larger one, presently due, is without consideration, and cannot be enforced; and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction.

When one promisor still continues liable, and is compelled to pay, the liability of the co-promisors for contribution will still remain, notwithstanding they may be discharged by the operation of the Statute of Limitations from their liability to the promisee.

The right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his just share of a joint burden; and this equity having once arisen between co-sureties, neither the creditor, the principal, nor the death of a party can take it away.

C., B., and M. on April, 1, 1879, gave a note to E. for $1400 payable in one year, for money loaned to C., who paid the interest regularly until April, 1885, when he failed in business. On April 1, 1886, M. paid to E. $700, or one-half of the note, with interest. E. subsequently indorsed the note to F. who brought suit against the makers. B. pleaded the Statute of Limitations; M. set up as a defence, that he had made an agreement with E. that if he, M., paid his one-half of the note, he should be released from any liability for the balance. This agreement E. denied. The jury, under instructions from the Court, rendered a verdict in favor of defendant B., and against C. and M.:

Held, not to be error; the alleged agreement being without consideration, either by way of advantage to the plaintiff, or disadvantage to defendant.

Error to the Common Pleas of Lancaster County.

Assumpsit, by Jacob M. Frantz, against John U. Charles, David Martin, and B. U. Charles to recover the balance claimed to be due upon a promissory note drawn by defendants to the order of John B. Eshbach, and indorsed by him to plaintiff. Pleas *non assumpserunt*, payment, and the Statute of Limitations.

Upon the trial, before LIVINGSTON, P. J., it appeared that the note in question, for $1400, for money loaned John U. Charles, was given by John U. Charles, David Martin, and B. U. Charles to John B. Eshbach on April 1, 1879, payable in one year from date with 5½ per cent. interest. John U. Charles was the son-in-law of Martin. At the time the note was given Martin said that at the end of the year he would pay the note himself to Eshbach, and that his son-in-law, John U. Charles, would then owe the money to him. Martin, however, did not pay the note, and it was carried by Eshbach until January 17, 1888, when he indorsed it to Frantz, the plaintiff. John U. Charles paid the interest regularly until April, 1885, when he failed. In March, 1886, Eshbach and Martin met and had a conversation about the payment of the note. According to plaintiff's testimony Martin said that he would pay the note that spring if he possibly could, but that he wanted to see B. U. Charles first. According to Martin, Eshbach agreed that if Martin would pay his half, he would release him and look to B. U. Charles for the other half. This was denied by Eshbach. Upon April 1, 1886, $770 was paid by Martin to Eshbach, and a receipt indorsed "for $700 on within note, and $70 interest for one year to April, 1885."

The Court instructed the jury to render a verdict in favor of defendant, B. U. Charles, and charged, *inter alia*, as follows:—

"It is claimed here by defendants that there is an accord and satisfaction in this case. In our

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judgment, accord and satisfaction do not arise here, are not presented by the evidence in the case. . . . .

"What was David Martin's position? He never was released by the operation of the Statute of Limitations. He made a payment just before it would have become inoperative, that kept it alive as to him for six years longer. It required no new promise to bind him. At the time he paid the half, he was bound for the whole. Is there any other relief for him? He might have paid the whole at any time prior to the time he paid the $770; he might have paid it all then and brought suit against Charles for contribution.

"Take David Martin's statement as entirely true, and we believe it is (though contradicted by Eshbach as to releasing). . . . .

"And this being our view of the law, we therefore instruct you to render your verdict for the plaintiff, for the amount of his claim, the balance of the note with the interest due thereon —the whole amount being $861.70.

"If we are in error in our view of the law, defendants may move for a new trial, when the case may be argued before a full bench, so that the error may be corrected."

Plaintiff requested the Court to charge:—

"The alleged promise or agreement testified to by David Martin, and some of defendants' witnesses, as having been made by John B. Eshbach, to the effect that he, David Martin, was to be relieved or discharged from all further liability on the payment of the half of the note in suit, being based on no valuable consideration, is not binding either on John B. Eshbach, or Jacob M. Frantz, the plaintiff in this case. Therefore said part payment is no defence to this suit which is brought to recover the balance, and the verdict of the jury must be for plaintiff and against David Martin and John U. Charles." *Affirmed.*

Defendants requested the Court to charge:—

"(1) That the liability of David Martin, on the note in controversy, one of the defendants, would have been barred by the Statute of Limitations, and himself relieved if he had not made the payment, to wit, seven hundred and seventy dollars, on April 1, 1886;" and "(2) That if the jury believe, from all the evidence, that at the time said payment was made, to wit, seven hundred and seventy dollars, on April 1, 1886, the distinct understanding and agreement was that he was to be discharged and relieved from all other liability on said note, then he is relieved and the plaintiff cannot recover against him."

Answer. Defendants' points refused. Six years bars recovery. If payment had not been made within six years statute would have been a bar, but payment was made within six years and statute did not become a bar, but continued the note as to him for six years more, unless he was relieved by payment or otherwise.

Verdict for plaintiff for $861.70 against John U. Charles and David Martin, and judgment thereon. Whereupon Martin took this writ assigning for error the portions of the charge, and the answers to the points, *supra.*

Philip D. Baker, for plaintiff in error.

William R. Wilson (*Andrew M. Frantz* with him), for defendant in error.

June 28, 1889. THE COURT. It is too well settled to admit of discussion that an agreement to accept a smaller sum in satisfaction of a larger one, presently due, is without consideration and cannot be enforced (Brockley *v.* Brockley, 122 Pa. 1), and the actual acceptance of such smaller sum is not a good discharge of the debt, even as accord and satisfaction. (Mechanics' Bank *v.* Euston, 11 WEEKLY NOTES, 389.)

It is clear, therefore, that the agreement relied on by the defendant below was without consideration in the way of benefit accruing to the plaintiff, and it must fail as a defence unless it imposed some burden or disadvantage on the defendant. All that is claimed for it in this regard is that it allowed the Statute of Limitations to run in favor of the co-surety, B. U. Charles, and thus deprived the defendant of his right to contribution. The authorities, however, are quite uniform that this result does not follow.

"The right of action for contribution does not arise until payment of more than a due proportion, and hence the Statute of Limitations does not begin to run until then." (De Colyar on Guaranties, 354, Morgan's Am. ed.; and see Parsons on Contracts, pp. 33-37, and cases there cited.)

The precise point involved here has been expressly decided by several Courts of the highest authority. Thus in Peaslee *v.* Breed (10 N. H. 489), one of two joint makers of a note was protected against the holder by the Statute of Limitations, while the other, through payments made by himself, remained liable.

The latter having paid, was held entitled to recover of the former his share for contribution, PARKER, C, J., saying, "We are of opinion that the plaintiff is entitled to recover for the amount paid after the period when no action could have been sustained directly against the defendant by the payee of the note."

In Boardman *v.* Page (11 N. H. 438) the rule is thus stated: "When one promisor still continues liable . . . . and is compelled to pay . . . . the liability of the co-promisors for contribution will still remain, notwithstanding . . . . they may be discharged by the operation of the Statute of Limitations, from their liability to the promisee."

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In Wood *v.* Leland (1 Metc. (Mass.) 387) it was said by Chief Justice SHAW, "Defendants contend that as they could not be held responsible to the obligee after the year, so they would not be liable for contribution to a surety after that time. But the Court are of opinion that the Statute of Limitations cannot be so applied. It may well be admitted that the Statute of Limitations would be a good bar to an action by the obligee . . . . but the right of action by the surety for contribution does not accrue at the breach of the bond, but upon his payment of the money pursuant to that breach."

And in Camp *v.* Bostwick (20 Ohio St. 347) it was held that the right to contribution does not arise directly from the original instrument of joint obligation, but from the equity of one who has borne more than his just share of a joint burden, and "this equity having once arisen between co-sureties," says McILVAINE, J., "neither the creditor, the principal, the Statute of Limitations, nor the death of a party can take it away."

It is thus clear on the authorities that whatever rights of contribution plaintiff in error may have, arise out of his payment of more than his due proportion of the joint obligation; and will date from such payment, entirely unaffected by the fact that the Statute of Limitations has barred any direct liability of his co-surety to the creditor.

The agreement relied on being therefore without consideration, either by way of advantage to the plaintiff or disadvantage to the defendant, was not a valid defence, and the learned Judge was right in directing a verdict for plaintiff.

Judgment affirmed.

Opinion by MITCHELL, J. H. C. O.

May '89, 9 & 10. June 3, 1889.

In re Roads in Londonderry Township.

Vacation of roads—Report of viewers—Act of June 13, 1836—Time for actual closing of road within control of the Quarter Sessions after report of viewers in favor of vacation.

Viewers appointed under the Act of June 13, 1836, to vacate parts of a public road, reported that the road had become useless, dangerous, inconvenient, and burdensome, and should be vacated, and further "that said vacation shall take effect from the time when the Pennsylvania Railroad Company shall have completed, ready for use, including approaches thereto, an overhead bridge over the tracks of its road," etc. The Court below set aside the report as conditional, and therefore, illegal and invalid:

Held, to be error. The record was regular on its face, and the report was not conditional in the objectionable sense of Road in Lathrop Township (84 Pa. 126) and Road in O'Hara Township (87 Id. 356).

There is a substantial distinction between proceedings to open a road in the first instance, and those to vacate an existing road because it has become useless, inconvenient, or burdensome. The latter is usually a proceeding with two branches, the closing of the old way, and the opening of a new one in its stead. It is of practical importance that the first branch should not be proceeded with so far in advance of the second as to leave the public even for a brief interval without any road at all.

The provision of section 24, of the Act of June 13, 1836, that "whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped, until the road laid out to supply the place thereof shall be actually opened and made," necessarily implies an interval of time between the decree of vacation, and the order to close in fact.

In cases like the present, the direction as to the time of actual closing, is a matter under the entire control of the Quarter Sessions.

Certioraris to the Quarter Sessions of Dauphin County.

Petitions were filed by citizens of Londonderry Township asking for the appointment of viewers to vacate parts of a public road lying between Canal and Allen streets, and between Allen and Northumberland streets, in the village of Port Royal.

Viewers were appointed, who reported in each case that the parts of the road sought to be vacated had become useless, dangerous, inconvenient, and burdensome, and should be vacated; and further "that said vacation shall take effect from the time when the Pennsylvania Railroad Company shall have completed ready for use, including approaches thereto, an overhead bridge over the tracks of its road, on Burd Street, in said township and village, and near to the road hereby vacated."

After the filing of the reports, a petition was filed, in one case only, for a revocation of the order appointing viewers. No exceptions were filed, nor a petition for a review.

The Court refused to confirm the reports, and set aside the proceedings, SIMONTON, P. J., saying:—

"The report of the viewers in this case contains upon its face a fatal error. The viewers report that they are of the opinion that the road in question has become useless, dangerous, inconvenient, and burdensome, and ought therefore to be vacated. The said viewers further report that said vacation 'shall take effect from the time when the Pennsylvania Railroad Company shall have completed, ready for use, including approaches thereto, an overhead bridge over the tracks of its road on Burd Street in said township and village and near to the road hereby vacated.'

"This leaves the finding of the jury conditional, and renders it impossible for the Court to confirm the report for the reasons given *In re* Road in Lathrop Township (84 Pa. State, 126).

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In that case the condition which was held fatal by the Supreme Court was in the decree of the Court below, and not in the report of the viewers, while in this case it is in the report, but the confirmation of the report would carry it into the decree, and we think that the cases are essentially parallel. The Supreme Court say: 'The conditional confirmation suspends the effect, and puts the record and effect of the decree in abeyance, until payment of the damages, an act necessarily done *in pais*. . . . . Now what guide has the clerk for entering the whole proceedings on the record? Is he to determine the fact of payment?' So here, how is the clerk to determine when the Pennsylvania Railroad Company shall have completed, ready for use, including the approaches thereto, an overhead bridge from the tracks of its road as provided in the conditional report.

"The road laws certainly make no provision for such a conditional finding as that contained in this report, and, as said in the case above cited of the decree, the report in this case is therefore illegal and invalid, and confirmation must therefore be refused and the proceedings be set aside. See, also, *In re* Road in O'Hara Township (87 Pa. St. 356)."

Petitioners then took this writ assigning this action of the Court for error.

Louis W. Hall and *Francis Jordan*, for plaintiffs in error.

The cases cited by the Court below are not in point.

Mill Creek Township *v.* Reed, 5 Casey, 195.

The viewers were authorized to report as they did because the eighteenth section of the Act of June 13, 1836, relating to roads, highways, and bridges (2 Purd. Dig. 1501, sec. 33), authorizes viewers to change and vacate "the whole or any part of any private or public road which may have been laid out by authority of law, whenever the same shall become useless, inconvenient or burdensome;" and the 24th section of the same Act is that: "Whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped until the road laid out to supply the place thereof shall be actually opened and made." (2 Purd. Dig. 1501, sec. 38.)

James I. Chamberlin, for defendants in error, relied upon the cases cited in the opinion of the Court below, and—

Newville Road Case, 8 Watts, 176.

June 28, 1889. THE COURT. The learned Court below seems to have felt constrained to set aside these proceedings because the findings of the viewers were conditional, and, therefore, illegal and invalid, under the cases of Road in Lathrop Township (84 Pa. 126), and Road in O'Hara Township (87 Id. 356). Both of these cases were decided on technical grounds and should not be held binding except where the same or similar technical defects exist. Without adverting to minor differences between those cases and the present, it is sufficient to note the substantial distinction between proceedings to open a road in the first instance, and those to vacate an existing road because it has become "useless, inconvenient or burdensome." The latter is usually, as in the present case, a proceeding with two branches, the closing of the old way, and the opening of a new one in its stead. It is of practical importance that the first branch should not be proceeded with so far in advance of the second as to leave the public, even for a brief interval, without any way at all. This inconvenience has been guarded against by the Act of 1836 itself, section 24 of which provides that "whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped, until the road laid out to supply the place thereof shall be actually opened and made."

This necessarily implies an interval of time between the decree of vacation and the order to close in fact, for it will rarely happen that the new way will be actually constructed until it is made certain that the old will be vacated and the new accepted as a substitute.

Examining the reports of the viewers in the light of this provision of the statute, we do not find that they are conditional in the objectionable sense of the cases cited. The finding that the road "has become useless, dangerous, inconvenient, and burdensome, and ought therefore to be vacated" is certain and absolute, and the further report that the said vacation shall take effect when the overhead bridge on Burd Street shall be ready for use, does no more than identify the new road which is to be substituted for the one vacated, and put into express words the direction as to the time of actual closing, which would otherwise have followed as an implication of law from the section of the Act of 1836 above quoted. This is a matter under the entire control of the Court by withholding or postponing the issue of the order for vacating until satisfactory evidence is presented that the time fixed alike by the report of the viewers and by the statute has arrived. There is, therefore, nothing in this provision of the reports which affects the regularity of the proceedings, or which need prevent the confirmation of the reports and the making of decrees of vacation of the roads as recommended therein.

It is not intended by our opinion or action in these cases to infringe in any way upon the discretionary control of the Court below over proceedings of this nature. In one of the cases

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there were no exceptions of any kind filed to the proceedings, and in the other no formal exceptions but only a petition to revoke the appointment of viewers. The learned Judge in setting aside the proceedings put his reasons on the record formally as part of his order, and the case has been argued by counsel for both appellant and appellee as if the reasons were regularly before us for review. We have assumed, therefore, that the Court as well as the parties desired a decision on the case as thus presented. In reversing the orders, therefore, the extent of our decision is that the proceedings are regular on their face and the reasons assigned on the record for setting them aside are not legally sufficient. If any other objections to confirmation exist, the Court as to them will be entirely untrammelled by our present action.

Orders setting aside proceedings reversed and records remitted for further proceedings according to law.

Opinion by MITCHELL, J. H. C. O.

Jan. '86, 301. April 19, 1887.

Crosland v. Borough of Pottsville.

Nuisance—Abatement of—Trespass—Drains—Boroughs.

When a person who is entitled to a limited right in real estate under a grant from another exercises the right in excess so as to produce a nuisance, the grantor may abate the exercise of the right to the extent of the nuisance. If the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within proper limits, but in such case the grantor proceeds at his peril and takes the risk of being able to show that the thing complained of was in fact a nuisance. If he errs in judgment he is answerable in damages, and if a breach of the peace is involved he is liable to indictment for the result.

C. being the owner of real estate granted to B. the right to run a drain across his premises for surface water only. B. made the drain, running it under a street and subsequently connecting it with his cesspool and that of other parties whereby a nuisance was created on the premises of C. In order to abate this nuisance C. disconnected the drain on his premises and plugged up the pipe, whereby the sewage was forced up into the street. The officials of the borough thereupon reconnected the drain renewing the nuisance on C.'s premises, and C. again disconnected the same. The borough officials again attempted to connect the drain, C. endeavored peaceably to prevent them and was thereupon arrested and committed to the lock-up. In an action by C. against the borough to recover damages, the Court instructed the jury that C.'s remedy was against B. and that the verdict must be for defendant. On writ of error:

Held, that this instruction was erroneous; that C. had been justified in the course he had pursued, and that the borough authorities had no right to open the drain through his premises.

Held, further, that the borough officers should properly have turned their attention to B., who was the offending party, and have compelled him to abate the nuisance which he had set up and maintained.

Error to the Common Pleas of Schuylkill County.

Case, by John M. Crosland against the Borough of Pottsville, to recover damages for injuries to his property and person.

On the trial, before PERSHING, P. J., the following facts appeared from the plaintiff's evidence: In 1872 D. P. Brown who owned real estate on the west side of Centre Street in the borough of Pottsville, obtained permission from Crosland, who was the owner of a lot of ground about 150 feet below Brown's, but on the east side of the street, to run a drain to drain his surface water only through the latter's premises to the Schuylkill River. It appeared that no sooner had Brown constructed his drain down through and crossing Centre Street, the main thoroughfare of the borough, and through Crosland's premises, that he not only connected the same with an old coal shaft or abandoned mine working about forty feet deep, that he was using as a cesspool, but also sold rights to other inhabitants and property owners in his neighborhood to connect their drains with the one so constructed by him.

Crosland subsequently built a row of frame dwelling houses on his premises, Brown's drain running directly through the basement or cellar of one of them. These dwellings were rented from time to time by Crosland and occupied by his tenants. As early as 1875 Crosland discovered that, instead of the drain being used for drainage of surface water only, as agreed upon between him and Brown, it was used as a sewer or drain for Brown's cesspool and also as a drain for Brown's neighbors. The tenants of the dwellings also made complaint, and on May 26, 1880, after Crosland had exhausted every remedy known to him to disinfect his dwellings and make them habitable, and after having verbally notified Brown, he served a written notice on Brown to cut off and remove his drain or sewer altogether. Brown paid no attention to these notices. Crosland's dwellings became permeated with noisome sewage and cesspool smells from this drain.

On May 10 or 13, 1881, almost a year after the first and six weeks after the second notice to Brown, Crosland dug down about eleven feet from the curbstone, on the west side of the street, and disconnected the pipe that led to his premises, secured the disconnected ends by plugging them tightly and mailed Brown a notice of what had been done. The result of this was that the water or sewage thereafter oozed or was forced up on the street at the point where Crosland had disconnected the pipe. It remained in this con-

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dition until August 23, 1881, when the borough at the instance and in pursuance of notice from Brown, by its officials, the chief burgess, Joseph Derr, and supervisor Dewald, took possession of the drain, opened it up at the point where Crosland had disconnected it, put in new pipe, reconnecting it with Crosland's property, and thus again draining Brown's cesspool and filth through and over Crosland's premises. Two days after that, August 25, 1881, Crosland again cut off the connection at the curbstone and plugged up the pipes.

Nothing further was attempted by the borough until October 17, 1881, when the borough hands again came there, dug up the drain, and undertook to again reconnect the same with Crosland's premises. Crosland was present and warned them to desist, but they paid no attention to his warning. He therefore resisted this invasion of his right and property with all the peaceable means he possessed, but committed no breach of the peace. Finally the chief of the borough police appeared, arrested him without a warrant, and compelled him to walk a long distance up the main street of the town in his custody, refused bail, took him to the borough lock-up, and there confined him in a cell. The next day this action was brought against the borough to recover damages. The defendant's evidence contradicted that of the plaintiff in many particulars.

The Court charged the jury, *inter alia*, as follows:—

"It is claimed here that all the borough did was what they had a right to do, and what they were compelled by law to do, in order to carry out the duties the officers owed to the borough, and to the community. It is alleged here by the plaintiff that the claim for damage is not for the condition of the street, nor in consequence of the flow of foul water on the street, as I understand counsel to state, but because the borough turned this water, as they claim, upon Mr. Crosland. [Mr. Crosland, whatever his grievance may have been against those who injured him by turning foul water upon him, if that is the fact, whatever right he might have to sue Colonel Brown if Colonel Brown violated his contract with him, he would not have any more right to plug up the pipes, so as to throw foul water on the streets, than he would have to pump it from a reservoir on to the street, if he had a reservoir of that kind on his premises. It is the thing done, and not the way it is done. I therefore cannot see, it is not made plain, how he could set up a claim against the borough for the condition of the street, when that was brought about in consequence of his own act, in trying to cut off the water from his own premises.]

"[Now, upon the other points, we say that there is no evidence in my judgment here to show that Mr. Crosland sustained any damages by the connecting of these pipes on the 23d of August, and the 17th of October. The evidence has not shown what the damages were that he did sustain. It is not claimed that his property was entered, that his house was entered, or that any actual damage was done to his real estate. If such were done, it is not shown here, and it is the duty of the party claiming damages to show what the damages are, and the extent of those damages. It seems to me that there is an absence of evidence here for the jury to found a verdict upon.]

"[Another view we take of it is, that this water having been turned on the street by Mr. Crosland, thus constituting a nuisance, the borough authorities had a right to restore the street to the condition in which it was before he plugged up the pipes, and thus threw the water upon it, and in the exercise of their rights over the streets of the borough, finding them in this condition, and knowing the cause, they had a right to make the connection of the pipes, simply to restore the street to the condition it was in before it was interfered with by Crosland, not for the purpose of throwing water upon him, but to put the street in proper condition, the same condition in which it was at the time that he first interfered with it by turning the water upon it, by closing up the pipes.]

"[In view of the complaints, in view of the undisputed condition of that street, it was the bounden duty of the borough to abate the nuisance, and they had the right to put the street just in the condition it was in before the nuisance was created by plugging up these pipes, although the effect of that was to throw the water where it had been before, where Mr. Crosland, by his agreement with Brown, agreed it should be—on his premises.]

"[The view we take of it is that the borough was there in the exercise of a lawful right. There is no evidence here that it exercised it in any other than a lawful manner. So far as any alleged injury to real estate is concerned, they are therefore not responsible in this action for damages.]

"[I think Mr. Crosland has mistaken his remedy, mistaken the party who is liable to him, if he has been injured in consequence of this overflow of water.] [The borough has done nothing more, as we view it, than to put the street in the same condition that it was in before Crosland interfered with it by closing up the drain causing the nuisance.] [Upon the whole evidence in the case, we find no disputed question of fact to submit to you. Your verdict will therefore be for the defendant."]

Verdict accordingly, and judgment thereon. Whereupon the plaintiff took this writ, assigning

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for error the portions of the charge given above in brackets, with the instructions of the Court to the jury to find for the defendant.

J. W. Moyer and *John W. Ryon* (with them *W. F. Shepherd*), for plaintiff in error.

The defendant in error had no power to abate this nuisance in such a manner as to deposit filth on the plaintiff's premises. To do so was to seize his property for public use without compensation.

Haugh's Appeal, 6 Out. 44.
Wood on Nuisance, §§ 738, 752, 771.
Clark *v.* Syracuse, 13 Barb. 32.
Kirk *v.* Noville, 1 T. R. 124.
Manhattan Co. *v.* Van Comes, 23 N. J. 255.
B. & P. R. R. Co. *v.* Baptist Church, 108 U. S. 317.
Byrnes *v.* Cohoes, 67 N. Y. 294.
Bartable *v.* Syracuse 8 Hun, 587; 72 N. Y. 64.
Noonan *v.* Albany, 79 N. Y. 475.
Beach *v.* Elmira, 22 Hun, 158.
Field *v.* West Orange, 37 N. J. Eq. 120.
Philadelphia *v.* Collins, 18 Smith, 122.
Seifert *v.* Brooklyn, 2 Cent. Rep. 135.
Radcliff's Ex's *v.* Mayer, 4 N. Y. 195.
Dillon on Mun. Corp., § 1051.

R. H. Koch, for defendant in error, cited—

Haugh's Appeal, 6 Out. 44.
Borough of Butler's Appeal, 1 Cent. Rep. 594.
Martin *v.* Riddle, 2 Casey, 415, note.

May 27, 1889. THE COURT. After the argument of this case, it was assigned to our late brother TRUNKEY for an opinion. After his death, the re-assignment of it was overlooked, and hence the delay in entering judgment.

We will not enter into any extended discussion of the case, but will briefly state the grounds for the judgment we now enter. As the jury received binding instructions to find for the defendant, the testimony adduced by the plaintiff, with all reasonable inferences to be drawn therefrom, must be taken as establishing the true theory of the case on the facts.

We assume, therefore, that Crosland gave to Colonel Brown the right to conduct the surface water only, from his premises, through this drain into the Schuylkill River; that after the drain pipes were put down, he turned into it the foul matter which came from his cesspool and privy vaults, and that he sold a similar privilege to others; that thereby the drain, instead of being used to conduct the surface and mountain water as originally intended, was converted into a common sewer which caused the plaintiff's house to be untenantable, and it is believed unhealthy, and thus became a nuisance which the plaintiff claimed the right to abate. There is testimony also that the privilege given to Brown was experimental merely; if it should prove unsatisfactory, Crosland says, he had the right at any time to terminate it. The privilege must be treated therefore as a mere license, which it was in Crosland's power to revoke at his pleasure. It must be assumed also that the persons who were employed to adjust these pipes, and who re-constructed the sewer so as to again throw its contents upon the plaintiff's premises, were acting under authority from the borough, and were directed to do just what was done, and that the borough was responsible for these acts. There is abundant testimony to justify this inference, no matter what the facts may have been.

The drain was put down by Brown, for his own convenience; the borough had nothing to do with it, but as it was laid in the street and suffered to remain, and the borough exercised its authority to maintain it, we may infer that it was originally placed there by permission, or that its construction was afterwards assented to. Nor had Crosland anything to do with the drain beyond yielding his assent that it might be laid in his lots, to lead from the street to the river, and to conduct the surface water. It conferred only a limited right.

When a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess (Barclay *v.* Commonwealth, 25 Pa. 503; Taggart *v.* Commonwealth, 21 Id. 527). But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits (Wood on Nuisances, 804; Addison on Torts, 269; Cawkwell *v.* Russell, 26 L. J. Exch. 34; Beard *v.* Murphy, 37 Vt. 101). If Brown abused the privilege which had been given him by using these pipes as a channel for noxious and offensive matter, instead of surface water, and thereby created a nuisance, Crosland had an undoubted right after due notice to go either upon the premises of Brown, or his own premises, and abate the nuisance by stopping up the drain, thereby preventing even the surface water from flowing therein, until Brown reduced his use thereof within the proper limits. Of course a person who undertakes to abate a nuisance proceeds at his peril; he takes the risk of being able to show that the thing complained of was in fact a nuisance; if he errs in judgment, he is answerable in damages, and if a breach of the peace is involved he is liable to indictment for the result.

But, creating no breach of the peace, he had a right to abate this nuisance. The noxious matter which passed through the drain under the road, came from Brown's premises; it was his (Brown's) duty to convey it to the river, or to some other place where it would not become offensive and injurious to the public, and when he received notice that the drain was obstructed, it was his duty to stop the flow. It was not an unlawful obstruction of the drain which caused the

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public nuisance, it was the continued use of the drain by Brown after he knew it was obstructed, that caused the overflow into and upon the highway, and for this Brown was responsible. Brown's recourse, if he had any, was upon Crosland; he had no right to discharge the sewer into the street. The borough authorities of Pottsville had no more right to open up the sewer through Crosland's property than Brown had; their attempt to do so was wholly without authority, and in denial of the legal rights of Crosland, who had a clear right, in a lawful and peaceable manner, to protect his property against the unlawful use of this drain by Brown, and against the unlawful acts of any other person who might come to aid in perpetrating this wrong upon him. Brown was the offending party, and the officers of the borough should have given their attention to him; they should have obliged him to abate the public nuisance which he had set up and was steadily maintaining.

We decide this case upon the force and effect of the plaintiff's testimony, adopting his theory of the case as the correct one; when it comes to be tried again and the evidence on both sides is submitted to the jury, the case may be presented in an entirely different light. The Court erred, we think, in submitting the case to the jury with binding instructions to find for the defendant.

Judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. S. H. T.

Jan. '89, 45. April 30, 1889.

Erie Boot and Shoe Company v. Eichenlaub.

Bills and notes—Affidavit of defence—Sufficiency of—Who may make—Allegation of fraud.

In a suit on a promissory note made in the name of a company defendant, by the president of said company in favor of an estate of which said president was executor, and payable at a certain bank, the statement of the plaintiff averred that the note had gone to protest, and that he, being an accommodation indorser for said defendant, was compelled to pay and did pay to said bank, the owner and holder of said note, the amount thereof. An affidavit of defence was filed averring that the note was made fraudulently, without the knowledge and authority of the company defendant, and that the plaintiff had knowledge of these facts before he took the note. The Court entered judgment for want of a sufficient affidavit of defence:

Held, that the failure to aver in the statement that the bank was a *bona fide* holder for value, before maturity, left a flaw in the plaintiff's title insufficient to meet the allegation of fraud in the affidavit of defence:

Held, also, that even were the bank a *bona fide* holder, its title would not protect the plaintiff in the face of the allegation of the affidavit that he was a party to the original fraud.

Held, therefore, that the Court erred in entering judgment for want of a sufficient affidavit of defence.

The affidavit of defence in the above case was made simply by a stockholder, not by one of the officers of the company. A supplemental affidavit averred that the affiant was the business manager of the company:

Held, that this obviated the defect that the original affidavit did not set forth that the affiant had a special knowledge of the facts or the reason why it was not made by an officer or director of the company.

Error to the Common Pleas of Erie County.

Assumpsit, by J. Adam Eichenlaub against the Erie Boot and Shoe Company, upon a promissory note for $10,000.

The plaintiff filed a copy of the promissory note which was made in the name of the company by Joseph P. Eichenlaub, president of the company, in favor of the estate of Joseph Eichenlaub, deceased. The note was payable at the Second National Bank of Erie, Pennsylvania, and was indorsed by Joseph P. Eichenlaub, executor of the estate of Joseph Eichenlaub, and by J. A. Eichenlaub. The statement averred that the note went to protest and that the plaintiff and indorser, J. A. Eichenlaub, "was compelled and did pay to the Second National Bank of Erie, the owner and holder of said note, the said sum of ten thousand and two hundred seventy dollars and thirteen cents to take the same up; . . . . and that he the said plaintiff was an accommodation indorser for said defendant on said note at its request."

The defendant company in its affidavit of defence averred the note upon which suit was brought was made by Joseph P. Eichenlaub without any knowledge or authority from the officers and directors of said company, and without any consideration to support it; that the said company was in no wise indebted to the estate of Joseph Eichenlaub, deceased, in whose favor the said note purported to be made, but on the other hand, the said estate was at the time the note was made largely indebted to the said company; that the plaintiff was not a *bona fide* holder of said note, but was fully cognizant that the said note was made without the authority of the company defendant and was a fraud thereon; that the said plaintiff knew these facts before the note came into his hands, and that he and Joseph P. Eichenlaub acted in collusion to perpetrate a fraud upon the said company defendant.

This affidavit was made by Thomas H. Cole, a stockholder of the said company, to the best of his knowledge, information, and belief. The company defendant obtained leave to file a supplemental affidavit which set forth that the said Thomas H. Cole, deponent, was the manager of the business of the said company, and again averred the fraudulent character of the note.

Plaintiff obtained a rule for judgment for want of a sufficient affidavit of defence, which

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rule the Court, GUNNISON, P. J., after argument, made absolute, filing the following opinion :—

"The facts alleged in the affidavit of defence would be a sufficient defence in suit by the payee against the maker of the note. They would also constitute a sufficient defence in this suit if there had been no intermediate *bona fide* holders of the note before maturity and for value. It is not alleged that the Second National Bank was not such a holder. The plaintiff became the holder of the note by reason of his payment of it to the Second National Bank. The bank was his immediate assignor. 'The assignee takes the instrument subject to all the objections and equities to which it was subject in the hands of the person from whom he takes it.' (Waln & Co. *v.* Halderman, 2 Pearson, 26.) No facts are set out which could constitute a defence against recovery on the note at the suit of the bank. Nor could the plaintiff, who was an accommodation indorser, have resisted payment at the suit of the bank against him upon his indorsement. He was compelled to pay the bank. The want of consideration and the fraud in the original transaction alleged by the defendant could not have availed him as indorser or the defendant as maker, as against the bank. Having been compelled to pay he succeeded to the right of the bank, and was affected by such equities as it was affected by, and by none other."

Judgment for plaintiff for want of a sufficient affidavit of defence. Whereupon the defendant took this writ, assigning for error the action of the Court in entering judgment as above.

William Benson, for plaintiff in error.

An averment of fraud or that the plaintiff is not a *bona fide* holder is sufficient to prevent judgment.

Moeck *v.* Littell, 1 Norris, 354.
Eyre v. Yohe, 17 Smith, 477.
Smith *v.* Loan Assn., 12 Norris, 19.
Hutchinson *v.* Boggs, 4 Casey, 294.
Bronson *v.* Silverman, 27 Smith, 94.
Hays & Harris *v.* Kingston, 23 WEEKLY NOTES, 277.

When a *prima facie* case is developed in an affidavit, and in all cases when the affidavit alleges matters *dehors* the record, the case should be sent to a jury.

Noble *v.* Kreuzkamp, 17 WEEKLY NOTES, 89.
Kaufman *v.* Cooper Iron Co., 9 Out. 537.
Prahl *v.* Smaltz, 6 WEEKLY NOTES, 571.
Williams *v.* Williams, 7 Id. 388.
Bank *v.* Castner, 9 Id. 273.

F. F. Marshall, for defendant in error.

The affidavits were made by a stockholder, not by one of the officers. This is not sufficient.

Griel *v.* Buckius, 114 Pa. St. 187.

Mere averment of fraud is not sufficient; facts must be stated showing the fraud.

Kaufman *v.* Iron Co., 105 Pa. St. 541.
Sterling *v.* Ins. Co., 32 Id. 75.
Stitt *v.* Garrett, 3 Wharton, 282.
McCracken *v.* Church, 17 WEEKLY NOTES, 45.
Lord *v.* Ocean Bank, 20 Pa. St. 384.
Erie City *v.* Butler, 21 WEEKLY NOTES, 459.
Bardsley *v.* Delp, 88 Pa. St. 420.

The averment in the narr. that the bank was the "owner and holder of said note" is a sufficient statement, undenied in the affidavit of defence, that said bank was a *bona fide* holder, and the plaintiff took the note subject to all the rights of the bank.

Wilson *v.* Mech. Savings Bank, 45 Pa. St. 488.
Youngs *v.* Ball, 9 Watts, 139.

The statements in the affidavit are evasive, and would not hold the affiant for perjury, if untrue.

Coulston *v.* Bertolet, 11 Cent. Rep. 152.

May 29, 1889. THE COURT. This action was brought upon a promissory note made in the name of the company plaintiff in error by Joseph P. Eichenlaub, its president, in favor of the estate of Joseph Eichenlaub, deceased, of which he was himself the executor. It was therefore a note in the name of a principal, but made by an agent in his own favor. The affidavit of defence avers that the note was made fraudulently, without the knowledge or authority of the company and without consideration, and that the plaintiff below had knowledge of these facts before he took the note. The Court below, conceding that this established a *prima facie* defence against the payee, nevertheless held the affidavit insufficient in the present action because the plaintiff had become the holder through his payment of the note to the bank. But this view of the case overlooks two important points in defendant's favor.

First, it nowhere appears that the bank was a *bona fide* holder for value before maturity. In fact, it is only stated collaterally and argumentatively that the bank was a holder of the note at all, all that appears on the subject anywhere in the record being that part of the plaintiff's statement which says that the defendant "has never paid the said note or any part thereof, and the plaintiff was compelled and did pay to the Second National Bank, the owner and holder of said note, the sum of ten thousand dollars," etc. Where the affidavit avers that a note was made or put in circulation fraudulently, it must appear that the holder has such a title as bars all the equities between the original parties. Under the former affidavit of defence law, such an affidavit was sufficient to prevent judgment. (Smith *v.* Loan and Building Association, 93 Pa. 19.) How far, under the Procedure Act of 1887, the plaintiff's statement may supply the proof of title previously required to be made to a jury, it is not necessary now to consider, as it is entirely clear that nothing short of a specific and positive averment of the whole facts in plaintiff's title can have that effect, and there is no such aver-

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ment here. For all that appears, the bank may have been a mere depository of the note for the purpose of collection. On this branch alone the affidavit was sufficient.

But, secondly, even if the bank was a *bona fide* holder, judgment could not be entered in favor of the plaintiff, in the face of the supplemental affidavit that he knew of, and was a party to the fraudulent arrangement by which the note was made. The *bona fide* title of a holder protects all subsequent holders, as a general rule, but this protection does not extend to a party to the original fraud.

The affidavits, therefore, set up facts which if true are a good defence against the present plaintiff. The counter statement of the defendant in error gives an entirely different version of the transaction, and states several facts that would do away entirely with the defence set up, but being no part of the record these allegations cannot be considered here. The point against the affidavit that it is made by a mere stockholder without setting out any special knowledge of the facts, or any reason why it is not made by an officer or director, is well taken, but its effect is obviated by the averment in the supplemental affidavit that the affiant is the manager of the business of the company.

Upon the case as it stands the defendant was entitled to go to a jury.

Judgment reversed, and procedendo awarded.

Opinion by MITCHELL, J. S. H. T.

July '89, 43. May 29, 1889.

Lightner v. Lightner.

Wills—Construction of—Legacies—Maintenance during minority.

A. by his will gave his son H. $1000 to be paid when H. arrived at the age of twenty-one years, and divided the residue of his estate equally between his two sons H. and L. L.'s share he directed to be paid as follows: $1000 on his majority, and the remainder to be used in purchasing a farm for him, to be selected by persons named, L. to have the full control of the farm and all the proceeds thereof, but with no power to sell it, with remainder to his issue, and in default of issue devise over. During L.'s minority his guardian, under order of the Orphans' Court, paid several sums for the maintenance of L. which with other sums paid him amounted in full to $1000:

Held, that the gift of $1000 was absolute, and that the amount to be invested in a farm was only the remainder after this $1000 was paid, and therefore the amounts paid for maintenance during minority must be deducted from this remainder and not from the $1000.

In the above case, there being no direction in the will to accumulate income during the minority of L. nor any gift over of the income:

Held, that any accumulations after deducting what had been spent on his maintenance were payable to L. on coming of age in addition to the specific bequest of $1000.

Error to the Common Pleas of Perry County.

Case stated in the nature of a special verdict between Linn C. Lightner, plaintiff, and Samuel R. Lightner, guardian of Linn C. Lightner, defendant.

The material facts of the case stated will be found in the opinion of the Court below, BARNETT, P. J., as follows:—

"The following facts appear from the case stated, dated 1st March, 1889:—

(1) "Wm. H. Lightner died testate, leaving to survive him two sons, Linn C. Lightner, who attains to his majority on or about the 25th of March, 1889, and whose guardian is Samuel R. Lightner; and Horace W. Lightner who has for his guardian Henry P. Lightner.

(2) "Wm. H. Lightner provided in his will as follows: 'I desire that my son Linn C. Lightner receive one thousand dollars ($1000) as soon as he arrives at the age of twenty-one years; and that the remainder of his share be invested in a farm, he, the said Linn C. Lightner, having full control and management of farm and receiving all revenues and proceeds therefrom, but not having power to sell or convey said farm. And in case that the said Linn C. Lightner dies without issue or widow, then the farm reverts to Horace W. Lightner or his legal heirs; but in the event of Linn C. Lightner dying and leaving issue, then the two-thirds of the farm reverts to his children and the interest of one-third to his widow; but if he leaves no widow then the whole of farm will belong to his children. And I hereby appoint Joseph Wagoner, D. B. Milliken, and my son Linn C. Lightner to select and purchase the farm for my son, provided, however, that all three of the persons named are satisfied and agreed both as to location and price of farm.'

(3) "By virtue of certain decrees of the Orphans' Court of this county, dated respectively on the 14th September, 1886, 13th April, 1887, and 14th April, 1888, the said Linn C. Lightner received from his said guardian several sums of money aggregating $700, and has received other sums from his guardian, so that the full sum of $1000 has been paid.

(4) "The question for decision is does the $1000 thus advanced pay in full the said legacy or is the said Linn C. Lightner entitled to receive an additional $1000 upon his arriving at the age of 21 years—the $1000 already paid him being advanced under the decree of the said Court for necessaries?

"Under this statement of facts it will be observed that no provision is made in the will for the support and education of Linn C. Lightner

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during his minority; also that no question is raised as to the propriety of the decrees made by the Orphans' Court, but on the contrary the fact as stated is that the $1000 were 'advanced under the decrees of said Court for necessaries.' We are of opinion, therefore, that the case falls within the provisions of the 13th section of the Act of 29th March, 1832: 'When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the Orphans' Court may direct a suitable periodical allowance, out of the minor's estate, for the support and education of such minor, according to the circumstances of each case; which order may from time to time be varied by the Court according to the age of the minor and circumstances of the case.' (Purdon, p. 516, pl. 50.)

"Upon reference to the will itself, it appears the testator having given a legacy of $1000 to his son Horace W. Lightner, then further provides: 'It is my will that all the balance of my property be divided equally between my two sons Linn C. Lightner and Horace W. Lightner in the following manner;' and then follows the provision copied into the case stated. There is here a separate and antecedent gift, which is independent of the directions as to time of payment, and therefore the legacy of $1000 to Linn C. Lightner is a vested legacy. (Seibert's Appeal, 13 Pa. 503; Bowman's Appeal, 34 Id. 19.) But whether the legacy be vested or contingent the legatee, by virtue of said Act of Assembly, may have an allowance at least out of the interest for his support and education. (Seibert's Appeal, 19 Pa. 49; Seitz's Appeal, 87 Id. 159.) We are not aware that it has been decided that such allowance may not be made out of the corpus of the legacy. That question was left undecided in Leiby's Appeal (49 Pa. 186).

"As to the remainder of Linn C. Lightner's share, directed by the testator to be invested in a farm, the intention being clear to give only the usufruct of the investment to said legatee for life, and after his death the investment, or the farm purchased therewith, to his heirs mentioned; Linn C. Lightner has no absolute right of property in the corpus of the fund to be invested; this was otherwise disposed of by the testator. (Bentley *v.* Kauffman, 86 Pa. 99.) But he had an absolute right of property in the vested legacy.

"Furthermore, it would appear from the will (which was presented with the case stated) that Linn C. Lightner was not intended to come into the enjoyment of either the absolute legacy or the farm until he had attained the age of twenty-one years. The provision respecting Horace is, 'it is my desire that my son Horace W. Lightner receives his portion of this bequest when he arrives at the age of twenty-one years.' In respect to Linn C. Lightner it is, 'I desire that my son Linn C. Lightner receive one thousand dollars ($1000) as soon as he arrives at the age of twenty-one years, and that the remainder of his share be invested in a farm.' That remainder would be the residue of his share of the estate, principal and interest, after deducting the one thousand dollars; or, in other words, the whole of Linn C. Lightner's share of the estate, with its accumulated interest, at the time he attains his majority, is to be invested in a farm, excepting only the legacy of one thousand dollars. If now we give said legatee 'an additional $1000 upon his arriving at the age of 21 years,' it can only be done by taking from the remaindermen property to which they have an absolute right, and, in violation of that right and the manifest intention of the testator, bestowing upon one absolutely who is entitled only to a life interest. This we think cannot be done.

"If the legatee has been advanced the corpus of his own estate, no wrong at least has been done to any other person; but if it now be paid from the corpus of another's estate, the remaindermen would have just cause of complaint.

"Being of opinion that the said Linn C. Lightner is not entitled to receive the additional $1000, we, therefore, in accordance with the terms of the case stated, now, this 29th day of March, 1889, enter judgment for the defendant."

Whereupon the plaintiff took this writ, assigning for error the action of the Court in entering judgment for the defendant.

B. F. Junkin (*W. A. Sponsler* with him), for plaintiff in error.

W. H. Sponsler (*E. R. Sponsler* with him), for defendant in error.

June 28, 1889. THE COURT. The scheme of the will in controversy is plain and simple. It gives the testator's son Horace a legacy of one thousand dollars, and divides all the residue of his estate equally between his sons Horace and Linn. Horace's share is given absolutely to be paid to him on arrival at the age of twenty-one, with a conditional devise over in case of death before that time. Linn's share is given in the following words: "I desire that my son Linn C. Lightner receive one thousand dollars as soon as he arrives at the age of twenty-one years, and that the remainder of his share be invested in a farm, he the said Linn C. Lightner having full control and management of farm, and receiving all revenues and proceeds therefrom, but not having power to sell," etc., with remainder to his issue, and in default of issue, devise over to

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Horace or his heirs. The testator intended that on coming of age his son Linn should have a cash sum of one thousand dollars put in his hands to start with. The gift for that purpose is absolute, and no provision is made for reduction or abatement. If his whole share had amounted only to that sum, on reaching the stipulated age, it would all have been payable to him without regard to the consequent failure of the provision for a farm. So long as that amount remained, it became his absolutely and presently, and the Court has no authority to say that it shall be reduced by sums paid previously and for a different purpose. To do so is to substitute a new will for that which the testator made. We are therefore clearly of opinion that there must be judgment for the plaintiff.

The learned Court below was largely influenced by the consideration that plaintiff had but a limited interest in the money to be invested in the farm, and an absolute property only in the legacy of one thousand dollars, and that the sums paid for his maintenance during minority should therefore come out of this latter fund. Such a result might have followed had it become necessary to use up the fund for maintenance during minority, but it could not do so until all the rest of the share had been exhausted. As already said the specific gift of the thousand dollars was the primary and controlling intent of the testator, and must be carried out so long as any portion of the share remains to pay it with. It is only the remainder after payment of this sum that is directed to be invested in a farm.

Nor do we find any difficulty in regard to the income. The gift of the shares themselves is not by way of remainder, or of a future contingent estate, but is, in terms, absolute, present, and immediate—"it is my will that all the balance of my property be divided equally between my two sons . . . . in the following manner,"—and then follows the provision for his son Linn already quoted. In the case of Horace there is a subsequent devise over in the event of his death before reaching the age of twenty-one, but in the case of Linn there is no contingency of any kind between him and his life estate. It is postponed as to full enjoyment, till majority, but the gift itself is of a present and absolute interest for life in the fund, vesting at once upon the death of the testator, and there is neither gift over of the income, nor direction to accumulate during minority. If the devise had been of real estate, the title would have passed by the will directly and immediately to Linn for life. As it was of personalty his interest is equally direct and immediate. The title being in him, the income followed the title, and was his absolute property both before and after majority. During minority of course it was applicable to his maintenance under the direction of his guardian or of the Orphans' Court. If there are any accumulations they are payable to him on coming of age, in addition to the thousand dollars of the corpus of the fund, given him specifically by the will.

Judgment reversed, and now judgment for plaintiff on the case stated for $1000.

Opinion by MITCHELL, J. S. H. T.

Common Pleas.

C. P. No. 1. June 8, 1889.

Shumway & Co. v. Webster.

Foreign attachment—Rule to dissolve—Affidavit—Insufficiency—Where plaintiff's affidavit is insufficient to sustain the attachment he cannot amend.

Rule to show cause of action and dissolve attachment.

This was a foreign attachment, and after service of the writ the defendant obtained the present rule.

Plaintiffs' affidavit set forth that the firm were the holders of a draft made by defendant which they received in payment of a bill for goods sold and delivered. That plaintiffs presented the draft for payment to the drawers, Temple & Co., and that payment thereof was refused by them, whereupon the present attachment issued and goods belonging to defendant, who was a citizen of Maryland, were attached.

The affidavit failed to state that notice of the dishonor of the draft had been given to defendant before the attachment issued.

N. Dubois Miller, for plaintiffs.

Notice of dishonor was given, and leave is asked to withdraw the affidavit and file an amended one setting forth the fact. The rule was returnable to-day and plaintiffs have a right to file an affidavit any time during the day.

Charles K. Zug, contra.

No amendment to the affidavit is allowable.

Eldridge *v.* Robinson, 4 S. & R. 548.
Mylert *v.* White, 1 WEEKLY NOTES, 626.

THE COURT. Rule absolute. W. W. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, SEPT. 13, 1889.* [No. 20.

Supreme Court.

Jan. '88, 206. February 13, 1889.

Williamson's Appeal.

Decedent's debts—Lien of—Judgment against administrators with sci. fa. against heirs—Lien of—Nature of—Revival of.

A judgment obtained against the administrator of a decedent, followed by a scire facias against the heirs of the decedent and a judgment thereon, is a lien upon the lands of such decedent for five years from the date of the judgment on the scire facias. If, however, the judgment is not revived by scire facias, the lien thereof expires at the expiration of said five years, and it is not thereafter entitled to share in the distribution of the proceeds of the sale of such land to pay the debts of the decedent.

An order of the Orphans' Court directing the sale of the real estate of a decedent for the payment of his debts does not have the effect of imposing a trust on said land or the proceeds thereof for the payment of the debts of the decedent which were a lien on said land at the time the order was made, or were included in the schedule of debts annexed to the petition upon which the order was made.

When after a judgment has been obtained against an administrator for a debt due by his decedent, a scire facias is issued to bring in the heirs, a judgment obtained on such scire facias against the heirs for want of an appearance is a judgment *de terris*, and not *in personam*, and therefore if the lien of such judgment is allowed to expire, the holder thereof is not entitled to be paid the same out of the distributive shares of the heirs against whom such judgment has been recovered.

Appeal of Azariah L. Williamson, executor of George M. Hunter, deceased, from a decree of the Orphans' Court of Delaware County, making a distribution of the estate of William Gray, deceased.

Before the Auditor (W. Ross Brown, Esq.) making distribution the following facts appeared: William Gray died on or about June 10, 1874; intestate, and without issue, and seised in fee of a small farm in Newtown Township, Delaware County. Letters of administration on the decedent's estate were granted to James Dunwoody and Reese Pyott on July 16, 1874, who made application to the Orphans' Court on September 28, 1874, for authority to sell the decedent's real estate to pay his debts, the personalty being insufficient. An order for such sale was directed to issue the same day. The administrators exposed the real estate to public sale, but returned the same unsold on November 27, 1874.

Among the debts scheduled in the petition of the administrators was a claim on a promissory note due George M. Hunter, dated February 12, 1867, for $90. No further steps were taken in the settlement of the estate until April 4, 1885, when, both the original administrators being deceased, letters of administration *de bonis non* were issued.

The administrator d. b. n. applied for and obtained an *alias* order from the Orphans' Court for the sale of the real estate, on April 6, 1885, and returned a sale of the same for $4000, which was confirmed by the Court on June 16, 1885. The account of the administrator d. b. n. was duly confirmed on September 21, 1885, showing a balance of $2823.92, which the Auditor was appointed to distribute.

On April 18, 1878, George M. Hunter commenced suit in the Common Pleas, on his note above mentioned, and recovered judgment on May 20, 1878, for $140 and costs against James Dunwoody, the then surviving administrator. On November 19, 1878, a writ of scire facias to charge real estate was issued on this judgment, in which James Dunwoody, administrator, and Robert Gray and Rebecca Tyler, heirs of the decedent, were made parties defendant. This writ the sheriff returned served on Dunwoody and Robert Gray and *nihil habet* as to Rebecca Tyler.

On December 9, 1878, an alias sci. fa. issued, upon which the sheriff made a similar return, and on January 15, 1879, judgment was entered on the alias sci. fa. against said heirs for want of an appearance, and damages assessed at the sum of $145.49.

In the application of the administrator d. b. n. for the *alias* order to sell the real estate, this judgment was scheduled as one of the debts remaining unpaid. The amount of it, with interest and costs, was claimed by the plaintiff's executor, out of the fund produced from the sale of the decedent's real estate, but the Auditor refused to allow it to participate in the distribution on the ground that it had lost its lien on the lands sold through not having been revived by sci. fa. within five years previous to the sale.

Exceptions to this report were dismissed by the Court, CLAYTON, P. J., in an opinion wherein, after reciting the facts, the Court continued:—

"The learned counsel for the exceptant does not claim to participate in the fund because of any lien of his judgment upon the land; he admits that it is gone. He claims that his debt was a lien by virtue of the statute; and that it continues against the heirs until barred by such a lapse of time as would raise a presumption of payment. He holds that an order of the Orphans' Court for the sale of the land to pay

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debts, made in 1874, when his debt was a lien, has the effect of a trust to pay all subsisting debts. This position is not sound. There is a clear distinction between a trust raised by the testator in his will for the payment of his debts and one raised by an order of Court to sell for that purpose. In the first instance, the owner of the land devises it in trust for the payment of his debts; in the second case, the Court merely grants leave to the administrators to sell the land to pay such debts as are liens upon it, and no others. The Court has no power to make trusts from the property of other people. The exceptant's judgment against the administrators only entitled him to payment out of the personal property in the administrators' hands. If he intended to claim payment from the lands which, by the intestate law, had descended to the heirs of the debtor, it was his duty to warn them by sci. fa. This he did, but unfortunately for him he let his lien expire; whereby he is remitted to the claims against the personal estate. If there is not sufficient personalty to pay it, the debt is lost.

"It must be conceded that a judgment obtained against a debtor in his lifetime continues an indefinite lien upon his lands, against him and his heirs. This is upon the principle that the lien attached before the death of the debtor; and his decease could not loosen its grip; but a debt not reduced to judgment at the time of the debtor's death is only a lien by virtue of the statute, which continues it for five years. To further continue this lien, a judgment must be obtained against the administrators within the five years; and the heirs must be warned by sci. fa.; and a judgment obtained against them in due course. As the last judgment is the creature of the statute, its lien must be preserved by the statute.

"The exceptant also contends that, in any event, his judgment should be paid out of the share of Robert Gray and Rebecca Tyler, because they were parties to his sci. fa., being the heirs of the original debtor. He obtained his judgment against the heirs January 15, 1879; and he holds that, as against them, the lien of his judgment is indefinite. This is also a mistake. The judgment on his sci. fa. was *de terris* only; it was a judgment that the debt of the plaintiff could, at his option, be paid out of decedent's lands, but it was not a personal judgment against the heirs. Reviving it would not make it a judgment against them, except so far as to preclude them from setting up any defence they, or the decedent, if living, might make. If the exceptant's judgment against the heirs of the debtor had been based upon any personal liability of theirs, as upon a promise to pay it, or any assumption of the debt, the point raised by the exceptant's counsel would be the undoubted law; but it was not such a judgment. It was a mere warning to them to show cause, if any they had, why the judgment for a debt of their ancestor should not be paid out of his land, of which they were the heirs. The effect of the judgment was only to finally settle the question, and to give to the judgment a lien for five years upon the lands of the heirs. At the end of the five years its grip would be loosened and the entire effect of the judgment lost, unless it should be duly revived according to the statute.

"The exceptions are dismissed and the report of the Auditor confirmed."

Whereupon the said claimant, Azariah L. Williamson, executor of George M. Hunter, deceased, took this appeal, assigning for error the action of the Court in confirming the Auditor's report, and disallowing the appellant's claim.

H. C. Howard, for appellant.

George E. Darlington (*G. Heide Norris* with him), for appellees.

March 4, 1889. THE COURT. This was not a judgment recovered against the decedent in his lifetime, but against his administrators after his death. Had it been a judgment against the decedent, it must be conceded it would remain a lien upon his land in the hands of his heirs. It was recovered against the administrator May 20, 1878. Judgment was obtained against the heirs January 15, 1879, and it was therefore a valid lien against the lands of the decedent for five years from that date. The lien expired January 14, 1884. It could have been continued by a scire facias, but this was not done, and the lien upon the land was lost. The learned Auditor correctly held that as the judgment had lost its lien when the land was sold, it could not participate in the distribution of the fund raised from the sale. The appellant contends, however, that if the lien is gone, the order of the Orphans' Court for a sale of the land for the payment of debts, made in 1874, when the debt was a lien, has the effect of a trust to pay all debts existing at that time. This position cannot be sustained. An order of sale for the payment of debts creates no trust; it is a mere authority to sell for the payment of such debts as may be a lien upon the lands. If pending the execution of the order a lien is suffered to expire, it ceases to be operative so far as the lands are concerned, and the holder must look to the personal estate. Nor is there any force in the position that the lien was good against Robert Gray and Rebecca Tyler, parties to the scire facias. The judgment against them was *de terris;* it was not a personal judgment.

We find no error in this record.

Judgment affirmed.

PER CURIAM. C. K. Z.

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July '88, 136. January 18, 1889.

Conrow et al. v. Conrow et al.

Executors and administrators—Pleading—Practice—Evidence—Parol evidence to vary written contract.

When a suit is brought by executors or administrators and after issue joined on the trial the defendant moves to amend the record by inserting as a party plaintiff the name of a co-executor or co-administrator not joined, such motion is made too late and is properly overruled. A judgment recovered by the executors or administrators who have sued is a full protection to him.

In the absence of fraud, accident, or mistake, parol evidence is not admissible to modify the terms of a written contract; particularly when it does not appear at what time the alleged modification of the original contract was made.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by Emma B. Conrow and Joseph A. Sinn, executors of George E. B. Conrow, deceased, against Sarah B. Conrow, Joseph D. Conrow, and Howard F. Conrow, upon the following agreement:—

We, the undersigned, executors under the will of late Jos. B. Conrow, do agree with Geo. E. B. Conrow, also one of the executors named in said will, That in consideration of his renouncing all right to serve under said will as executor, and agreeing to go upon our bond as security for the faithful performance on our parts as executors, That we do hereby agree that he shall share with us the lawful commission allowed us as executors, and that he shall represent the estate as attorney where the services of an attorney may be required, and have charge of collecting all such rents forthwith as heretofore collected by Twining & Son for the deceased.

Signed in the presence of S. C. Biggs. Sarah B. Conrow, Jos. D. Conrow, Howard F. Conrow.

Plea "non-assumpsit."

On the trial, before Gordon, J., the plaintiffs offered the above agreement in evidence and also offered the letters testamentary issued to them and to Howard F. Conrow upon the estate of George E. B. Conrow, deceased. It was admitted that defendants received $3000 as commissions.

Defendant moved to amend the record by adding the name of Howard F. Conrow, co-executor of plaintiffs, to names of plaintiffs, and by striking off the name of Howard F. Conrow as defendant. *Refused.* Exception.

Defendant then offered to prove that the agreement was not the whole of the contract made between the parties at the time; that it was distinctly agreed and understood that plaintiffs' testator should be entitled to share in the commissions on moneys of the estate which were actually collected by him and no more; and that he died before any moneys had been collected, and before he had rendered any of the services contemplated by the agreement. Objected to. Objection sustained. Exception.

The Court instructed the jury to find for the plaintiff. Verdict and judgment accordingly. Whereupon the defendant took this writ, assigning for error the refusal to amend the record and the refusal to admit the defendant's evidence as above.

S. Morris Waln, for the plaintiffs in error.

The Court erred in refusing to strike off the name of Howard F. Conrow as defendant. Howard F. Conrow was one of the executors of George E. B. Conrow. If Howard F. Conrow was indebted to his testator at the time of his death, as claimed by the plaintiffs, that debt was assets in the hands of Howard F. Conrow.

Berry *v.* Usher, 11 Vesey, 87; 13 Id. 262.
Schnell *v.* Schroder, 1 Bailey Eq., So. Car. 384.
Carey *v.* Goodenge, 3 Bro. C. C. 110.
Ingle *v.* Richards, 28 Beaver, 370.
Wood *v.* Tallman, 1 Cox N. J. 157.
McCandless's Estate, 6 Pa. St. 360.

Parol evidence of a verbal contract made at the time of the written contract, on the faith of which the written contract was signed, is admissible.

Bank *v.* Jones, 10 Weekly Notes, 436.
Driesbach *v.* Bridge Co., 32 Sm. 177.
White *v.* Dixon, 35 Leg. Int. 114.
Burk *v.* Kerr, 12 Weekly Notes, 191.
Keough *v.* Leslie, 92 Pa. St. 424.
Whitney *v.* Shippen, 89 Id. 22.
Hoopes *v.* Beale, 90 Id. 82.
Barclay *v.* Wainwright, 86 Id. 191.

Charles L. Lockwood, for defendants in error.

If only one of several executors or administrators bring an action either of debt or assumpsit or in tort, it is settled that the defendant can only take advantage of the non-joinder of the executor or co-administrator by pleading in abatement, after oyer of the probate or letters of administration, that the other creditor or administrator therein mentioned is alive and not joined in the action.

1 Chitty's Pleading, 16th Amer. Ed., page 23.
Williams on Executors, foot page 957.
Packer *v.* Wilson, 15 Wendell, 343.
Gordon *v.* Goodwin, 2 Nott. & McC. 70.
I. Saunders 291, i. note to Cabell *v.* Vaughan.

The reason probably is that non-joinder can work no harm to the defendant, as a judgment for or against him would protect him from further demand. Whereas the omission of a joint promisee would leave the defendant liable to another action.

Devlin *v.* Little, 26 Pa. St. 502.
Reber *v.* Gilson, 1 Id. 54.
Grace *v.* Sutton, 5 Watts, 540.
Gees *v.* Shannon, 2 Id. 71.
Stuyvesant *v.* Hall, 2 Barb. Ch. 151.

January 28, 1889. The Court. It is said in Chitty on Pleading, vol. I. of the tenth Ameri-

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can edition, at page 20*, that "If only one of several executors or administrators bring an action either of debt or assumpsit, or in tort, it is settled that the defendant can only take advantage of the non-joinder of the co-executor or administrator by pleading in abatement, after oyer of the probate or letters of administration, that the other executor or administrator therein mentioned is alive and not joined in the action." If the defendant pleads the general issue he is too late. (1 Saunders, 291.) The reason of the rule may be found in the fact that the non-joinder can do the defendant no harm, as a verdict for or against him is a full protection. A receipt or release by one executor discharges the debt. (Devlin *v.* Little, 26 Pa. 502.) This is an answer to the first assignment of error. No application in reference to the non-joinder of Howard Conrow, executor, as one of the plaintiffs, was made until the general issue had been pleaded. It came too late.

Nor do we see any error in rejecting the evidence referred to in the fifth assignment. It was not alleged that there was either fraud, accident, or mistake in the execution of the agreement in regard to the commissions. Aside from this the offer did not propose to show that the evidence had any reference to what took place at the time the paper was executed; nor was any time whatever designated when the alleged modification of the original agreement was made.

As there was nothing in the case to contradict the documentary evidence, it was not error to instruct the jury to find for the plaintiff.

Judgment affirmed.

PER CURIAM. L. L., JR.

July '88, 189. March 20, 1889.

First National Bank v. Ladd et al.

Attachment execution — Judgment creditors — Rights of garnishees — Answers of — When uncontradicted — Plea of nulla bona — What garnishee may show thereunder — Practice.

A. and B. being both judgment creditors of C. placed writs of execution thereon in the sheriff's hands which were levied on personalty, and entered into an agreement with one another that the proceeds derived therefrom should be divided between them in the proportion of the amounts due to each. On the same day A. assigned to B. the whole of his interest in his judgment against C. as collateral security as B. averred for a debt due by A. to B. C.'s goods were sold by the sheriff and the money paid to B. in whose hands it was attached by D., a creditor of A. to the amount of A.'s interest therein. Interrogatories were filed, and B. answered setting forth the above facts. The case came to trial and these answers were put in evidence by D., who, however, claimed that as neither the agreement nor assignment especially mentioned the debt from A. to B., that debt could not be paid out of the fund in B.'s hands. The Court, however, allowed this amount to be deducted by B.:

Held, not to be error.

The assignment from A. to B. was made expressly subject to a prior assignment of an interest in the same judgment to one L. L. intervened in the attachment execution and was allowed by the Court to enter her name on the record as a defendant, but no plea was filed by her. The case went to trial simply on the plea of *nulla bona* filed by B. as garnishee. Under these circumstances the Court allowed the garnishee to deduct the amount due L. from the balance in his hands:

Held, not to be error.

Error to the Common Pleas of Bradford County.

Attachment execution by the First National Bank of Towanda against Charles K. Ladd and William Little, administrators c. t. a. of E. T. Fox, deceased, garnishee of C. M. Manville.

Pending the proceedings Fox died and his administrators were substituted as above by leave of Court. Prior to his death interrogatories were duly filed and answers made by Fox in substance as follows: That he and C. M. Manville were both judgment creditors of N. P. Hicks, Manville to the amount of $4650 and Fox to the amount in the aggregate of $1000. That several writs of execution on said judgments had been placed in the sheriff's hands, and the goods of Hicks were about to be sold; that on November 25, 1884, he and Manville had entered into a certain agreement in writing, by which the money realized by the sheriff's sale was to be divided between them in the proportion of 4.65 to 1, and also that all the goods bought in, if any, should be immediately put up at private sale and the proceeds similarly divided; that on the same date Manville assigned the whole of his interest in the $4650 judgment to Fox as collateral security for a judgment note of $1000 held by Fox against him subject to a previous assignment of $500 of the same judgment to Mrs. M. A. Lyman. The answer further set forth that E. T. Fox had realized by the sales of said property the gross sum of $4540.95, and had expended $791.34, leaving a net balance of $3749.61 for distribution according to the agreement. Of this the garnishee claimed that Manville's share was $3085.96 and his own $663.65, and that he had paid out of Manville's share certain claims, including his own note with interest amounting to $1090, a total of $1743.72, leaving in his hands a balance of $1342.24, subject to the attachment and claim of Mrs. M. A. Lyman.

The bank alleging there was a greater balance in the hands of said Fox than he had admitted, and denying the right of Mrs. Lyman, prosecuted the attachment to trial.

Before the case was put at issue Mrs. M. A. Lyman presented her petition alleging she was

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interested in the funds in the hands of the garnishee and obtained an order from the Court entering her name on the record as a defendant in the attachment.

E. T. Fox alone pleaded, and his plea was *nulla bona*, except as set forth in his answers, and the additional sum of $40 received since his answers were filed.

On the trial, before SITTSER, P. J., of the Forty-fourth Judicial District, the plaintiff objected to the allowance of the Fox note of $1090, and to the adjudication of Mrs. Lyman's claim to the assignment of the $500 interest in the Hicks judgment, contending that the latter's claim must be adjudicated in an interpleader framed for that purpose, no issue having been joined between the bank and Mrs. Lyman.

The Court allowed both these claims, and directed the jury to find for the plaintiff to the amount of the balance in the hands of the defendant.

Verdict for plaintiff and judgment thereon. Whereupon the plaintiff took this writ, assigning for error the charge of the Court, as above.

Rodney A. Mercur, for plaintiff in error.

Evidence of an express agreement or understanding is required to authorize the holder of collateral security to apply the proceeds thereof to any other debt or liability except that which it is given to secure. Neither in the assignment or agreement is mention made of any indebtedness in favor of Fox against Manville.

Story on Bailment, § 304.
Buckley *v.* Garrett, 60 Pa. St. 338.
James's Appeal, 89 Id. 54.

There was no issue between the plaintiff and Mrs. Lyman, and the plea of *nulla bona* put in issue only the question of effects in the hands of the garnishee.

Beards *v.* Hathaway, 5 Luz. Leg. Reg. 259.
Wood *v.* Roach, 1 Yeates, 177.
Allen *v.* Erie City Bank, 57 Pa. St. 139.
Peterson *v.* Sinclair, 83 Id. 250.
McCormack *v.* Hancock, 2 Id. 310.
Flanigan *v.* Wetherill, 5 Wharton, 286.
Irwin *v.* Pittsburgh & Connellsville R. R. Co., 43 Pa. St. 491.

The answers of the garnishee were evidence for the plaintiff, but he was not bound by them.

Adlum *v.* Yard, 1 Rawle, 163.
McIbree *v.* Guy, 1 Phila. 491.

Edward Overton, Jr., for defendant in error, cited—

Sinnickson *v.* Painter, 32 Pa. St. 384.

May 6, 1889. THE COURT. By the terms of the written agreement between Manville and Fox, dated November 25, 1884, the proceeds of the goods of Hicks sold by the sheriff were to be divided between them in the proportion of $4650 to Manville and $1000 to Fox. Under the last clause of the same agreement it was stipulated that as to all goods which they might buy at the sale they should be sold thereafter at private sale and the money resulting should be divided in the same proportion. Fox's share of all these moneys was due to him by virtue of his own judgments and executions against Hicks. In addition to these he had another claim which was against Manville, a note for $1000, and secured by a judgment. As collateral security for that he took an assignment from Manville of Manville's judgment against Hicks for $4650. This assignment also was made on the same 25th of November, 1884. Whatever right therefore Manville had or could have to the money arising from the sheriff's sale or from the subsequent sale of goods purchased at that sale was by the said assignment pledged to Fox as collateral to the $1000 note. Manville was undoubtedly bound by this assignment and agreement as to the distribution, and of course his attaching creditor was bound to the same extent. We are quite unable to discover any reason why Fox cannot avail himself of the moneys in his hands, whether coming from the sheriff's sale directly or from the subsequent sale of goods, bought at that sale for the protection of his $1000 note. Those moneys all grew out of the proceedings on the judgment for $4650, which was specifically assigned, and whatever advantage accrued under that judgment passed by the assignment.

Fox says in his answers the assignment was made as collateral security for the note of $1000, and there is nothing to contradict him on that subject. The assignment itself is printed and it is absolute in its form and passed all of Manville's title. But as Fox only claimed enough to pay his note his demand would be satisfied by the application of so much of the proceeds in his hands as would pay his note, and this is precisely the way in which his account of the proceeds is made up. It is not at all necessary that the specific purpose to which the proceeds derived from the $4650 judgment were to be applied should be set out at length in the assignment if in point of fact there was a fair and honest consideration for the assignment. This has been expressly alleged by Fox in his answers, and as he is not contradicted in his statement on that subject is entitled to full credit.

As to the Lyman claim it was specially charged upon the $4650 judgment by the express terms of the assignment to Fox—that assignment was made subject to the previous assignment of $500 of the same judgment to Mrs. Lyman on November 17, 1884. The Lyman assignment on that day was also given in evidence, and the effect of the two assignments was to make Fox a trustee for Mrs. Lyman to the extent of $500, in advance of any benefits to which he could take out of the proceeds realized by him. We can see

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no necessity for a separate issue on the Lyman assignment. It was set up both in Fox's answers and in her own petition. No issue was asked for, and as the truth of the facts could just as well be tried on the answers of the garnishee, there was no occasion for any.

Judgment affirmed.

Opinion by GREEN, J. S. H. T.

July '88, 208. January 24, 1889.

Allison v. Gilton.

Referees—Act of May 14, 1874—Evidence—Exceptions—Practice.

When service has been accepted by a party of a notice of intention to file on a certain day the report of a referee under the Act of May 14, 1874 (P. L. 166), it is immaterial that notice of said filing was not given by the prothonotary to such party in the manner specified by the Act.

Assignments of error to a judgment on a referee's report on the ground that the findings of fact and conclusions of law were not separately and distinctly stated in the report and that there was an error of fact therein were not sustained, the record showing that the report was properly framed, and there being no evidence to show that the matter of fact was incorrectly decided.

In the above case an assignment of error on the ground that the referee dismissed exceptions to his report without argument was not sustained, there being nothing in the record to show that such was the case.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by Thomas N. Allison against John W. Gilton upon a single bill. By agreement the case was referred to John W. Patton, Esq., as referee, under the Act of May 14, 1874 (P. L. 166). The Master found separate findings of fact and law, and on March 5, 1888, reported in favor of the plaintiff in the sum of $48.49. Attached to the report was an acceptance of service of notice of the intention of the referee to file the account on the above date signed by plaintiff's attorney. On April 2, 1888, exceptions to the report of the referee were filed by the plaintiff, and on April 7, 1888, a further report of the referee was filed overruling the exceptions. On the same day judgment was entered.

The plaintiff thereupon took this writ, filing the following assignments of error:—

(1) No notice of the filing of the referee's decision was given by the prothonotary, as provided by the Act of Assembly.

(2) The findings of fact and the conclusions of law are not separately and distinctly stated.

(3) The findings of fact do not include all the material facts of the case.

(4) The referee erred in refusing the plaintiff's seventh point, as follows:—

"The evidence showing that the item of $578.83 claimed by defendant, includes the cost of rebuilding a portion or all of the work for which it is charged, which settled for want of a sufficient foundation; and the defendant, not having separated the same so that the amount expended in said rebuilding could be deducted, nor offered any evidence to show the cause thereof, the referee cannot allow any portion of the said item."

(5) The referee erred in deciding upon and dismissing plaintiff's exceptions without hearing argument.

James P. Dolman, for the plaintiff in error.

The failure to give notice of the filing of the account was a fatal defect.

Foreman *v.* Hosler, 94 Pa. St. 418.
Marr *v.* Marr, 103 Id. 463.
Sweigard *v.* Wilson, 106 Id. 247.

With reference to the findings of fact, it is held that they must have the same certainty and fulness as is required in a special verdict, so that the judgment shall be the conclusion of law upon the facts.

Butterfield *v.* Lathrop, 71 Pa. St. 229.
Marr *v.* Marr, *supra.*
Sweigard *v.* Wilson, *supra.*
Harris *v.* Hay, 111 Pa. St. 562.
Ellis *v.* Hano, 85 Id. 265.

A special verdict must include *all* the facts of the case.

Tuigg *v.* Tracey, 104 Pa. St. 493.
Sweigard *v.* Wilson, 106 Id. 207.
Comm. *v.* Grimes, 116 Id. 450.
Vansyckel *v.* Stewart, 77 Id. 124.

It is submitted that the defendant could not charge the plaintiff with half the cost of rebuilding a chimney which fell, because the defendant neglected to make its foundation strong enough. It resulted entirely from his own negligence.

Lindley on Partnership, *760.
McIlreath *v.* Margetson, 4 Doug. 278.

Plaintiff should have been allowed a hearing on his exceptions.

Frederick A. Sobernheimer (with whom was *William Gorman*), for defendant in error.

The referee's findings of fact in the absence of fraud are conclusive.

Brown *v.* Dempsey, 14 Norris, 243.

It is not the practice to argue the exceptions.

Butterfield *v.* Lathrop, 21 Smith, 255.
City *v.* Linnard, 1 Out. 249.

February 4, 1889. THE COURT. The plaintiff complains that no notice of the filing of the referee's decision was given by the prothonotary, as provided by the Act of Assembly. This would be a serious matter if the plaintiff had not received actual notice. The record shows that notice of the intended filing of the report was

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accepted by the plaintiff, and as the only object of the Act was to provide notice, it is difficult to see how the omission of the prothonotary has injured him. There are numerous instances where actual notice covers omissions of this character: Thus an unrecorded mortgage is good as against a subsequent recorded mortgage where the second mortgage has notice of the first mortgage. This disposes of the first assignment. The second and third allege that the findings of fact and conclusions of law are not separately and distinctly stated. In this the plaintiff is not sustained by the record; nor is there any merit in the fourth assignment. It refers to a question of fact, and there is nothing before us to show that it was incorrectly decided. The decision of the referee is entitled to the same weight as the verdict of a jury. It is sufficient to say in regard to the last assignment, that there is nothing in the record to show that the referee dismissed the exceptions without hearing an argument, except the unsupported averment in the assignment itself.

Judgment affirmed.

PER CURIAM. L. L., Jr.

July '88, 86. February 7, 1889.

Allentown Iron Co. v. McLaughlin.

Master and servant—Contract of hiring—Breach of contract—Causes of discharge—Sickness.

When a servant is engaged for a specific period of time, serious illness on his part, although a sufficient justification on his part for ceasing to work, to enable him to recover for the services actually rendered by him under the contract, nevertheless absolves the master from the contract, so that he is not obliged to receive the servant back into his employ. It releases both from their mutual obligations, but in such case, if the master has sustained any damage by reason of the servant's failure to perform his contract, he is entitled to deduct it from the wages earned, and if the damage is more than the value of the service no recovery can be had.

Although a master has clearly no power to discharge a servant during the term of his employment because he was too high priced, yet if at the time the master had a right to discharge the servant for any cause, such discharge will not be unlawful because a wrong reason was assigned by the master for it.

When a servant during the term for which he had been hired is incapacitated by serious illness from actively performing the duties of his position, but does render some service to his employer while thus ill, and during such illness he is informed that he has been discharged because he is too high priced, and subsequently, on his recovery, he reports for work and is refused, he may, in an action therefor, recover the wages due him under the contract until the date of bringing suit, less whatever damage the master had sustained by his absence from his work.

Error to the Common Pleas of Lehigh County.

Assumpsit, by Thomas McLaughlin against the Allentown Iron Co., to recover wages claimed to be due on a contract of hiring.

At the trial, before ALBRIGHT, P. J., the following facts appeared: The plaintiff claimed to have been employed by the defendant to serve as superintendent or foundry boss for one year at $1300 a year, to be paid monthly. He accepted the position early in January, 1887, and was paid monthly up to the end of September, 1887. On October 7, 1887, he was injured by dropping hot iron on his foot, and was confined to his bed or house from then until about the middle of December, 1887. He continued, however, to give directions as to the running of the furnace until about the middle of October, when he was notified that he had been discharged from his position. Plaintiff claimed that he had been discharged because he was too high priced. Defendant asserted it was because of his incapacity to attend to his duties, and denied that plaintiff had been hired for a year. When the plaintiff recovered he reported for work, but was refused and was tendered wages up to October 7, 1887. He refused to accept those wages and brought this writ to recover his wages for October and November.

The defendant requested the Court to charge, *inter alia*, as follows:—

"(1) Under the evidence the verdict cannot be for the plaintiff for more than the amount due for the seven days worked in October, 1887." *Answer*. "Negatived."

The Court charged the jury, *inter alia*, as follows:—

"The plaintiff was hurt while in the employ of the company, and I suppose in the line of his duties. So the question arises as to what the law is where one promises to do work for another, and becomes sick or disabled and cannot work. How does that affect the contract of the parties? If a man promises to work for a year or a month and without cause quits the work before the time is up then he can recover nothing, because he broke the contract. On the other hand, if the employer without cause discharges him before the time is up, the workman can recover for the whole period he was to serve, provided he was ready and willing to serve and did not go into other employment.

"In the case of sickness or disability the law is this: 'Serious illness on the part of the servant, although a sufficient justification to enable the servant to recover for the services actually rendered by him under the contract, nevertheless absolves the master from the contract so as not to be obliged to receive the servant back into his employ.

"'It releases both from their mutual obliga-

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tions, but in such case, if the master has sustained any damage by reason of the servant's failure to perform, he is entitled to deduct it from the wages earned, and if the damage is more than the value of the service no recovery can be had. The rule, under such circumstances, is that the servant is entitled to recover the contract price less the damages sustained by reason of his failure to perform, and this is so, even although his inability results from an accident received while discharging his duties to his master. But as the contract is not rescinded no recovery can be had until by the terms of the contract the wages became due and payable. Sickness for a length of time releases both parties from the contract. The master is not bound to wait an unreasonable time for the restoration of his servant's health.'

"You will observe that where the servant becomes sick or is disabled from doing that which he promised to do, he is not to be regarded the same as if he had refused to perform the services.

"Mr. McLaughlin having been incapacitated through this accident about the 7th of October, according to the uncontradicted evidence, is not in the position he would have been if he had then refused and left the employ of the company, and without cause had said he would not work any longer. This affects the case so far that he can recover for whatever he did during the months of October and November, 1887. He can recover what according to the contract his services were worth, but his employer can deduct from that sum whatever damage he had, if any, by reason of the inability of Mr. McLaughlin to perform his services. The law is very plain, and cannot be disputed that a man cannot get pay for that which he does not do, even although the misfortune of sickness prevents him from doing it. If a man promises to do certain work for you, and he is ever so willing to do it, but owing to sickness he cannot do it, it cannot be pretended that you must pay him for that which he did not do. You will plainly understand that. Taking this case—what did Mr. McLaughlin actually do in the months of October and November? He speaks of it as being about seven weeks—whether it covers the whole of those months I am not prepared to say. It is for you to say how long he was incapaciated. Then you will inquire how much the services were worth during that time. He has testified that while he was sick Mr. Earnshaw, the superintendent, came to him and consulted with him about the running of the furnaces. If he rendered any services while he was in bed that would be of any value, he would be entitled to be paid for them. This, however, is to be looked at in a common sense way. If he was doing something which was of value then he would be entitled to be paid for it, although he was laid up. But if it was simply talk and conversation, such as men may have between each other, without the idea that there was superintendence or services rendered, then the jury could not say he was then rendering services. You will give him whatever that which he did according to the contract was worth during those months, and you cannot award him pay for the time he could not serve, even although he had the misfortune to be hurt. You must say the company is entitled to deduct from that which he earned during those months what damage they had by reason of his being incapacitated to perform the contract. Could they get somebody else to take his place; and if they could or did, or if there was no particular loss sustained by reason of Mr. McLaughlin's absence, then there would be nothing to deduct. If there was such loss, then you will deduct it.

["Gentlemen, there is some testimony that Mr. Earnshaw stated to Mr. McLaughlin, while Mr. McLaughlin was in bed, that he was discharged because he was too high priced. The company had no right to discharge him for that reason. It seems that this was sometime in the month of October, 1887. There was a bargain that he was to serve the company for $1300 a year, to be paid monthly. That would affect this case so far and no further—if before the month of October was up, or the seven weeks after the 7th of October, if that time came before the 1st of December, and Mr. McLaughlin came back, and was well and able to serve, and was not received, then the company could not have refused to receive him because he was too high priced. I have already said to you that the sickness and incapacity of Mr. McLaughlin excused the company from paying for that time or any other service. They had a right to get somebody else when he could not serve them, and they were relieved for that reason. That he was too high priced was no adequate cause for discharging him."]

Verdict and judgment for plaintiff for $216.66. Whereupon defendant took this writ assigning for error, the answer to its point and the charge of the Court as above set forth, the portion in brackets constituting the fifth assignment of error.

Robert E. Wright (*J. Marshall Wright* with him), for plaintiff in error.

Edward Harvey (*Joseph Hunter* with him), for defendant in error.

February 18, 1889. THE COURT. If that portion of the charge of the learned Court below embraced in the fifth assignment stood alone, it might be open to criticism. The contract of hiring was for one year, and it is true, as was stated by the Court in that portion of the charge

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referred to, that the defendant below had no right to discharge the plaintiff during the running of the contract because he was too high priced. But if at the time the defendant company had a right to discharge him for any cause, such discharge would not be unlawful because a wrong reason had been given for it. An examination of the charge of the learned Judge shows that he had instructed the jury fully and correctly upon the right to discharge plaintiff by reason of his sickness and inability to perform his duties. Then followed the instruction that they could not discharge him because he was too high priced. Both rulings were correct and sufficiently presented either view of the case. It was not, perhaps, a generous act to discharge an old employé of the company for a temporary incapacity to perform his duties caused by an accident occurring in their service. We are not dealing with the sentiment of the case—which is often misleading—but with its law, and that requires this judgment to be affirmed.

PER CURIAM. C. K. Z.

Quarter Sessions.

Q. S. Franklin Co.

In re Gordon's Application.

Wholesale liquor licenses—Act of May 24, 1887 (*P. L.* 194)—*The words "existing laws," in the provision of* § 2 *of the Act of May* 24, 1887, *that "licenses shall be granted . . . . in such manner as is provided by existing laws," have reference to the Act of March* 22, 1867, *in counties where no other local wholesale liquor law is in force—The granting of a wholesale license, under the Act of* 1867, *is a matter within the discretion of the Quarter Sessions—In re Applications of Prospect Brewing Company and Pollard et al., ante, pp.* 177, 181, *applicable only to the granting of licenses in Philadelphia, Allegheny, and such other counties where similar local laws prevail.*

Sur motion for rule to show cause why the action of the Court, in refusing a wholesale liquor license to Cyrus H. Gordon, should not be reconsidered, and said license granted.

W. R. Gillam, for petition.

Sept. 2, 1889. THE COURT. On the fourth Monday of January last the petition of Cyrus H. Gordon for a license to sell liquor at wholesale in the Fourth Ward of Chambersburg was presented to the Court, it having been previously filed in the clerk's office and duly advertised pursuant to law and the standing rules of the Court. It represented that the applicant was a citizen of the United States, of sober habits and good moral character, and a good and sufficient bond accompanied it.

No remonstrance was filed, nor was objection made by any one to the granting of the license.

In addition to all this the Court had knowledge within itself, that the averments contained in the application with respect to the character and qualifications of the applicant, were true in fact.

Yet, notwithstanding, we refused the license, in the exercise of a discretion, which, as we believed, was vested in the Court by the law. The sole reason for the refusal was the belief entertained by the Court that such license was not required for the accommodation of the public; and with respect to the public whose accommodation we were considering, we had regard not only to the population of the Fourth Ward of Chambersburg, but to the general public throughout the county.

We had, previous to our action on this license, at the same term of Court, granted six distillers and twenty-six hotel licenses. This, in our judgment, made abundant provision for the accommodation of the public within the county. With this number of licensed places fairly distributed, liquor in large or small quantities could be obtained in any part of the county, with as great facility as almost any article of traffic for which there is an equal demand. We could then have no warrant for granting wholesale licenses, in addition to those already granted, so far as the accommodation of the public was concerned; and we regarded it as our imperative duty under such circumstances to reject the application. Ample provision having been made for every legitimate public demand, the increase of licensed places beyond this point would be attended with mischief which we felt it our duty to avert.

But it is now insisted upon, that, no matter what the public necessities are, and no matter what the public good requires, the Court has no discretionary power in the premises, but is required by law to grant the license, if the applicant has shown that he possesses the common qualifications of citizenship, good moral character and sobriety, and in making his application has conformed to the established rules.

In support of this view of the law, our attention is directed to the recent decisions of the Supreme Court in the Pollard and Prospect Brewing Co. cases (24 WEEKLY NOTES, 177, 181).

If the present case is not to be distinguished from these, then it follows that we had in fact no discretionary power in the matter, and that our action in withholding the license was wholly un-

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warranted in law. Holding as we do to the opinion, that serious public mischief is certain to result from granting wholesale licenses to all who are likely to apply, possessing the qualifications alluded to, the case assumes grave proportions, and we have endeavored to examine the question with a full sense of its importance, and our own responsibility in connection therewith. If the cases recently decided by the Supreme Court and above referred to, are to govern our action in the present case, the same rule must obtain with respect to all, and we may safely anticipate that the discretion which the Court legally exercised in denying hotel and tavern licenses to certain localities, will be rendered idle and fruitless by the enforced allowance of wholesale licenses in their stead. However this may be, it will be our duty none the less to grant this license now prayed for, if the Supreme Court has decided, as is claimed, that we have no discretion in the matter, the necessary qualification of the applicant being conceded.

In both of these cases relied on as authority for this view, the application had been refused by the Courts below, under authority supposed to be granted by the Act of 13th May, 1887, known as the Retail Act. The Act of 24th May, 1887, providing for wholesale licenses, directed that such licenses should be granted "in such manner as is provided by existing laws."

It seems to have been assumed by the Courts below, that by existing laws was meant the earlier Act of 13th May, 1887, which did unquestionably, by its very terms, commit the granting of licenses very largely to their discretion.

Herein error was committed, for as is clearly shown by the opinion of the Chief Justice, the two Acts have no relation to each other whatever, the one being a restraining statute, while the other, relating to wholesale licenses, was enacted for the purpose of revenue solely. It is unnecessary to quote here at length the several reasons advanced to show that it could not have been the legislative intent that the earlier Act of the 13th was to be read into the later Act of 24th May. It is enough to say that the whole purpose or scope of the argument of the Court is to show that by the term "under existing law" was not meant the Retail Act of 13th May, 1887, but such other laws as related to wholesale licenses and which remained unrepealed.

In the Pollard case the existing law was the local Act of 1872 relating to Allegheny County exclusively. In the Prospect Brewing Co. case the existing laws were those which related to the city of Philadelphia exclusively. And in neither case did the existing law vest any discretion in the Quarter Sessions Court, where the qualifications of the applicant was conceded.

With this plain and explicit interpretation of the Act of 24th May by the Supreme Court before us, we have but to determine what was the existing law in regard to wholesale licenses in Franklin County at that time. Certainly it was not the Act of 13th May; that much has been settled beyond all dispute. It could not have been the Act of 1872, which determined the Pollard case; for this Act was local in its operation, being limited to Allegheny County. Nor was it the law governing the granting of license in Philadelphia, under which the Prospect Brewing Co. case was decided; for in Philadelphia, prior to the Act of 1887, the Courts had nothing to do with the granting of license to sell liquor, as we shall see further on. What, then, was the "existing law" as applicable to Franklin County and, indeed, the entire State, excepting those localities which were under the operation of special statutes?

It is unnecessary, for the purpose of this inquiry, to trace the history of the liquor legislation of the State back of a comparatively recent period. An examination of the earlier laws will disclose the fact that prior to 1856 vendors of liquor, in quantities greater than a gallon, obtained their license to sell, not through the Court, but in the same way that vendors of other merchandise obtained theirs, viz., from the county treasurer, upon payment of the tax assessed thereon.

By the Act of 31st March, 1856, entitled "An Act to regulate the sale of Intoxicating Liquors," all this was changed.

The 6th section of this Act distinguished the several kinds of license that were to be allowed: 1st, licenses to vendors of wines, malt or brewed liquors, either with or without other goods, wares, or merchandise, in quantities not less than one gallon; 2d, to keepers of hotels, inns, or taverns, selling in quantities less than a gallon; and 3d, to keepers of eating-houses, for the sale of malt and brewed liquors and domestic wines; and it was provided by the same section that these licenses should only be granted to citizens of the United States, of temperate habits and good moral character.

The 7th section provided "that licenses for sale of liquor as herein provided, shall be granted by the Court of Quarter Sessions of the proper county, except Philadelphia or Allegheny, at the first or second session in each year, and shall be for one year."

"The said Courts shall fix by rule or standing order a time at which application for said licenses shall be heard, at which time all persons applying or making objection to applications for license may be heard by evidence, petition, remonstrance, or counsel."

By the 16th section boards of licensers were created for the counties of Philadelphia and

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Allegheny, whose power and discretion were defined by the next succeeding clause.

This legislation was followed by the Act of April 20, 1858, one evident purpose of which was, to take away from the Courts the discretion which it was thought the Act of 1856 gave them.

AGNEW, J., in Schlaudecker *v.* Marshall (72 Pa. St. 204), speaking of these several Acts, says: "Under the Act of 1856 the discretion of the Court in granting licenses differed somewhat, but not greatly, from that given by the Act of 1834, and was regulated by the 6th section, which required the Court to fix, by rule or standing order, a time at which application for license should be heard, and when all persons applying or making objections might be heard by evidence, petition, remonstrance, or counsel. This provision was essentially changed by the 6th section of the Act of 1858, which made the granting of licenses mandatory 'to citizens of the United States, of temperate habits and good moral character, whenever the requirements of the laws on the subject are complied with by any such applicant, to sell the liquor aforesaid for one entire year from the date of his license. *Provided*, that nothing herein contained shall prohibit the Court from hearing other evidence than that presented by the applicant for license: *and provided further*, that after hearing the evidence as aforesaid, the Court, board of licensers, or commissioners, *shall* grant or refuse a license to such applicant *in accordance with the evidence*.'

"This Act took away the discretion which the Courts had exercised under the Acts of 1834 and 1856, and made it a matter of legal judgment and evidence."

This Act of 1858 was a supplement to the Act of 1856, and repealed by substitution certain clauses of the Act of 1856, and others by specific enumeration, notably those which related to Philadelphia and Allegheny. The Act of 1856, as thus modified by the Act of 1858, made the granting of licenses mandatory, whenever the prescribed qualifications were met; and our examination, so far as concerns Philadelphia, has not disclosed any change or modification in this respect.

It was in the light then of this Act of 20th April, 1858, which by its very language was mandatory, unrepealed and unmodified so far as it relates to Philadelphia, that the Supreme Court disposed of the Prospect Brewing Co. case. The Court having clearly shown that the Act of 13th May, 1887, had no application, the existing law under which wholesale licenses in Philadelphia were to be granted, was necessarily the Act of 1858, and considered in connection with that Act, the license became a matter of right, if the legal conditions were met on the part of the applicant.

But while this is so with respect to Philadelphia, we have to consider later legislation affecting the State at large. By the Act of 14th April, 1859 (P. L. 653), the mandatory provisions of the Act of 1858 were repealed so far as they related to "applications for licenses to *keep a hotel, inn, or tavern*," and such applications were to be refused whenever in the opinion of said Court, "such inn, hotel, or tavern is not necessary for the accommodation of the public and entertainment of strangers or travellers." Philadelphia was by express terms excepted out of the provisions of this Act.

This, whilst changing the whole system as to retail license, left the status of wholesale license unaffected.

Thus the situation remained, wholesale licenses under the Act of 1858, hotel licenses under the provision of the Act of 1859, until 1867, when by the Act of 22d March of that year (P. L. 40) both were put upon the same footing. It is entitled "A further supplement to an Act to regulate the granting of license to hotels or eating houses, approved March 31, 1856." It will be observed that the reference to the Act of 1856 in the title is a manifest misrecital. The Act of 31st March, 1856, was not an Act to regulate the granting of license to hotels or eating houses, but was an Act to regulate the sale of intoxicating liquors generally. Its title was "An Act to regulate the sale of Intoxicating Liquors," and its provisions embrace both wholesale and retail licenses. Indeed, it was the first departure from the old system which allowed wholesale licenses to be issued by the county treasurer, and required such licenses thereafter to be granted by the Courts.

The 1st section enacted as follows:—

"That when an application is made to any Court of Quarter Sessions of this Commonwealth for license to sell intoxicating drinks, it shall be lawful for said Court to hear petitions, in addition to that of the applicant, in favor of, and remonstrance against, the application for such license, and in all cases, to refuse the same whenever, in the opinion of the said Court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers and travellers."

By the 5th section it was enacted "that the provisions of the 1st section of this Act shall not apply to the city of Philadelphia or the county of Allegheny."

One evident purpose of this Act was, to invest the Courts with the same discretionary power with respect to wholesale licenses, as was given them by the Act of 1859, in the case of hotel licenses; the plain language of the Act imports this purpose, and the continued practice of the

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Courts thereunder shows that it was so understood throughout the Commonwealth. But, more than all, the Supreme Court has clearly and explicitly recognized it as the law governing the granting of such licenses in Reed's Appeal (114 Pa. St. 263), a case to which we shall have occasion presently to refer at greater length. In this case the Court was dealing with a wholesale license which had been granted by the Quarter Sessions Court of Washington County.

If we are correct in this conclusion, then manifestly, the conditions which governed in the Pollard and Prospect Brewing Co. cases are wanting when we come to deal with a case unaffected by local laws. These cases are controlling only so far as they direct us to disregard the Act of 13th May, 1887, when we are considering a wholesale license, because it is inapplicable thereto, and requires us to ascertain what is the *existing law*, so that we may measure our discretion by *its* provisions.

So having determined the existing law to be the Act of 22d March, 1867, we next inquire into the extent of our discretion thereunder.

Fortunately this has been settled for us beyond the possibility of controversy.

In Reed's Appeal, *supra*, the Court, in a *Per Curiam* opinion referring to the Act of 22d March, 1867, says: "The legislative mind is therein very clearly expressed, and ought not to be mistaken. The Court is to hear petitions in addition to that of the applicant, in favor of, and remonstrances against the application for such license, and in all cases to refuse the same whenever in the opinion of the Court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, and entertainment of strangers and travellers."

"In this we see that the petitions and remonstrances are for the sole purpose of determining, without regard to the character of the applicant, whether such license is, or is not, a matter of public necessity. Furthermore, the Legislature has prescribed the method by which this necessity shall be ascertained, that is, by the number and character of those petitioning for or against such application. We may also here call attention to the fact that the remonstrance, as well as the additional petition, must be special, not general; that is, for or against a single or particular application, otherwise it may be disregarded. . . . . The Act is a valuable one if properly administered; but whether it was so administered in this case, we cannot determine. The petitions, *pro* and *con*, are not matters of record, but in the nature of evidence for the information of the conscience of the Court, and as a consequence, we cannot review them, or reverse the action of the Judge of the Quarter Sessions on a certiorari."

In the case we are now considering there was, as we have said, no remonstrance or objection made to the granting of the license. The applicant was known to the Court to be a citizen, of temperate habits and good moral character, and his application was rejected solely because we were of opinion that a place for the sale of liquor at wholesale was not required for the public accommodation, in view of the provision already made. The applicant and those who signed his petition thought the license was required; the Court thought differently, and the license was refused. The question here arises, were we within the true limits of our discretion in allowing the opinion of the Court to prevail against that of the applicant and his petitioners?

Here, too, we are relieved from all argument or controversy. The purpose of petitions, and the duty of the Court with regard thereto, are clearly stated by the present Chief Justice in Raudenbusch's Petition (120 Pa. St. 342).

"I will not," says PAXSON, C. J., "consume time with an extended discussion of the right of the Judges of the Court of Quarter Sessions to exercise their discretion in the granting of license. It has been exercised by that Court almost time out of mind, and the power has been again and again affirmed by this Court."

"This discretion, however, is a legal discretion, to be exercised wisely and not arbitrarily. A Judge who refuses all applications for license, unless for cause shown, errs as widely as a Judge who grants all applications. In either case, it is not the exercise of judicial discretion, but of arbitrary power. The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the Court of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the Act of Assembly has provided means by which the conscience of the Court may be informed as to the facts; it may hear petitions, remonstrances, or witnesses, *and we have no doubt the Court may in some instances act of its own knowledge.* The mere appearance of an applicant for license, when he comes to the bar of the Court, may be sufficient to satisfy the Judge that he is not a fit person to keep a public house. The Judge is not bound to grant a license to a man whom he knows to be a drunkard or a thief, *or has actual knowledge that his house is not necessary for the public accommodation.*"

"The object of evidence in such cases is to inform the conscience of the Court, so that it can act intelligently and justly in the performance of a public duty. While the act of deciding in such cases is, perhaps, quasi-judicial, the difference

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between the granting or withholding of a license, and the decision of a question between parties to a private litigation is manifest. Neither the petitioner nor any other person in this State has any property in the right to sell liquor."

It may be urged that in this particular case the Court had regard to hotel or tavern licenses alone, and that we do violence to the opinion when we seek to apply it to wholesale applications.

True it is that it was an application for a tavern license that was before the Court in this particular case, but the argument and reasoning of the Court are as applicable to one kind of license as another, except as they may be granted in Philadelphia and Allegheny and such other counties as are excepted out of the operation of the general law of 1867, for, as we have before stated, the Act of 1867 places all licenses upon the same footing, and not only makes *the public accommodation a necessary condition for a license of any kind*, but provides for petitions and remonstrances as a means for enlightening the Court with reference thereto. Reed's Appeal, *supra*, is so clear and explicit on this subject that it admits of no question.

The examination we have thus made of the several Acts of Assembly relating to licenses to sell intoxicating liquors, and the adjudication of our Supreme Court in connection therewith, satisfies us that in rejecting Mr. Gordon's application for a license to sell in quantities not less than a quart, we exercised a discretion which the law has, wisely or unwisely, as the case may be, vested in the Quarter Sessions Courts of the Commonwealth, excepting in those counties which are under the operation of special laws.

The motion for a rule to show cause why our action should not be reconsidered, is therefore refused.

Opinion by STEWART, P. J.

[See next case.]

A. R. H.

Q. S. of Bucks Co.

In re McBride's Application.

Wholesale Liquor License Act of May 24, 1887 —*Bottler's license—The Act of May* 24, 1887, *and the decision of the Supreme Court thereunder in Prospect Brewing Co.'s, Pollard's and Einstein's applications, ante, pp.* 177, 181, 184, *do not deprive the Courts of Quarter Sessions, in counties not heretofore affected by special laws on the subject, of the right to exercise their discretion in granting or refusing bottlers' licenses.*

Sur motion to reconsider application for bottler's license.

J. Monroe Shellenberger, for the motion.

B. F. Gilkeson, contra.

August 19, 1889. THE COURT. The personal fitness and qualifications of the petitioner to hold a license were unquestioned; his license was refused at the May Court solely on the ground of want of necessity, the issue raised by the remonstrance.

The question now raised is whether the recent decisions of the Supreme Court which deny any discretion in the Judges of the several Courts of Quarter Sessions to refuse to grant wholesale and bottlers' licenses for want of necessity, apply to bottlers' applications in counties not heretofore affected by special laws.

Before the Act of May 24, 1887, became a law, it appeared to be conceded that the Courts could, in their discretion, refuse to grant wholesale liquor licenses when deemed unnecessary. The decisions and practice of the lower Courts almost uniformly sustained this view, the Judges entertaining the opinion that the conditions of citizenship, sobriety, and moral character, mentioned in the Act, were intended to apply to the qualifications of the applicant and not to define the discretion of the Courts.

The Supreme Court approved and affirmed the use of such a discretion by the lower Courts in cases where the applications were for wholesale liquor licenses. (Reed's Ap., 114 Pa. 452; Conway's Petition, 1 Cent. 148.)

But in recent cases they have declared that they had overlooked the distinction between wholesale and retail licenses, and, therefore, they reverse the cases previously decided in relation to wholesale licenses. They define the discretion of the Courts in acting upon such licenses to be a limited one confined within restrictions which they find imposed by the former Acts of Assembly which are to be read into the Act of 1887. They say that, while the Courts, under the old law, had a discretion, it was limited to three things, to wit: citizenship, character, and sobriety of the applicant, and that no discretion was vested in the Judges of the Courts of the Commonwealth to refuse a wholesale license because unnecessary. The reasons for this conclusion are given at length by Chief Justice PAXSON in the cases of the Prospect Brewing Company and Pollard's applications (24 WEEKLY NOTES, 181).

The effect of those decisions is, that the interpretation of the old law and practice by the Courts throughout the State, were, as to wholesale licenses, erroneous, if not arbitrary. Although the Supreme Court, by their recent decisions, have left no room for doubt in regard to that class known as wholesale liquor license cases, it does not follow, because the law, as so long practised, was not correctly understood in its application to

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one class of subjects, that the same error prevailed also in the practice in relation to another and different class.

The law which required bottlers to obtain licenses in this and most of the other counties of the State was not the same code which regulated the granting of wholesale licenses. By gradation, bottlers were brought within the penalties and restrictions regulating other vendors of liquors. Prior to the legislation of 1887, they were always regarded as retailers, and were so classified and digested. The Acts of 1855 and 1856 permitted them to sell without license; so did all the supplements thereto, down to the Act of March 22, 1867, which forbade the sale of intoxicating liquors by any persons without a license, except druggists.

The Act of 1875 required that all licenses, unless otherwise provided for by special laws, should be obtained by the Courts. That was an Act to "restrain and regulate the sale of intoxicating liquors." It classified bottlers with hotels, inns, and taverns, and provided for a hearing, by evidence, petition, remonstrance, or counsel.

In the case of Flacke *v.* Commonwealth (3 Penny. 498), the Supreme Court indorsed the law as given by the Court below, which had said that the Act of 1875 vested the power to grant bottlers' licenses solely in the Courts, and also asserted that the Legislature had intended to clothe the Courts with the same discretion as in retail cases.

In the case of Heck's Petition (3 Del. Co. 1), this Court held that it could exercise a discretion and refuse a bottler's license when deemed unnecessary. In that case it was urged that the use of the word "may," in the second section of the Act of 1875, should be read "shall," and left no discretion. We said: "The answer is apparent; such an interpretation would apply to all licenses to be granted by the Courts, and would abrogate the discretion conferred on them by prior Acts; something the Legislature never intended by an Act to 'restrain' the sale of liquors." (See, also, Com. *v.* Fine, 1 Del. Co. 145.)

In another case, the venerable Judge ELWELL properly and clearly construed the Act of 1875 to be *in pari materia* with the existing retail Acts. He said: "The natural, if not the necessary, inference is that the Legislature intended the Act of 1875 to be auxiliary to and in aid of the purpose of the old law, and, as a consequence, it must be read into it." (License Petitions, 2 Ches. Co. 321.) We are unaware that any Judge in the State reached a different conclusion. Judge Ross, of Montgomery County, at first held that the Act of 1875 deprived the Courts of all discretion in acting upon retail licenses, but he changed his views and conformed his practice to the rule of the old law. (License Cases, 2 Ches. Co. 323.)

The Act of 1875 does not confine the discretion of the Courts, and when the Act of 1887 was passed there was no Act of Assembly in existence that defined or attempted to define their discretion in the matter of bottlers' license. They had never been classified with wholesale, but only with retail dealers, and, therefore, there was no existing statute from which it could be inferred even (as was the case with the wholesale dealers) that there was a limited discretion in the Courts, other than that affecting retailers. The only existing law in relation to licensing bottlers by the Courts was to be found in the Act of 1875 and the decisions and practice of all the Courts to which I have referred. Therefore, when the Act of 1887 was passed there was a marked distinction between the law and practice then existing in relation to wholesale liquor dealers and bottlers. The old statute did impose the qualifications of citizenship, character, and sobriety for wholesale dealers to which the Supreme Court has confined the discretion, but, in the case of bottlers, there was no such limitation, and the declared law and practice was in favor of a broader interpretation. The knowledge of the existing law is presumed to have been in the thought of the law-making power when the new law was made. It is laid down as a rule for the construction of statutes, that contemporary practice is a circumstance connected with a law in time, by which its meaning may be inferred, for it consists of what was usually done in the place where the law was made at or near the time of making it. (Potter's Dwarris on Statutes, 136.)

It is reasonable that the same rule of interpretation which results in a decision that there is a limited discretion, in wholesale license cases, will require us to apply the larger discretion in acting upon bottlers' petitions. The learned Chief-Justice, in Pollard's case, cites a number of reasons why the restrictions imposed by the retail Acts are inapplicable to wholesale licenses. He says: "Wholesale licenses are not granted for the convenience of a particular neighborhood, nor does it matter where the place of business is; the business is not confined to any particular locality; on the contrary, it is general, and we may fairly infer, from the knowledge of trade which every intelligent man possesses, that but a small portion of the sales of a wholesale house is confined to the city or place in which it is located." However true this may be as to wholesale liquor stores, in cities, selling in not less quantities than one gallon, we apprehend the trade and business of a bottler, as usually practised in our country towns, was not within the scope of thought when these conditions were cited. A bottling trade is

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of a far different character to that described. It serves to conveniently supply, in unstinted quantity, by the jug, kettle, can, bucket, or bottle, the families in the immediate neighborhood of the place of business, where neighbors, friends, and children are equal partakers of the evils which are supposed to attend the too free use of intoxicating drinks. As aptly said by the counsel for the remonstrance, bottlers keep a travelling bar. Through the medium of their trade, the taste for intoxicants is acquired and becomes an irresistible appetite amongst those who otherwise and under usual conditions would be debarred from all opportunity to use them.

It is usual for bottlers' applications to be supported on the ground that families in the neighborhood require the license of a convenience for retail purchases. A reference to the depositions in this case shows that the only ground for the application is that it would be "handy" for the people to have a place to purchase bottled liquors in each ward of Bristol.

In the criminal Court we have observed that the bottle is oftenest shown to have been the medium through which intoxicants were furnished in cases where their use resulted in public drunkenness and disturbances. In fact, we have come to regard this method of retailing liquors as the most pernicious and difficult of detection of any.

There is, besides, other evidence that this class of dealers were not in the contemplation of the Supreme Court. Only recently one of the present Justices of that Court declared that "the laws have determined that the people have a right to purchase liquor in quantities not less than one quart, to be drank or used elsewhere than upon the premises where purchased, and provided that reasonable facilities shall be afforded for the exercise of that right." (Susquehanna County Licences, 3 Pa. C. C. 616.) This points to a retail trade with the consumer.

The Supreme Court, in the matter of the application for bottlers' licenses in Allegheny County, say that, as they are unable to distinguish them in principle from Pollard's case, the order refusing the license is reversed. (Einstein's Petition, 24 WEEKLY NOTES, 184.) The local law of 1872 did not require bottlers to be licensed in Allegheny County, and the Act of 1875 did not apply there. Therefore, when the Acts of 1887 were passed there was no existing law providing a manner of licensing bottlers in that county.

It is quite likely that the attention of the Supreme Court was not directed to the law as it existed, by virtue of the Act of 1875, in other counties. We are unable to find that any reference whatever was made to that Act. The opinion in Pollard's case calls attention to the circumstances that it is under the local Act. The opinion in the bottlers' cases does not give in detail the reasons for the conclusion reached. It is probable that, as there was no former law regulating the granting of bottlers' licenses in Allegheny County by the Court, the Supreme Court read into the new law the provisions of the local Act defining the qualifications for license, which declares that licenses shall be granted "to citizens of the United States of temperate habits and good moral character." Whatever may have been the reasons that induced the decision in the Einstein case, we are unable to find wherein it is like the case under consideration.

We must look to the Act for the intention of the Legislature in relation to it and like cases. The Act of May 24, 1887 (P. L. 194), is entitled "An Act providing for the licensing of wholesale dealers in intoxicating liquors." The second section declares that licenses shall be granted in such manner as is provided by existing laws, and prescribes the manner of fixing a rule of practice and hearing; it evidently applies to the kinds of licenses enumerated in the preceding section, which does not include bottlers. The third section refers exclusively to bottlers; it fixes the rate of license and directs that they shall be required to "procure licenses from the Court in the manner provided for in the second section" of the Act.

Statutes are to be construed so as to best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and, when discovered, it ought to be followed with judgment and discretion in the construction, though it may seem contrary to the letter of the statute. (Big Black Creek Imp. Co. *v.* Com., 94 Pa. 450; Com. *v.* Fraim, 16 Id. 163.) And words may be taken in a different sense in the same will or statute, when they apply to different descriptions or subjects. (Potter's Dwarris on Statutes, 194, 195.)

What did the Legislature intend by saying in the third section that bottlers should procure licenses "in the manner provided for in the second section of this Act?" The Supreme Court holds that the Act is purely for revenue, the main purpose was to provide a classification of licensed vendors, and that it did not aim to change existing laws, regulating the method of granting licenses, is clear beyond argument. The intention was to classify for revenue purposes, and it would be a strained construction to hold that the title of the Act, incidentally including bottlers with the wholesale class, must be given such force as to warp the statute itself to the extent of giving a different meaning to the manner of obtaining the license from that apparently expressed.

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It was true that, under our present Constitution, the title is a part of the Act, but it is principally important in a constitutional view of the statute, and it has been said that it is a very insufficient and unsafe guide to assist us in ascertaining, even in the most general way, the scope and purport of the Act; but, where the intent is not plain, it may slightly assist in removing ambiguities, although it frequently alludes to the subject-matter of the Act only in the most general or sweeping terms, and very often is not co-extensive with the provisions of the Act. (Potter's Dwarris on Statutes, 102–7.)

The third section did not alter the existing law in relation to bottlers at all, except as to the amount of the license fee. The history of the contemporary legislation, and the cause and occasion for the Act, all rebut any intention to change the law or its meaning.

If we read the third section so as to make it say, "in the manner provided for in the second section of this Act," *in regard to wholesale licenses*, we undertake to supply words that we have no reason to believe were omitted. But if we regard the section as it appears to have been intended, an independent enactment classifying bottlers, we give to it the same force as attaches to the second section, and carry out the apparent intention when we construe it to mean that licenses shall be procured "as provided by existing laws." The reference then becomes a reasonable one, the Act stands as a revenue measure, and we resort, as was intended, to the then existing laws to ascertain the power conferred upon the Court in granting bottlers' licenses.

There is nothing in the Act or section to show that there was any purpose to restrict the discretion of the Court. On the contrary, there is a noticeable change in the phraseology of the two sections; the second section provides that the Courts shall grant licenses, while the third declares that the bottler shall be required to procure license from the Court. This change was made for a purpose, and is entirely consistent with a knowledge of the distinctions between the two kinds of licenses. Unless there was some weighty purpose, it is difficult to understand why bottlers' licenses were not provided for in the first and second sections, as could readily have been done.

The most that can be claimed, from the reference in the third section, is that it may apply to the manner of obtaining a license prescribed in terms, in the second section, to wit, under the rule or standing order of Court and upon hearing by petition, evidence, remonstrance, or counsel.

As applicable to existing laws, the Act of 1887, if, indeed, it be constitutional, is a difficult one to understand, and it illustrates the carelessness attending the making of many of our important laws.

We have carefully considered it in connection with recent decisions with a desire only to reach a conclusion satisfactory to ourself as right and in harmony with those decisions. We do not think the question before us, to wit, the law governing the granting of bottlers' licenses in the country districts, was presented to or considered by the Supreme Court in the cases referred to. We are not warranted in assuming that they have decided what does not clearly appear, when, by doing so, we must enter a judgment which we do not believe to be correct or justified by their decisions. It is our duty to abide by and uphold the decisions of the higher Court by giving to them the interpretation clearly intended. If we go further than this against our convictions, we sacrifice judicial independence through apprehension of correction or reversal for error. If we give an effect to their decisions which they will not bear, but which may result in evil and injustice, it would be unworthy of a Court and discreditable to the administration of justice.

We have been unable to find anything in the law which directs us to change our ruling in this case, and we therefore adhere to the practice and precedents established by this and the Courts of like jurisdiction throughout the State. We believe the judgment to be correct; if it be incorrect, fortunately there is a remedy. The Supreme Court have shown a disposition to consider this class of cases, and to give the lower Courts the benefit of their greater wisdom. If we are wrong, it is important that we be set right, and receive a clear interpretation of the conflicting laws bearing upon the subject under consideration. It is more important that all doubts over the law should be resolved beyond question, so that if remedies are needed, they may be provided by the Legislature.

No new applications can now be heard until next year, and in the meanwhile ample opportunity will be afforded to obtain a final adjudication, if this is not satisfactory.

Upon the original hearing of this petition, we gave the case careful consideration. The petitioner failed to present any new facts showing an increased demand for a bottler's license, and we refused him a license because, upon the issue raised by the remonstrance, we believed his place unnecessary. He has not now presented any new facts.

The motion to reconsider is dismissed.

Opinion by YERKES, P. J.

[See preceding case.]

A. R. H.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, SEPT. 20, 1889.* [No. 21.

Supreme Court.

Jan. '89, 453. May 16, 1889.
July '89, 35.

Datesman's Appeals.

Act of January 24, 1849—Life interest in realty—Mortgage of—Sale under—Method of distribution between life-tenant and remaindermen.

The Act of January 24, 1849 (P. L. 677), which prohibits a sale by the sheriff of a life interest in real estate without notice to the life-tenant or leave of Court, has no application to the sale of a life estate under a mortgage given by the life-tenant. Such a sale passes the entire interest of the life-tenant.

Where the Auditor, appointed to make distribution of the funds realized from such a sale, finds that the mortgage was given for the sole benefit of the life-tenant, and that the remaindermen joined in the same only for the purpose of perfecting the security, the amount of the mortgage as well the expenses and costs of the audit must be paid out of the interest of the life-tenant.

There are two modes of disposing of the balance after payment of the mortgage and costs: (1) to invest the balance until with the accumulation of interest it amounts to the sum which the property brought at the sheriff's sale and then award the income to the life-tenant, if living, and the principal to the remaindermen at his death; or (2) the method adopted in this case, viz., to value the life interest, give the tenant thereof his share, if any, in cash, and divide the balance between the remaindermen.

The life-tenant will not be allowed for unimportant repairs made without the consent of the remaindermen.

Appeals by Robert Datesman and Edgar P. Datesman and wife from a decree of the Common Pleas of Union County, in the matter of the distribution of a fund arising from the sale of certain real estate.

The following are the material facts as found by the Auditor, Horace P. Glover, Esq.:—

The fund in Court arose from the sale of certain real estate, situate in Kelly Township, Union County, of which Sarah J. Datesman, *nee* Patterson, was in her lifetime seised in fee, and which at her death, intestate, in 1862, descended to her husband, Robert Datesman, and to her two sons, Edgar P. Datesman and Harris M. Datesman; the said Robert Datesman taking a life estate therein as tenant by the curtesy, and Edgar P. and Harris M. each an undivided half interest in fee in remainder.

In January, 1878, Robert Datesman borrowed $3000 from one Alice Pilling; and Edgar, his son, having become of age in June, 1878, secured this debt of his father by a mortgage to Miss Pilling, executed August 15, 1878, on his undivided interest in above land, at the same time receiving from his father an assignment of his life estate in above land as collateral security for the obligation thus incurred, said assignment being executed August 15, 1878, but not recorded until July 10, 1883.

On January 27, 1883, the Pilling mortgage was satisfied, being paid off with money borrowed from one Hiram Dunkel, who received as security therefor a mortgage on the above land, executed by Robert Datesman, Edgar P. Datesman, and Harris M. Datesman, and duly recorded on said January 27; said mortgage being the first lien upon said land, and the one on which the sale was had producing the fund now in Court, and securing, as did the Pilling mortgage for which it was substituted, the personal debt of Robert Datesman, the life-tenant, his sons Edgar P. and Harris M. being but sureties therein.

On April 2, 1883, Robert Datesman, as life-tenant, and Harris M. Datesman, as owner of an undivided half-interest in fee in remainder in above land, executed a mortgage of their respective interests therein to one Abraham Fairchild, to secure a loan of $3000 to said Harris M. Datesman, which mortgage was duly recorded April 3, 1883, in the recorder's office of Union County in Mortgage Book "E," p. 537 *et seq.*, in which mortgage the said Harris M. Datesman was the primary debtor and Robert Datesman was only surety.

On October 26, 1887, judgment was entered in the Court of Common Pleas of Union County to No. 53, December Term, 1887, by confession under a warrant of attorney, on the bond accompanying said Fairchild mortgage, and the same day a fi. fa. was issued thereon to No. 19, December Term, 1887, and a levy thereon made upon the estates of said defendants bound by said morgage, to wit, upon the life estate of said Robert Datesman and on the undivided half-interest in fee in remainder of said Harris M. Datesman in said land.

On December 8, 1887, by virtue of said fi. fa., which waived inquisition, the sheriff sold the undivided half-interest in fee in remainder of said Harris M. Datesman in said land to Mary J. Datesman for $3900; and on the same day struck off the life estate of Robert Datesman in said land to Abraham Fairchild, the plaintiff in said fi. fa., at the sum of $100.

On December 22, 1887, the sheriff duly acknowledged in open court his deed poll to said Mary J. Datesman for said half-interest in fee in

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remainder of said Harris M. Datesman in said land, and on the same day paid to McCleery & Voris, Esqs., as attorneys for Abraham Fairchild, the plaintiff in above fi. fa., the sum of $3817.25, in full of the debt, interest, costs, and attorney's commissions due him on said fi. fa. The sheriff also applied $44.70 to costs on said writ and afterwards paid the sum of $38.05 to Harris M. Datesman, defendant and principal debtor, thus fully appropriating the $3900 realized out of the latter's interest in said land.

On December 22, 1887, also, the Court made an order fixing March 15, 1888, for reading a special return of sale of life estate of Robert Datesman, under above fi. fa., to Abraham Fairchild, the plaintiff therein; which return was read on said date, 15th March, 1888, and deed poll therefor acknowledged.

Default having been made on the mortgage to Hiram Dunkel, he recovered judgment thereon against Robert Datesman, Edgar P. Datesman, and Harris M. Datesman, by scire facias to No. 104, March Term, 1888, and alias sci. fa. to No. 31, May Term, 1888, for the sum of $4181.70, on the 28th April, 1888, and immediately issued a levari facias thereon to No. 13, May Term, 1888. Under the lev. fac. the sheriff made return that he had sold the land above mentioned to Mrs. Hannah Fairchild (wife of Abraham Fairchild) for the sum of $14,000, of which sum he applied $4314.43 in payment of debt, interest, and costs on said writ, and the balance, to wit, $9685.57, was paid into Court and the Auditor appointed to report distribution.

Before the Auditor the claimants were:—

(1) Abraham Fairchild, who claimed to own the life estate of Robert Datesman by purchase thereof under his fi. fa. No. 19, December Term, 1887, as above stated, and to be entitled to the entire fund in Court for and during the lifetime of said Robert Datesman.

(2) Edgar P. Datesman and Mary J. Datesman, who claimed the entire fund as owners of the land sold; Edgar P. Datesman also claiming as vendee and assignee of all the estate of Robert Datesman in said land, by virtue of a bill of sale or assignment of said estate, executed August 15, 1878, as above mentioned.

(3) Robert Datesman, who claimed that the fund in Court remaining after the payment of the mortgage debt represented the land, and that, as life-tenant, he was entitled to the same for life.

(4) Ephraim Datesman, who appeared as plaintiff in a judgment entered May 12, 1887, to No. 138, May Term, 1887, against Harris M. Datesman, which judgment, however, was discharged by the sale on the Fairchild fi. fa. No. 19, December Term, 1887, and was no lien on the fund now in Court.

On December 20, 1888, the Auditor filed his report and the same was confirmed *nisi* by the Court. The Auditor found as a fact that Abraham Fairchild's fi. fa. No. 19, December Term, 1887, had been fully paid and discharged out of the proceeds of the sale of the interest of Harris M. Datesman, the principal debtor, in the land sold, at December Term, 1887, to wit, on December 22, 1887; whereas the deed to said Fairchild was not acknowledged or delivered until March 15, 1888; and that no consideration passed from said Abraham Fairchild for said life estate; also, finding that the sale of said life estate, under fi. fa. No. 19, December Term, 1887, was ineffectual and void as a matter of law.

The Auditor also found that Robert Datesman was the principal debtor in the Dunkel mortgage, and that Edgar P. Datesman and Harris M. Datesman were only sureties therein; and that the life estate of Robert Datesman was not divested by the sale under the Dunkel mortgage, and that only the fee estate in remainder, belonging to Edgar P. Datesman and Mary J. Datesman, passed by said sale.

He accordingly reported a distribution of the net fund in Court, to wit . . . . $9583.72 as follows:—

To costs of audit . . .	$172 72	
To Edgar P. Datesman .	4705 50	
To Mary J. Datesman .	4705 50	$9583.72

To this report, Robert Datesman, the life-tenant, filed, *inter alia*, the following exceptions: (1) Because the Auditor erred in distributing the fund in court, to the remaindermen in the lifetime of the exceptant; and (4) because the Auditor erred in finding as a matter of fact, that the Hiram Dunkel mortgage was the debt of him, the said Robert Datesman. Exceptions were also filed by Abraham Fairchild.

The Court, BUCHER, P. J., after argument on these exceptions, overruled those of Robert Datesman, and sustained the Auditor's finding of facts, but held that the life estate of Robert Datesman did pass by the sale on the Dunkel mortgage: then computing the value of said life estate at one-third of the gross proceeds of said sale, and appropriating said sum (the life-tenant being the principal debtor and the owners of the fee estate in remainder but his sureties) first to the discharge of the mortgage debt and the costs of sale, etc., the Court awarded distribution of the fund as follows:—

Fund in Court		$9583 72
To Robert Datesman .	$77 66⅔	
To Mary J. Datesman .	4666 66⅔	
To Edgar P. Datesman .	4666 66⅔	
To costs of audit .	172 72	$9583 72

From this decree an appeal was taken by Rob-

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ert Datesman, who assigned the following specifications of error: the action of the Court (1 and 2) in overruling his exceptions to the Auditor's report, as above set out; (3) in holding that the life estate of Robert Datesman passed under the sale on the Dunkel mortgage; (4) in not allowing Robert Datesman the amount expended by him for certain improvements; (5) in charging all costs against the share of the life-tenant; and (6) in entering the above decree.

An appeal from this same decree was also taken by Edgar P. Datesman and Mary J. Datesman, owners of the fee estate in remainder, specifying for error (1 and 2) the finding that the title of Robert Datesman was divested by the sale under the Dunkel mortgage; (3) in decreeing to Robert Datesman out of the fund $77.66; and (4) in refusing to confirm the distribution as reported by the Auditor.

William R. Follmer and *Samuel H. Orwig*, for Robert Datesman, appellant.

Andrew A. Leiser and *Charles S. Wolfe*, for Edgar P. and Mary J. Datesman, appellants.

McCleery & Voris and *J. Merrill Linn*, for appellees.

ROBERT DATESMAN'S APPEAL.

June 28, 1889. THE COURT. The first question we have to consider is whether the life estate of Robert Datesman passed by the sheriff's sale on the writ of levari facias No. 13, May Term, 1887. Prior to the sale the title was vested in the said Robert Datesman as tenant for life, with remainder to his two sons, Edgar P. Datesman and Harris M. Datesman. While the title stood in this position, the life-tenant and the two remaindermen united in a mortgage to Hiram Dunkel for $4181.70. Upon this mortgage a scire facias issued, and upon the judgment recovered thereon a writ of levari facias was issued, No. 13, to May Term, 1888, and the mortgaged premises sold for $14,000. It is upon the distribution of this fund that the questions in this case arise.

It was a conceded fact that the sale by the sheriff was without notice to the life-tenant or leave of Court, as required by the Act of 1849. It was contended on behalf of the appellant that under said Act a life estate can only be sold upon a writ of venditioni exponas after ten days' notice to the life-tenant, and by leave of Court, and a number of cases were cited in support of this proposition. Pentland *v.* Kelly (6 W. & S. 483), was the case of a writ of levari facias issued upon a mechanic's lien. Parget *v.* Stambaugh (2 Pa. 485), Snavely *v.* Wagner (3 Id. 275), Eyrick *v.* Hetrick (13 Id. 488), Com. *v.* Allen (30 Id. 49), Kintz *v.* Long (Id. 501), and Snyder *v.* Christ (39 Id. 499), were all sales upon a writ of fieri facias or venditioni exponas. There is no question as to the law of these cases. Whether they apply to a sale under a mortgage is a different matter. Upon this point the industry of counsel has not furnished us with any decided case in this State, and I do not think it has been expressly ruled. I see no difficulty, however, in disposing of it upon principle. A sale of a life estate upon a mechanic's lien, or an execution issued upon an ordinary judgment, is an adversary proceeding; a life estate is an uncertain thing, and an adverse sale thereof can rarely take place without a serious sacrifice. The law, therefore, wisely lays its hand upon such a proceeding and prohibits a sale except upon certain conditions. But a sale upon mortgage is a different matter. No one doubts that a life-tenant may convey his estate by deed. A mortgage is but a conveyance with a clause of defeasance. It is something more than a lien; it is the grant of an estate as specific security for the money loaned. The mortgagee is not bound to proceed by scire facias, but may bring his ejectment. Moreover, a mortgage contains an express stipulation that if default be made in the payment of the money secured, the mortgagee may at once proceed to collect the same, and may issue a writ of scire facias thereon, "any law, usage, or custom, or anything herein contained, to the contrary notwithstanding." We are entirely clear that the Act of 1849 has no application to the sale of a life estate upon a mortgage given by the life-tenant, and that such sale passes his entire interest.

The remaining questions refer to the distribution. The Auditor has found, and upon sufficient evidence, that the mortgage under which the property was sold was given for the benefit of the life-tenant alone, the two remaindermen having joined in it to perfect the security, but without receiving any part of the proceeds. Under such circumstances the mortgage must be paid out of the interest of the life-tenant, as also the expenses and costs of audit, as they were rendered necessary by his default. There were two modes of disposing of the fund, either of which would have been allowable. One was to invest the fund until with its accumulated interest it would amount to $14,000, the sum which the property brought at sheriff's sale, after which the life-tenant would have been entitled to the fund if living; the other was to value the life interest, give the tenant thereof his share in cash, and divide the rest between the two remaindermen. The Court adopted the latter principle, and followed the old common law rule in force in England, and recognized in this State in Dennison's Appeal (1 Pa. 201), and in Shippen & Robbins's Appeal (80 Id. 391), that one-third of the capital sum is the measure of the life interest.

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The Court therefore awarded $67.66⅔, which was all there was left of his interest, to the life-tenant, and the balance was equally divided between the two remaindermen. We see no error in this. The life estate in the land was destroyed by the act and default of the life-tenant; the fund realized by the sale represented the entire title to the property; the interest of the life-tenant therein had been exhausted within a few dollars, and no good reason is apparent why the remaindermen should not have their money.

What has been said covers all of the assignments of error except the fourth, in which complaint is made that the Court below erred in not allowing to Robert Datesman, the life-tenant, the amount expended by him for permanent improvements, as found by the Auditor. I do not see that the appellant made any such claim before the Auditor; certainly no such exception was made to his report. There was some evidence before him tending to show that the life-tenant had made some trifling improvements and repairs, but it was so unimportant as not to be included in his findings of fact. There was nothing to show that the improvements were made with the consent of the remaindermen, and it is settled law that the life-tenant cannot of his own motion improve the remaindermen out of their estate. Where the latter consent to improvements for the mutual benefit of the joint estate, and the property is afterwards sold to promote the interest of both, equity would perhaps allow the life-tenant a reasonable compensation for the value of the improvements. This assignment is not sustained.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

APPEAL OF EDGAR P. DATESMAN ET AL.

June 28, 1889. THE COURT. This appeal was from the same decree as Robert Datesman's Appeal just decided, and presents no question that was not considered and decided in that case. We need not repeat what was there said.

Decree affirmed, and the appeal dismissed at the costs of the appellants.

Opinions by PAXSON, C. J. W. M. S., Jr.

Jan. '89, 406. May 1, 1889.

Moore v. Colt.

Penalties and liquidated damages—Provision in contract construed to be a penalty.

Articles of agreement under seal for the sale of the good-will, etc., of an omnibus business for $150, contained a provision that the vendors "were not to engage in or use their influence in opposition to the vendee in the passenger, mail, or express business in any manner or form. And each party is hereby held and fully bound in the sum of $300 for the faithful fulfilment of the above contract." The vendee completed his purchase. In a subsequent action by the vendee against the surviving vendor alleging a breach of the above covenant:

Held, that the above provision was a penalty and not a liquidation of damages, and therefore the vendee was entitled to prove his actual damages, and recover therefor, though they were in excess of $300.

Error to the Common Pleas of Erie County.

Covenant, by W. O. Colt against George Moore who survived R. G. Moore.

At the trial, before GUNNISON, P. J., the following facts appeared: For some time prior to May 1, 1880, George Moore and R. G. Moore were engaged in the business of carrying passengers, express matter, etc., between Waterford Station, on the Philadelphia and Erie Railroad, and the borough of Waterford, a small town about one and one-half miles distant from the station. W. O. Colt was also engaged in carrying the United States mail, passengers, and express matter between said points. These parties entered into the following agreement, duly signed and sealed:—

Article of agreement, entered into this 1st day of May, 1880, between the firm known as Moore Bros., consisting of George and Robert Moore (engaged in the bus business between the borough of Waterford and Waterford Station, on the Philadelphia and Erie Railroad), of the first part, and William O. Colt, of the second part, all of the borough of Waterford.

That the party of the first part agree to sell to the party of the second part all their interest and good-will in the above-named business; also the bus that they are now using, and the covered sleigh, built by Matteson and the body by James Boyd, all complete and in good repair (the repairing of the broken spring included) all for the sum of one hundred and fifty dollars ($150), to be paid as follows: One hundred and twenty-five dollars ($125) in hand upon delivery of the bus and twenty-five dollars ($25) upon the delivery of the above-named covered sleigh, which is to be held by the party of the first part till the final payment of twenty-five dollars ($25).

And the party of the first part are not to engage in, or use their influence in opposition to the party of the second part, in the passenger, mail, or express business, in any manner or form. And each party is hereby held and fully bound in the sum of three hundred dollars for the faithful fulfilment of the above contract.

In August, 1884, one S. E. Dewey obtained a contract with the government of the United States for carrying the mail between Waterford Station and the borough of Waterford, and at or about that time placed a bus upon the road to carry passengers and express matter between said points, and George Moore was employed by the said Dewey as manager of the said passenger, mail, and express business between said points, at the stipulated wages of $50 per month. This employment of George Moore in the business was regarded by W. O. Colt as a breach and infraction of the terms of the contract between

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the parties, and he thereupon instituted this suit against George Moore, R. G. Moore being dead, to recover damages.

The plaintiff offered in evidence, as a measure of his damages, an estimated number of passengers carried by defendant. Objected to. Objection overruled and evidence admitted. Exception.

The Court charged the jury, *inter alia*, as follows:—

"The counsel for the defendant asks the Court to charge you that the limit of the damages that the plaintiff can sustain is the three hundred dollars fixed in the agreement as a penalty, or in which sum each one became bound for the fulfilment of the contract. That is not the view the Court takes of the contract; it is a question which is to be decided from a construction of the contract itself. The parties could make an agreement that in case of a violation by either party the party violating it should forfeit the sum of three hundred dollars to the injured party; but that is a question to be determined by the contract itself and by its language. Now the language of the contract itself is directly contrary to that theory; it says: "Each party is hereby held and firmly bound in the sum of three hundred dollars for the faithful performance of the above contract." That makes it a penalty, not as liquidated damages. A man who is appointed a tax collector and gives a bond in a penalty of one thousand dollars, conditioned for the faithful collection and account of the taxes—that is not the amount he is bound to pay in case he violates his duty. If he collects two thousand dollars of taxes and does not properly account for it, the officials of the county could recover from him the full two thousand dollars notwithstanding the penalty in his bond was only a thousand dollars; and if the penalty in his bond was a thousand and he collected and accounted for all but five hundred, all that they could recover from him would be the five hundred dollars. So in this case; the penalty is not the measure of damages. In these cases, an action of covenant, you should give to the plaintiff the actual damages that he has sustained by reason of the violation of the contract, if such a contract was actually delivered and consummated.

"Now on that subject the testimony does not entirely agree. The testimony of some of the witnesses is that the bus which the defendant drove went to the station at every train, and some of the witnesses say they took on an average some five or six passengers a day, and that the fare was fifteen cents for each passenger. I think the driver of the bus said it was fifteen cents without any round trip fares. It seems to have been the practice in Waterford to charge fifteen cents for a ride one way and twenty-five cents both ways, and the driver said when he drove the bus there were no round trip fares, and he tells you, I think, that the number he carried averaged five or six each day each way. But he does not pretend to be accurate in that respect. He kept no account of it and gives only his estimate, but that estimate is proper evidence.

"On the other hand the plaintiff says that he kept an account of the amount of fares received by the defendant on each day during this time; he don't know exactly what amount was received but he says he knows the amount that he should have received from the passengers that he saw carried, and that amount is $580.

"The measure of damages would be the amount that he suffered by reason of the violation of the contract, and the evidence of that amount would be the number of passengers that the defendant carried, and the amount of fares that he would receive; so that that would be proper for you to consider in estimating the damages, if you find for the plaintiff."

Verdict for the plaintiff for $602.42 and judgment thereon. Whereupon the defendant took this writ, assigning for error, the admission of the above evidence, and the portion of the charge above quoted.

George A. Allen (*Louis Rosenzweig* with him), for the plaintiff in error.

E. L. Whittelsey, for the defendant in error.

June 28, 1889. THE COURT. The defendant below was clearly liable for his breach of the agreement of May 1, 1880. The only question is to the amount of damages. The jury rendered a verdict against him for $602.42. He now claims that the damages were liquidated by the article of agreement at the sum of $300. The language of said agreement is as follows: "And each party is hereby held and fully bound in the sum of three hundred dollars for the faithful fulfilment of the above contract." If we interpret this contract by this language we have the case of a penalty. It is in almost the exact terms of the ordinary penalty of a bond. There is no agreement "to forfeit," which in Streeper *v.* Williams (48 Pa. 450) was held to be the equivalent of the word "pay," and to be liquidated damages. In Cushing *v.* Drew (97 Mass. 445) Cushing sold to Drew certain horses and wagons and the goodwill of an express business in the town of W. for $650, and agreed in writing not to do any express business, or cause any to be done in that town so long as D. should do such business there, and in case he violated the agreement he was to pay D. $900. This was held to be liquidated damages. Cushing stipulated to do a single thing, viz: to abstain from interfering with the business of D., and if he failed in this he was to pay Drew the sum of $900. It is diffi-

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cult to see how any doubt could have arisen in that case. The one in hand is not clear. The parties have merely bound themselves in the sum of three hundred dollars for the faithful fulfilment of their contract. That contract was that Moore (defendant below) agreed to sell to Colt (plaintiff below) all his interest and good-will in the "bus business" between the borough of Waterford and Waterford station, together with the "bus" and sleigh then in use by him for the sum of $150, with the stipulation that the said Moore should not engage in, or use his influence in opposition to Colt, in the passenger, mail, or express business in any manner or form; each to be held and fully bound as above stated in the sum of three hundred dollars. The nature of this stipulation, whether a penalty or liquidated damages, does not depend upon which party violates the agreement. Had the breach been by Colt, and he had refused to pay the $150, what would have been the measure of damages in a suit against him by Moore? Would it have been the sum he agreed to pay—$150 with interest—or would it have been the $300 as liquidated damages? The latter proposition cannot well be maintained. There is no class of cases which come before us more difficult to determine upon any settled rule than this. It was said by Mr. Justice AGNEW, in Streeper *v.* Williams (*supra*), at page 454: "Upon no question have the Courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases the Courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulty of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. . . . Upon the whole, the only general observation we can make is that in such case we must look to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract, and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." This language is so appropriate that I trust it will justify the length of the quotation. The defendant contends that the difficulty of ascertaining the damages is a reason why the case should be treated as one of liquidated damages. The jury, however, appear to have had no difficulty upon this head.

The plaintiff proved that the defendant, in violation of his contract, had carried a certain number of passengers, which at the regular rates of fare amounted to the sum found by the jury. This was just so much money practically taken out of the plaintiff's pocket, and no good reason is apparent why he should not be compensated. The defendant has no equity which would constrain us to hold that language which technically provides a penalty shall be treated as liquidated damages. It is true the whole amount he received for the business, good-will, and property was only $150. But this claim was for an interference with his business for over a year, and the direct loss to the plaintiff as found by the jury was largely in excess of the penalty. It can readily be seen that for such interference, continued for years, the sum of $300 would not be an adequate compensation.

In this view of the case we think the evidence referred to was properly admitted. It was not offered to prove speculative profits but to show actual loss to the plaintiff. Nor do we find any error in that portion of the charge of the learned Judge embraced in the remaining assignment.

Judgment affirmed.

Opinion by PAXSON, C. J. C. K. Z.

May '89, 22. June 4, 1889.

Cooper v. Hart & Co.

Arrest—Act of July 12, 1842—Affidavit necessary for issuance of a warrant of arrest thereunder.

A certiorari to the refusal of a Court to quash a warrant of arrest issued under the Act of July 12, 1842 (P. L. 339), brings up nothing but the record, and as said Act contains no provision that the proceedings subsequent to the warrant should form a part of the record, the Supreme Court on such a certiorari can only consider the affidavit upon which the warrant had issued.

An affidavit to support a warrant of arrest under the Act of July 12, 1842 (P. L. 339), averred that the defendant purchased iron of plaintiffs, agreeing that the same should be shipped to plaintiffs' agent in care of defendant, and remain in possession of said agent until paid for; that the iron was so shipped, but defendant in violation of his

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agreement and in fraud of plaintiffs' rights took possession of the same without paying therefor, by reason whereof the defendant had fraudulently incurred the debt or obligation sued for. The warrant having issued, on proceedings to quash the same:

Held, that the affidavit was insufficient to support the warrant, because the facts set out proved a fraudulent breach of contract by defendant, and not that the debt had been fraudulently incurred.

Certiorari to the Common Pleas of Dauphin County.

Trespass, by Wm. R. Hart & Co. against George P. Cooper and Charles H. Reynolds, trading as Cooper, Reynolds & Co.

After the writ in this case had been served upon George P. Cooper, the plaintiffs made an application for a warrant of arrest filing the following affidavit:—

"Geo. T. Barnes, a member of the firm of Wm. R. Hart & Co., the plaintiffs in the above stated case, being duly affirmed according to law, deposes and says, that a suit has been duly commenced in the Court of Common Pleas of Dauphin County, to No. 300 of January Term, 1889, against George P. Cooper and Charles H. Reynolds, doing business near Harrisburg, in said county, as Cooper, Reynolds & Co., for the recovery of a debt or demand due to the said Wm. R. Hart & Co., from the said Cooper, Reynolds & Co., amounting to $549.39, with interest thereon from the 16th day of June, 1888, together with unliquidated damages thereon, the nature and character of which demand is as follows: That on or about the 14th and 18th days of June, 1888, respectively, the said Wm. R. Hart & Co., upon the order of one W. S. Pilling, per Ezra Bertolet, an iron commission merchant, residing in the city of Philadelphia, at the request of the said Cooper, Reynolds & Co., and in accordance with the usages of the trade, shipped from Steelton, Pa., two car loads of pig iron consigned to the said W. S. Pilling, in care of the said Cooper, Reynolds & Co., who then operated a rolling mill near Harrisburg, Pa., known as the 'Lochiel' Rolling Mills; that the said pig iron was so shipped with the express understanding and agreement that the same should be and remain in the cars unloaded and in the possession and custody of the said W. S. Pilling for account of the said Wm. R. Hart & Co., until it should be fully paid for by the said Cooper, Reynolds & Co.; that the manner of said shipment and consignment was with the knowledge and consent of said Cooper, Reynolds & Co., and for the purpose of carrying out said agreement, and each shipment was therefore accompanied by a sight draft upon Cooper, Reynolds & Co. for the price or value thereof, together with an order from the said Pilling to the Pennsylvania Railroad Company, authorizing them to deliver said iron to said Cooper, Reynolds & Co., on payment of the accompanying drafts; that agreeably to this agreement pig iron to the amount of 37 tons, 16 cwt., 0 qrs., 38 lbs., belonging to the said Wm. R. Hart & Co., of the value of $549.39 was shipped to the said W. S. Pilling, in care of the said Cooper, Reynolds & Co., at Lochiel, Pa., where said Lochiel Rolling Mills are located; that the said Cooper, Reynolds & Co., in violation of their express agreement and in fraud of the rights of the said William R. Hart & Co., immediately took possession of the said pig iron and converted the same to their own use by working it up in the said mills, and have refused to pay, and do still refuse to pay, said drafts or either of them, or in any way to account to said Wm. R. Hart & Co. for the pig iron thus fraudulently obtained and used, and that by reason of the facts as above stated the said Geo. P. Cooper and Charles H. Reynolds, doing business under the name and style of Cooper, Reynolds & Co., have fraudulently incurred the debt or obligation for which the above entitled suit is brought, within the meaning of the Act of July 12th, 1842."

Affidavits by Ezra Bertolet and W. S. Pilling were also filed, averring the truth of the facts averred in the above affidavit, Ezra Bertolet further saying, "that said shipment was so made because said Cooper, Reynolds & Co. were not in good credit, and the said Wm. R. Hart & Co. were unwilling that said iron should be delivered to them until the same was fully paid for; that the said Cooper, Reynolds & Co. well knew the purpose intended to be effected by such shipment and consignment, and the taking possession of and using said iron by them was a palpable fraud upon said Wm. R. Hart & Co., as the said Cooper, Reynolds & Co. well knew."

A warrant of arrest having issued on these affidavits, and George P. Cooper having been arrested thereunder, he filed an answer to these affidavits denying all knowledge of the contract under which the iron was alleged to have been purchased, and praying that the warrant of arrest should be quashed and he be discharged.

The testimony of a number of witnesses was taken and the case argued before SIMONTON, P. J., who subsequently filed an opinion, wherein, after citing Bowen *v.* Burdick (3 Clark, 113); Bager *v.* Radley (1 Phila. 47); Gallager *v.* Norcross (7 Id. 623), and Philadelphia Coal Co. *v.* Huntzinger, (6 WEEKLY NOTES, 300) as authority for issuing a warrant of arrest in this case, he concluded:—

"A careful consideration of all the evidence brings us to the conclusion that the debt in this case was fraudulently contracted, and, if so, it brings the case within the provisions of the Act of 1842. Fraud is not to be presumed, but it

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may, and often must, be proved by circumstances. The defendant contends that he did not know the terms of the contract under which the iron in question was purchased. The evidence clearly establishes that he was not purchasing iron in any other way than by cash order shipment purchases, at or about the time this transaction occurred, except in one instance, in which it was purchased on thirty days' credit. There is no evidence whatever that any cash purchases were made other than those in which the iron was not to be delivered until after payment. Defendant had notice several days before the shipment of the first car, that the purchase had been made, and there was nothing in the notice to lead him to suppose that the purchase was made on other than the usual terms, nor did he testify, when upon the stand, that he believed it was so made. He also claims that he did not know the iron was taken until after it was used. The whole evidence shows that he must have known it before the second lot arrived, and his concealment of the fact for nearly two months, from the plaintiffs' agent, that the iron had been used, and his evident reluctance, when upon the stand, to state candidly and clearly the whole truth of the case, lead us to the conclusion that he knowingly committed the fraud. If, by mistake, a car load of iron had been taken and used by an honest man, who had no design or intention to commit a fraud, the plain course for him to pursue would be, as soon as the mistake was discovered, to notify the owner and make restitution. Instead of this, the defendant, who must, if he had not known it at the time, have discovered the mistake before the second lot was taken, concealed the facts from the owners, made no restitution, refused to pay for the iron, and, on the hearing, set up the improbable excuse and defence that he did not know the terms upon which the iron was purchased, when, from the nature of things and from the letters produced in evidence, he must have known it.

"Without enlarging further, we conclude by finding that the claim in this case is one for which the defendant could not be arrested on a capias ad respondendum since the passage of the Act of 1842, and that the debt upon which the claim is founded was fraudulently contracted by the defendant, and, therefore, that a warrant of arrest must issue."

A commitment having duly issued, the said George P. Cooper took this writ of certiorari, assigning for error, the issuance of the warrant, the refusal to quash the same, and the issuance of the commitment.

Edmund G. Butler and *Edwin W. Jackson*, for the plaintiff in error.

M. E. Olmsted and *Robert Snodgrass*, for the defendants in error.

June 28, 1889. THE COURT. We are asked upon this writ of certiorari to review the proceedings of a warrant of arrest under the Act of 1842. It is clear that we cannot do so upon the merits. The certiorari brings up nothing but the record, of which the proceedings subsequent to the warrant form no part. There is no provision in the Act of 1842 that the proceedings, or any part of them, shall be filed of record. It follows that if the affidavit was sufficient to justify the warrant the action of the Court below must stand.

The affidavit of George T. Barnes, one of the plaintiffs below, upon which the proceeding was based, contains near the close thereof the general averment that "the said George P. Cooper and Charles H. Reynolds, doing business under the name and style of Cooper, Reynolds & Co., have fraudulently incurred the debt or obligation for which the above entitled suit is brought, within the meaning of the Act of July 12, 1842." Had the plaintiffs rested upon this general averment their case would have been stronger than it is as now presented, for when they proceed to set forth the facts upon which the charge that the debt was fraudulently contracted is founded, it appears that said charge was a mere conclusion of law from facts insufficient to support it. We think it conclusively appears that the fraud was not in the original contract—the order for the iron—but in its subsequent breach after the iron had been shipped by the plaintiffs to W. S. Pilling in care of the defendants at their rolling-mill near Harrisburg. Granted that the defendants had no right to use the iron until paid for, yet their use of it was but a subsequent breach of their original contract, and while such breach might have involved a fraud, it by no means follows that the original contract was tainted with the fraud; in other words that the debt was fraudulently contracted. There may be many instances in which the breach of a contract is a fraud, or at least partakes of the nature of a fraud. There is no averment in the affidavit to connect the subsequent fraud with the original contract. Had there been such averment—that the fraud was contemplated and intended when the order for the iron was given, the case would have presented a different aspect and raised quite another question. As it stands, there is nothing upon the record—and we look no further—to support the allegation that the debt was fraudulently contracted.

The proceedings are reversed.

Opinion by PAXSON, C. J. C. K. Z.

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Jan. '89, 433. May 28, 1889.

Long et al. v. Paul et al.

Wills—Construction of—Estates in fee, for life, and durante viduitate.

A testator in an illiterate, but in some respects, formal will, devised all his "improvement and income" of a certain messuage and lot and certain pieces of land to his wife, she "to pay all by debts and if she cannot pay it she shall sell so much of the land to pay for the rest of the land and keep it for her one youse, as long as she keeps my name, and after she marries and dound keep my name any more she shall have the one-half of all my real and personal property for her own youse and the other half I beques to my 3 sisters share and share alike." He further provided that after his wife "dound keep my name" his executor should divide all his real and personal property, one-half to his wife, the rest to his sisters, the executor selling the property, if necessary in order to divide it. The testator left surviving him his wife and sisters. The wife died, not having re-married, leaving to survive her her father and mother. In an action of ejectment by testator's sisters against the wife's father and mother:

Held, that it was apparent the testator intended in the first part of the will to give to his widow an estate *durante viduitate;* that such estate was not enlarged by the power of sale for the payment of debts, nor by the subsequent provisions of the will, in case of her re-marriage; that therefore as the widow had only an estate for life, the plaintiffs were entitled to recover.

Cooper *v.* Pogue, 92 Pa St. 254; Nash *v.* Simpson, 78 Me. 142 approved and followed.

Error to the Common Pleas of Northumberland County.

Ejectment, by Catharine Paul and Elias Paul, her husband, Salome Groh and John Groh her husband, and James D. Becker, against Jacob Long and Rachael Long his wife, to recover certain real estate in said county. After the service of the writ a case stated was agreed upon for the opinion of the Court, as follows:—

(1) That the title to the land mentioned in the writ of ejectment in this case was out of the Commonwealth on April 1, 1875.

(2) Samuel Weary was the owner in fee simple of said land, and on April 1, 1875, conveyed the same by deed to Cornelius Maurer, his heirs and assigns.

(3) That Cornelius Maurer, the grantee in said deed, made the following will:—

As to such estate as it has pleased God to intrust me with. I dispose of the same as follows vis: I give and bequeath to my beloved wife Sarah Maurer, all my household furniture, my library in my mansion or dwelling house my cow and heffer and hogs chicken and all my carpenter tools and all grains and all other personal property not mentioned also. all moneys and money Due me or hereafter may come, Due to be colected by my beloved wife Sarah Maurer herein named as soon after after my deceased as can be consistently with a property settlement. of. all my debts; and to have and to hold the same to her and assigns. and I also give devise and bequeath to her my said wife Sarah Maurer, all my improvement and in come of my messuage and lot and house where, I now live and all that peace of land whre Samuel Weary lived now deeased And, now occupied by his wido Catharine Weary on wich a dwelling house & Barn is on containing 93 acres more or less with its appertenances; and all that piece or parcels of lands siduated &c here described on the south by Machanoy Creek on the west by Benjamin Knerr & others on the north by land of the estat of Thommas henninger on the east by lands of Amos Vastine and my byloved wife Sarah Maurer is to pay all by Debt and if she can not pay it she shall sell so much of the land to pay for the rest of the land and keep it for her one youse, as long as she keeps my name and after she marries and dound keep my name any more she shall have the one half of all my Real & personal property for her own youse and the other half I beques to my 3 sisters share and share alike. Catharin Intermaried with Elias Paul Sollome inter married with John Groh Lusina intermarred with Joseph. B. Becker.

Lastly I appoint my esteemed fried Jerred Hennings to Eexecutor of this my last will and, testament after my beloved wife Sarah Maurer dound keep my name my above executor shall thevide it to my wife the one half of all Real & personal property and the other half to my three sisters share and share alike if can be devided without spoyling the hole if spoyling the hole he shall selling it at puplic sale and devided the money as directed.

(4) That the testator died on the 21st day of September, 1878, and the will was probated on the 9th of October, 1878, and letters testamentary granted to Jarred Henninger, the executor named in the will.

(5) The testator left surviving, Sarah Maurer, his widow, no children, and the three sisters named in the will, to wit: Catharine, intermarried with Elias Paul; Salome, intermarried with John Groh, and Lusina, intermarried with Joseph B. Becker. Lusina and her husband, Joseph B. Becker, have both died since the death of the testator, and left, surviving, James D. Becker, a son, who with the other two sisters, are the plaintiffs in this case.

(6) That Sarah Maurer, his widow, did not remarry but died as the testator's widow, and she left surviving her Jacob Long her father, and Rachel Long her mother, and brothers and sisters, who are in possession of the premises mentioned in the writ of ejectment.

(7) If the Court be of opinion that the title and right of possession to the land described in the writ of ejectment (which is made part of this case stated) vested upon the death of the testator or his widow, in the plaintiffs, under the intestate laws, then judgment to be entered in favor of the plaintiffs. If, however, the Court be of opinion that a fee passed under the will to the widow, then judgment to be entered for the defendants for the premises mentioned in the writ. The costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon.

The Court below, ROCKEFELLER, P. J., filed an opinion wherein, after stating the question at issue and the facts, he proceeds:—

"It is strenuously contended on the one hand

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that under the said latter parts of the will in case the widow had re-married, she would have taken an estate in fee in the one-half of the land, or, in case of a sale, one-half of the proceeds absolutely; and that that being the case it follows that the testator intended to vest a fee in the whole of the land in the widow in the first instance.

"On the other hand it is argued and was so held by the learned Auditor that by the said latter clauses it was only intended that in the event of the widow re-marrying she should have the one-half of the real and personal estate "*for her own use*," that is to be used by her during life. As the widow did not re-marry, no question of that kind arises in the case, except so far as the whole will must be taken together in order to ascertain the intention of the testator. It is well settled as a general rule of law that a devise of the rents, issues, and profits of land is equivalent to the devise of the land itself, but the intent to dispose of land is not usually manifested by disposing of the income, rents, and use only thereof; and in such cases it has always been held that the devisee only takes the land for such length of time as he is given the income, rents, and profits. (France's Estate, 25 P. F. S. 220.)

"In the present case, it being clear that the will only gives the improvement and income of the land, or the land itself to the widow, for her own use during widowhood, which would mean, at the longest, during the natural life of the widow, I am of opinion that it by no means follows that the latter clause giving her the one-half of the estate *for her own use*, or the one-half of the proceeds of a sale in case of re-marriage, necessarily enlarges the life estate given in case she remained unmarried. The one is a provision in case the widow remained unmarried, and the other a provision in case she re-married. I think it is quite likely that the scrivener intended to create a life estate only in the one-half of the whole estate in case the widow re-married; but perhaps he has not clearly so expressed it. Looking at the whole scheme of the will nothing would seem more natural. The meaning of the will in this respect may be doubtful, but in that case the construction is to be as conformable as possible to the general rules of inheritance. (France's Estate, *supra*.) If the contention of the plaintiffs is correct, the land goes to the parties who would be entitled to the same under the general inheritance laws of the State; but if the construction contended for by the defendants should be adopted, it would go to parties who are entire strangers to the blood of the testator. The same construction contended for by the plaintiffs, it seems, was put upon the will by the widow herself, when a part of the proceeds of sale of some of the land sold by the executor and the widow, for payment of debts, was distributed by the Orphans' Court of this county. (See report of W. B. Faust, Esq., Auditor, filed January 7, 1884, and the opinion of the Court, confirming the same, April 7, 1884.)

"The learned Auditor gave her the interest on the proceeds, which represented the land, and she expressly declined, in writing, to except. I am of opinion that the title and right of possession of the land described in the writ of ejectment (admitted at the argument to be the same land described in the will as the messuage and lot and house where the testator lived), vested upon the death of the testator and his widow in the plaintiffs, the heirs of the testator, and therefore judgment in favor of the plaintiffs."

The defendants thereupon took this writ, assigning as error the judgment of the Court, and particularly the action of the Court in considering the Auditor's report which was not part of the case stated.

S. B. Boyer, for the plaintiffs in error.

Charles B. Witmer, for the defendants in error.

June 28, 1889. THE COURT. The draughtsman of this will had a very limited command of the English language, and even this was evidently hampered by the recollection of the form book. But taking the whole will together the testator's intention is reasonably clear to give his wife the use and income of his whole estate so long as she remained his widow, and of half of it in case she re-married, but not in either event to give her more than a life estate in the realty. The lands are expressly given to her "to keep for her own use, as long as she keeps my name," which is plainly a gift during widowhood, and therefore, an estate for life determinable on a second marriage. In this regard the case is not distinguished from Cooper *v.* Pogue (92 Pa. 254), and indeed is by no means so strong a case for plaintiff in error's contention as that was.

The first devise as to realty is of the "improvement and income" of his dwelling house, and it is conceded that these words in general carry the land. But the gift of the improvement and income is only "so long as she keeps my name" and cannot be more effective than a gift of the land itself, which expressed in those terms, would not extend beyond a life estate.

Nor is this estate enlarged by the provision that she shall pay the debts, and if she cannot (otherwise) she shall sell so much of the land as will enable her to keep the rest. This is only a power, not an estate, and is limited to the payment of debts, thus merely enabling the devisee to do in her own way what the law would do compulsorily for her without this provision. So

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far indeed as this clause of the will bears upon its construction at all it would seem to indicate that the testator himself did not intend to give a fee, for if he had done so, the power of sale would have been superfluous except as a matter of convenience on account of the possibility of the determination of the estate by a second marriage.

But after the devise to the widow so long as she remains unmarried, there is a provision for the case of her re-marriage, in which event she is to have "the one-half of all my real and personal property for her own use, and the other half I bequeath to my three sisters," etc., and the further provision that the executor shall make the division, and if it cannot be done without spoiling the whole, then he shall sell the property and "divide the money as directed," and it is argued that this is a gift of the corpus of one-half in case of re-marriage, and therefore, unless the first estate was a fee, a larger provision in case of second marriage than in the event of remaining a widow, which would be clearly contrary to the testator's main intent. While a fee in one-half would probably have been called by the early lawyers an estate of higher dignity than a life estate in the whole, I am not aware of any rule which would enable us to say as a matter of law that it was a larger or more favorable provision for a widow. That is a question of fact which depends on circumstances, and must always be largely a matter of individual choice. But it is by no means clear that this is the proper construction of the provision in case of re-marriage. On the contrary the repetition of the phrase "for her own use" seems rather to be meant to continue the idea of a life estate contained in the preceding clause, and if so the direction to the executor to make the division of the property, and if that cannot be done, to sell, and divide the money, would be subject to the same limitation, to wit, to her own use for life. As the widow however did not re-marry, our only concern with these parts of the will is their bearing on the construction of the previous clause, and as to it they give us very little light.

On the whole will even if the intent to give only a life estate were more doubtful than it is, we could not distinguish this case from Cooper *v.* Pogue, already cited. With variations of language the substance of the gifts is identical, and while will cases are rarely precedents for more than the principles they illustrate, yet where there is such substantial identity not only in intent but in expression, the prior case is at least very strong confirmation of the correctness of the view we have taken of the present. And the same remarks apply with great force to the notably analogous case of Nash *v.* Simpson (78 Me. 142).

The learned Judge below gave the true construction to the will, and we do not think his reference to the Auditor's report, etc., in a previous cause under the same will, was going outside of the case stated for facts, but only a reference by way of illustration and confirmation of his views, to an authority that was necessarily very pertinent.

Judgment affirmed.

Opinion by MITCHELL, J. C. K. Z.

July '88, 82. January 17, 1889.

Lee's Appeal.

Decedents' estates—Married women—Wills Act of April 11, 1848, sect. 9—Act of May 4, 1855.

When a testatrix who is a married woman dies without issue and intestate as to a portion of her property, her husband cannot by electing to take against the will, claim under the Act of May 4, 1855 (P. L. 430), one-half the personal property as to which his wife died testate, and the whole of that whereof she died intestate. His right is limited to one-half of the whole estate.

Appeal of Francis Lee from a decree of the Orphans' Court of Philadelphia County, making distribution of the estate of Maria L. Lee, deceased.

On the audit, before HANNA, P. J., it appeared that testatrix left her surviving a husband, Francis Lee, and no issue. By her will she bequeathed to her sister all the money she had in the Philadelphia Saving Fund for life, with remainder to her niece, and also left specific legacies of jewelry, silverware, and the like.

The amount of the inventory filed was	$362 96
The amount in the Saving Fund was	546 85
Making in all	$909 81

Francis Lee, on May 7, 1874, assigned to the testatrix a policy of insurance upon his life. Francis Lee electing to take against the will under the Act of May 4, 1855 (P. L. 430), claimed one-half of the estate passing under the will, and the whole of the policy of insurance as to which testatrix died intestate.

The Auditing Judge admitted the claim. Exceptions filed by one of the legatees were sustained by the Court in an opinion by PENROSE, J. (see Lee's Estate, 22 WEEKLY NOTES, 45), the Court holding that Lee was not entitled in the aggregate to more than one-half of the entire estate.

The amended adjudication showed that the policy of life insurance was worth $548.88, so that the whole estate was worth $1458.69, one-half of which sum, after deducting costs and

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commissions, was awarded to Francis Lee. The adjudication having been confirmed, Francis Lee took this appeal, assigning for error the decree of the Court.

W. Horace Hepburn, for the appellant.

By the Act of April 11, 1848, sect. 9, the intestate estate of Mrs. Lee vested in her husband absolutely, there being no children or the issue of any living.

Moyer's Appeal, 4 Harris, 407.

The Act of May 4, 1855, did not repeal the Act of April 11, 1848, and it merely provided a mode of distribution in cases of *testacy*.

Dickinson *v.* Dickinson, 61 Pa. St. 404.

A widow is not barred from her thirds in the intestate property of her husband, notwithstanding the fact that she has elected to take under the will.

Reed's Appeal, 1 Norris, 431.
Cramer's Estate, 11 WEEKLY NOTES, 95.

Henry C. Brown, for appellee.

January 28, 1889. THE COURT. The opinion of the learned Judge of the Orphans' Court is so clear and satisfactory that we affirm this decree, for the reasons given by him.

Decree affirmed, and the appeal dismissed at the costs of the appellant.

PER CURIAM. L. L., Jr.

Orphans' Court.

June, 1889.

Eichhorn's Estate.

Decedent's estate—When inventory can be corrected—Evidence—When husband of decedent who is also her executor, is a competent witness on the question of ownership of assets included in the inventory of the estate, but claimed by him.

Sur exceptions to adjudication.

At the audit of the account of the executor of Catharine B. Eichhorn, the accountant, who was the husband of decedent, was called, by the counsel of one of the parties in interest, for the purpose of showing the omission from the account of items with which he was chargeable. The examination was continued by the counsel of the accountant to establish the assertion that moneys in the saving fund included in the inventory belonged to the accountant individually, and not to the decedent or her estate. Objections was made to this, (first) on account of the incompetency of the witness to prove title in himself; (second) because of the insufficiency of the evidence, assuming its competency; and (third) because the accountant was estopped by the inventories and account from asserting ownership in himself; which objections were overruled by the Auditing Judge (PENROSE, J.), and exceptions to this ruling were filed.

Emil Rosenberger and *A. Atwood Grace*, for exceptant, cited—

Malone's Estate, 8 WEEKLY NOTES, 179.
Miller's Appeal, 3 Norris, 391.

Lewis Stover, contra, cited—

Bell's Estate, 1 Casey, 93.
Speakman's Appeal, 21 Smith, 25.
McBride's Appeal, 22 Id. 480.
Mast's Appeal, 4 Wr. 24.
Parvin *v.* Capewell, 9 Id. 89.
McDermott's Appeal, 10 Out. 358.
Leow's Estate, 6 WEEKLY NOTES, 333.

June 29, 1889. THE COURT. If the accountant's testimony as to transactions in the decedent's lifetime was competent, his claim was properly allowed. That he had included among the assets of her estate the amount of a deposit which stood in her name would not prevent him from showing at the audit that the money was his own, held by his wife at his disposal. It was his duty to account for every item of property which on its face belonged to his wife; and it was proper for him, therefore, to refer in some way, in his account, to this deposit. If he placed it erroneously in the inventory he was not estopped from correcting the mistake (Malone's Estate, 8 WEEKLY NOTES, 179; Miller's Appeal, 3 Norris, 391); and as his wife was simply, and with his consent, the custodian of his own money, there was no conflicting title, such as in McBride's Appeal (22 P. F. S. 480) which would shut him out from the jurisdiction of the Orphans' Court (McCarron's Estate, 15 WEEKLY NOTES, 485). The eligibility of the husband as a witness on the question of ownership was not affected by anything in the marriage relationship, his disability to testify against his wife, in matters not the subject of confidential communications, having been removed by her death (Robb's Appeal, 2 Out. 501). He was made competent, in this instance, by the act of the adverse party. That party called him as for cross-examination, and distinctly interrogated him upon matters which must have occurred in the lifetime of the decedent. One of the questions, relating to the fund on deposit at her death, was, "Who put it there?" and another, "Where had it come from?" The effect of this questioning, the Auditing Judge thought, and we agree with him, was to make the witness competent generally. Whether he would have been competent, under section 17, of the Act of June 23, 1887, if the cross-examination had been confined to transactions which happened after the death, we do not think it necessary to determine.

The exceptions are dismissed.

Opinion by ASHMAN, J. W. C. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, SEPT. 27, 1889.* [NO. 22.

Supreme Court.

July '88, 79. February 7, 1889

Williams's Appeal.

Equity—Jurisdiction of Court of—Partition—Vendee on sale in—Right of, to supplemental bill to recover value of articles belonging to the realty taken away by an owner after sale.

When a bill in equity by one tenant in common to compel partition of real estate is so proceeded in that the real estate is sold, the petitioner, as the vendee of such real estate at such sale, has the right to file a supplemental bill alleging that after such sale and before delivery of possession his co-tenant had removed articles belonging to the realty, and praying a decree that the value of the property so removed be paid him out of the proceeds of the sale.

In the above case, it appearing that the proceeds of the sale had been wholly distributed, a decree was entered that the respondent in the supplemental bill should pay to the complainant the value of the goods removed with costs.

In this case, squares, hammers, shovels, etc., articles used in the operation of a slate quarry and factory, were held to be fixtures and passed to the purchaser of the land, quarry, and factory on a sale thereof in a proceeding in partition.

Appeal of David Williams from a decree of the Common Pleas of Lehigh County.

Bill in equity, wherein Henry Fulmer was complainant and David Williams respondent, praying a partition of certain real estate.

Prior to October, 1880, David Williams and Henry W. Harper were the owners, as tenants in common, of a slate quarry and factory and tract of land in Slatington, Lehigh County, Williams owning the undivided two-thirds and Harper the undivided one-third thereof. Williams and Harper organized the firm of David Williams & Company to operate the quarry and they continued operating the same, as a firm, until early in 1880, when under a fi. fa. against Mr. Harper, his interest in all the firm assets, which did not include the real estate, was sold and purchased by David Williams, who then continued to work the quarry and factory in his own behalf. Afterwards on October 4th, 1880, the undivided interest of Harper in the real estate was taken in execution and sold to the First National Bank of Easton, which bank conveyed the same to Henry Fulmer.

On November 30th, 1880, Henry Fulmer filed a bill of equity (which is the bill on which this present proceeding was based) against David Williams for the partition of the said real estate, which bill was so proceeded in that after an appraisement and a refusal by both parties to accept, the property was sold, under an order issued to the Master, on August 3d, 1882, to Henry Fulmer, and about September 11th, 1882, a deed was delivered to him by the Master. Before the Master's sale Williams removed from the premises an iron hoist, and after the sale, but before deed or possession was given, he removed other articles, tools and machinery, claiming that they belonged to him and were not part of the real estate. The articles removed were as follows: Three squares, two hammers, one shovel, one monkey-wrench, two S wrenches, two split chisels, two hand-saws, one compass, two crow-bars, one hoist, two tables, one of them called a cutting bench and the other a polishing bench, one blacksmith's vice, one derrick boom, one trough, one tub, 120 feet of railroad iron, one pump, two slate dressing machines, about 200 feet of wire rope, one marbleizing box, two log chains, and three pipe tongues. After Fulmer had received his deed for the property from the Master, on November 14th, 1882, he filed a supplemental bill in the partition proceedings alleging the removal of these articles by Williams, averring that they were his (Fulmer's) property under the Master's deed and asking for a decree that the value of the property removed should be paid him out of the proceeds of the sale. To this an answer was filed by Williams denying that any of the articles he removed passed by the sale to Fulmer, and also averring that, if it were so, Fulmer had a complete and adequate remedy at law therefor.

The case was referred on this supplemental bill and answer to John Rupp, Esq., as Examiner and Master, who reported that the articles taken were all used in quarrying and dressing the slate, and were fixtures and had passed to Fulmer on the sale of the land; that they were worth $357, or with interest to date of report, $387.70; that all the proceeds of the sale had been distributed. He also found that a Court of Equity had jurisdiction in the matter, and recommended a decree that the said Williams should pay to Fulmer $387.70 with interest from February 6, 1884.

Exceptions to the Master's findings of fact, and his conclusion of law that a Court of Equity had jurisdiction, and to the decree recommended by him, were dismissed by the Court, ALBRIGHT, P. J., and a decree entered March 5, 1888, that Williams should pay to Fulmer $484.61 and costs. Whereupon the said Williams took this appeal

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assigning for error the dismissal of his exceptions, and the decree of the Court as above set forth.

Robert E. Wright (*J. Marshall Wright* with him), for appellant.

Edward Harvey, for appellee.

February 18, 1889. THE COURT. We have no doubt as to the jurisdiction of the Court below. The original bill was a bill for partition. A sale of the real estate in controversy was had under this proceeding and the same was purchased by the appellee. The property in question was a slate quarry. After the sale and before the delivery of the deed by the Master, the appellant removed a portion of the machinery and fixtures upon the property used in the quarrying of the slate and preparing it for the market. As the appellant had not received his share of the purchase-money, the appellee asked that the value of the fixtures so removed should be deducted from it, and this bill was filed for that purpose. It was in the nature of a supplemental bill, a proceeding ever recognized in equity, and which was sustained by this Court in Winton's Appeal (97 Pa. 385). It was there held that a supplemental bill in aid of a final decree in equity, the object of which is to compel the carrying out of the decree, and give full and complete effect to it, will be entertained. Then we have the principle that when once a Court of Equity takes cognizance of a cause of litigation, it will dispose of every subject within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. (McGowin *v.* Remington, 12 Pa. 63; Souder's Appeal, 57 Id. 498; Appeal of the Odd Fellows' Savings Bank, 23 WEEKLY NOTES, 85.)

Upon the merits of the case we are entirely with the learned Master, sustained, as he is, by the Court below. The articles which he has found belonged to the realty, were then visible upon the property at the time of the Master's sale. We must assume they were seen by the purchaser and enhanced the price at which the property was sold. Moreover, they were articles useful and necessary in operating the works, and as between vendor and vendee passed by the sale.

The decree is affirmed and the appeal dismissed at the costs of the appellant.

PER CURIAM. C. K. Z.

Jan. '89, 214. April 4, 1889.

Appeal of Harmony Lodge.

Wills—Testamentary capacity—Incapacity due to intoxication.

On an appeal from a decree of the register of wills admitting to probate a codicil to a will, the appellants alleged mental incapacity on the part of the testator at the time the codicil was executed. In support of this allegation they proved that he had a habit of excessive drinking, and that at or about the time the codicil was executed he was suffering from the effects of over-stimulation. It however appeared that this habit was not continuous, but periodical; that decedent was perfectly aware of his failing, and had upon several occasions voluntarily placed himself in a reformatory institution in order to rid himself of it; the fact of even ordinary intoxication at the time the codicil was executed was not proved. The proponents of the codicil proved that the codicil had been written by a disinterested attorney, at decedent's request, and that it was read over to decedent, who said he was satisfied with it; the subscribing witnesses testified that they thought decedent sound and rational at the time. It further appeared that after the execution of the codicil decedent went to Europe, and attended to business as a rational man; that he understood the purport of the codicil, and had subsequent to its execution expressed his satisfaction with it, and stated its contents and effect to other parties. On the above facts:

Held, that the Orphans' Court properly refused an issue to determine the testator's mental capacity and dismissed the appeal.

Appeal of Harmony Lodge, I. O. O. F., No. 16, etc., from a decree of the Orphans' Court of Philadelphia County, in the matter of the estate of Edmund C. Weisman, deceased.

This was an appeal taken by said Harmony Lodge from a decree of the register of wills, admitting to probate a codicil to the will of said Edmund C. Weisman, deceased, and granting letters testamentary thereon, together with a demand for an issue *devisavit vel non.*

The facts of the case are set forth at length in the opinion of the Court below, HANNA, P. J., dismissing the appeal and refusing the issue, which was as follows:—

"From the testimony in this matter it appears that testator, on June 8, 1885, executed his last will and testament, whereby after providing for the interment of his remains by the Harmony Lodge of Odd Fellows of this city, he bequeathed both specific and pecuniary legacies, among which the sum of $50 to Samuel Wistar, then in his employ for several years, and the sum of $500 to Harmony Lodge in trust to invest for the benefit of inmates of the Odd Fellows' Home. To this lodge he also bequeathed the residue of his estate absolutely. Testator further appointed the presiding officer of the lodge at the time of his decease and Samuel Wistar executors of his will, giving to each the sum of $50, as compensation for their services.

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"But for reasons satisfactory to himself, he subsequently concluded to alter the provisions of his will respecting the bequest to Harmony Lodge; and accordingly, on February 4, 1886, almost eight months after the date of his will, executed a codicil, whereby he revoked the directions for the interment of his body by the lodge, and also the bequest of $50 to Samuel Wistar, and the further sum of $50 to him as commissions as executor, and in lieu thereof bequeathed to him the stock, fixtures, and goodwill of his cigar store. He further revoked the bequest to Harmony Lodge, and the appointment of its presiding officer as one of his executors, and bequeathed the sum of $500, which by his will he had bequeathed to said lodge, to his cousin, William H. Coleman, whom he also appointed an executor, and to be in full compensation for his services as such.

"This codicil was prepared by testator's attorney, to whom several days previously he had given the necessary instructions; and after it had been carefully read to him and compared with his written memoranda, was executed in the presence of his attorney and an employé in his cigar store, as subscribing witnesses. It will be observed that none of the remaining bequests contained in the will were disturbed or revoked.

"Testator was unmarried and without children, his nearest of kin being his father, who is still surviving, and it may be well to remark, although not a legatee either by will or codicil, is not a party contestant. A few weeks after the execution of the codicil testator having long contemplated an ocean voyage prevailed upon his father to accompany him. They sailed together in March, 1886, for Europe, where they remained about two months.

"For some time previous to testator's visit abroad he had complained of failing health, superinduced beyond doubt by the too frequent use of spirituous liquors. For nearly ten years he had wholly abstained, but in the summer of 1885 resumed the habit of excessive tippling. He, however, attended to his business, which had proved lucrative during his years of sobriety, although from about the time mentioned, in the main, it was committed to the management of his trusted employé, Samuel Wistar. The habit, which had become fixed and a species of chronic disease with testator, was deeply deplored by him, and led him to endeavor to escape its thraldom by voluntarily becoming an inmate of that excellent and benevolent institution, the Franklin Reformatory Home, where upon seven separate occasions between July, 1885, and August, 1886, he was admitted for treatment. He remained at the Home periods ranging from three days to two weeks, and strange to say, on each occasion he went to the Home entirely sober, would go out and return sober, transact business while there, and the superintendent testified, 'I never saw him drunk, and we never treated him as a drunken man.' Testator's apparent reason for seeking the retirement, regimen, and discipline of the institution was, if possible, to overcome the terrible appetite for strong drink to which he eventually succumbed. His last visit to the Home was in August, 1886, which unfortunately was of but three days' duration. He then returned to his own residence. The old appetite reasserted its sway, and finally, after an illness of three or four months, the disease, cirrhosis of the liver, from which he suffered, and was produced by his intemperance, culminated in his death on November 2, 1886.

"The validity of the codicil is now denied by Harmony Lodge, and it is asserted it should be set aside upon two grounds, first, that at the time of its execution testator was not of sound and disposing mind and memory; and that second, its execution was produced by undue influence.

"The last reason assigned we will first dispose of. And it will suffice to say, that it was neither urged at the argument nor attempted to be supported by testimony.

"As to the remaining reason, the alleged testamentary incapacity of testator at the date of the execution of the codicil, our conclusion is, after a careful examination of the entire testimony, that not only is the contrary satisfactorily shown, but we would not be justified in imposing upon the parties interested in this small estate the expense and delay incident to a trial by jury, where, upon the vague, meagre, and indefinite testimony presented by the contestants, a verdict against the validity of the codicil should not be permitted to stand.

"The testamentary capacity of the testator at the date of his will is conceded by contestants; but they allege and attempt to prove that on the 4th day of February, 1886, the date of the codicil, he was so stupefied from the use of alcoholic stimulants as to be unable to comprehend the testamentary act, and incapable of an intelligent disposition of his estate.

"But from the testimony produced by the contestants, it is shown that testator, a day or two prior to the date named, sent for his lawyer, who, when he called at testator's residence, had an interview with him alone; and, as appears from the testimony of the attorney subsequently, this was the occasion he received instructions from the testator for the preparation of the codicil, and was handed the memoranda therefor written by him.

"Contestants also show that testator attended to some of the details of his business immediately prior to the execution of the codicil, although at its date he was confined to his room

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from illness, and gave to it personal supervision prior to the date of the codicil. That testator, prior to February 4, 1886, had been drinking intoxicating liquor immoderately is clear, from the testimony of the physician (Dr. Strittmatter), who was called to attend him on that date. He testifies that when he saw the testator, 'he was very nervous, weak, and suffering from mental and physical prostration at the time; it was attributed to over-stimulation; there were times when he could be able to make or alter a will during the time I saw him, and there were times when he was too incoherent to do so, that is, to make or alter a will.' In reply to the question, 'Was he drunk or sober when you saw him on February 4th, 1886?' the witness said, 'It would be impossible for me to say yes or no, as I saw him then for the first time; but he was troubled with delusions and saw figures on the wall, and spoke of having seen them during the night and heard voices.'

"This witness further testified that in his opinion testator did not, at the time of his visit, possess a sound mind, memory, and understanding, from the incoherency of his conversation, his nervousness, and suffering from over-stimulation, but such a person may afterwards be of a sound mind, memory, and understanding; that testator held his hands to his head, complained of noises and confusion he had heard during the night in his head, and 'was crying at the time he was making these remarks to me;' that while in his opinion testator was not suffering from incipient mania a potu, the direct result of over-stimulation as ordinarily seen in drunkenness, yet he had evidently been drinking a number of days before he saw him, and was in that condition of mania a potu produced by a withdrawal of stimulants after over-stimulation. And consequently he considered it imprudent to withhold all liquor from him, and directed his attendant to allow him a certain quantity at stated intervals. So far as appears from the testimony, this witness, who is produced as the attending physician and expert, made but a single professional visit to the testator of less than one hour's duration, which happened to be upon the day the codicil was executed; and he does not venture to say that testator was intoxicated or so stupefied from the use of liquor as to be mentally incapable of a testamentary act.

"But two other witnesses were produced by the contestants. One, a nurse or attendant upon testator (Elizabeth Lee), who at his request performed such services for him from February 1 for a period of six days, and was at testator's house in a room adjoining that occupied by him at the execution of the codicil, saw the attorney and the other attesting witness, and after their departure was informed by testator he had changed his will by giving the $500 he had intended for the old men at the Home to his cousin; and this same witness admitted that testator, while he did not then inform her he had also bequeathed his store and business to Samuel Wistar, yet on a previous occasion, after the execution of his will, he stated to her that such was his intention. And during the last illness of testator he caused the will and codicil to be taken from the box in which he placed them in safe keeping, and read to her in his presence by a friend of the witness, but who was not produced to testify. This witness, while she describes the repeated efforts of testator to obtain liquor, his frequent drinking by day and night, his manner during the single interview with the physician as related by the latter, yet does not undertake to say that at the execution of the codicil of which she was practically a witness and herself a legatee in the will, he was intoxicated, or so much under the influence of liquor that he was unconscious of the testamentary act he then performed, and incapable of intelligently disposing of his estate.

"The testimony of the remaining witness for contestants has but little if any bearing upon the question, and it is extremely uncertain whether the incidents related by her occurred prior or subsequent to the execution of the codicil.

"We have thus fully referred to the contestant's case to show that while Harmony Lodge is doubtless disappointed by the failure of testator to bequeath it the legacies he primarily contemplated, yet his undoubted right to dispose of his property as he deemed best, must be respected and maintained, as much in his ultimate as in his prior disposition of it, and such disposition cannot be interfered with nor frustrated, except upon clear and satisfactory proof of mental incapacity at the time of revocation of his previous testamentary act, or that his power of will was under the subjection and improper influence of another, so that in reality the codicil was the will of the latter, and not of the testator.

"The testimony on the part of the contestants, while it shows the testator to have been addicted to the immoderate use of intoxicating liquors, yet he was not a sot, reeling and staggering before the public gaze. He was conscious of his infirmity, which grew to be a disease, and, as he finally realized, unconquerable. He sought, by retirement to the Franklin Home, to overcome the appetite he knew would prove his ruin, but would emerge and relapse into his former habit. And at the date of execution of the codicil he was seeking recovery from the prostration produced by abstaining from proper food and the excessive use of stimulants. Yet the evidence is indisputable that at the same time he was successful in business, and gave personal supervision to his store and over his employés. And such was

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his concealment of his intemperance that his father, those with whom he had business dealings, and even the officials of the Franklin Home, were either in total ignorance of his habit or of its extent. That at the time of the execution of the codicil, testator, although suffering as stated, was rational, and fully comprehended the nature and character of the testamentary paper, we think there can be no question, and this is shown by the testimony of the principal witness for the contestants, by his declaration to her immediately after the codicil was executed. And that testator fully comprehended his surroundings, and his condition is further evident from his retiring again to the Franklin Home the second day after the date of the codicil, where he remained two weeks, and soon afterwards he, with his father, visiting Europe, as already stated.

"We have not referred at length to the testimony on the part of the proponents, as it is unnecessary. But it may be said that while some of the witnesses recognized the intemperate habits of testator, others with whom he had business transactions were not aware of it. Both the counsel who prepared the codicil and the other subscribing witness are clear and convincing upon the entire testamentary capacity of the testator at the time of its execution; and, with the superintendent of the Franklin Home, all unite in their testimony that he was possessed of unusual business qualifications, determined will, generous impulses, and benevolent disposition. So that it is not a matter of surprise, that he, unmarried and childless, should conclude to carry out his previously expressed intention of rewarding his faithful employé, and upon the eve of his departure execute the codicil bequeathing him his store, good-will, etc.; and preferring his cousin to the lodge of which he was a member, bequeathing him the legacy he had before intended for the lodge.

"It is with pleasure we commend the industry and ability shown by the counsel for the contestants, who has presented the case for our consideration, but, notwithstanding the earnestness evinced by her, for the reasons stated, we must dismiss the appeal, and refuse the issue; the costs to be paid by the contestants."

Thereupon the said Harmony Lodge took this appeal, assigning as error, *inter alia*, the dismissal of the appeal and refusal of the issue.

Mrs. Carrie B. Kilgore (*Damon Y. Kilgore* with her), for the appellant.

George L. Crawford (*George M. Dallas* with him), for the appellees.

June 28, 1889. THE COURT. A most patient and careful reading of all the testimony in this case impels us to say that there is absolutely no evidence whatever upon which it would be at all possible to sustain a verdict adverse to the will in question. We concur fully with all that is said in the opinion of the learned Court below, and affirm the decree for the reasons there stated. There are really no facts in proof which show or even tend to show a condition of mental unsoundness at the execution of the codicil. The only opinion expressed that is worth a moment's consideration is that of Dr. Strittmatter, and he was unable to say whether the testator was drunk or sober or had incipient symptoms of mania a potu at the time he saw him. The testator was suffering from the effects of over-stimulation, and exhibited some, though not by any means the worst, of the symptoms of that condition. The doctor says: "He was very nervous, weak, and suffering from mental and physical prostration; at the time it was attributed to over-stimulation." He adds, "there were times when he would be able to make or alter a will during the time I saw him, and there were times when he was too incoherent to do so, that is, to make or alter a will." The whole of the testimony of this witness shows a condition of mind and body constantly seen in persons who have been taking alcohol in excess, but he does not state a single fact which exhibits in any degree a condition of mental unsoundness indicating an inability to comprehend the nature and character of the testamentary act or of its exercise in the instance in question. So far from this being the case, the contestant's chief witness, Elizabeth Lee, testified that the testator told her immediately after the codicil was executed, that he had changed the will, and "had taken away five hundred dollars from the old men at the Home and had given it to Billy Coleman."

As this was precisely what he had done, this testimony is proof conclusive that the testator was thoroughly acquainted with the contents of the codicil, that he knew the objects and extent of his bounty both in the will and codicil, and the exact change which the latter made in the former.

The testimony of the two women, the only other witnesses for the contestants who expressed opinions, is of the most inconsequent and frivolous character, unsupported by any facts tending to show actual unsoundness of mind. If we regard the testimony of the proponents, it is simply overwhelming. The codicil was written by an attorney entirely disinterested, and solely at the dictation of the testator, who subsequently read it over, and said he was satisfied, and then executed it in the presence of two subscribing witnesses, both of whom testified that he was perfectly sound and rational at the time. A number of other witnesses who had known him long and intimately, testified that he was a man of unusual force of mind, and entirely sound at

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all times. The testator went to Europe, after the codicil was executed, with his father, and was gone several months, attended to business when at home, and in all respects conducted himself as a rational man. He was given to the bad habit of excessive drinking at times, but knew his failing well, and voluntarily went to a Home for inebriates a number of times in order to avoid indulgence. Those who knew him best, both at the Home and in his business, and who were entirely impartial and disinterested, most emphatically pronounced him of perfectly sound mind at all times.

When it is considered that the only allegation against his mental soundness was his habit of excessive drinking, that this was not continuous, but periodical, that the fact of even ordinary intoxication at the time the codicil was executed is not proved, and that it is proved without contradiction that the codicil was dictated by himself and perfectly well understood by him both at the time of execution and after, it would be an act of judicial unwisdom to subject the parties to the cost and vexation of a trial that could have but one result, and that prejudicial to the appellant. We are most clearly of opinion that the issue was properly refused by the Court below.

Decree affirmed and appeal dismissed at the costs of the appellant.

Opinion by GREEN, J. C. K. Z.

July '88, 141, 145. January 18, 1889.

Harris's Appeal.
Harris v. Sheldon et ux.

Writs of error—Appeals—Referees—Act of June 16, 1836—Execution—Ca. sa.

An appeal does not lie from the action of the Court dismissing exceptions to the report of a referee under the Act of June 16, 1836 (P. L. 717). A writ of error alone will lie in such case.

Where a trustee is surcharged with the principal of a ground-rent, the title whereof is in his *cestui que trust*, it is the duty of the Court to see that the ground-rent is properly conveyed to the trustee.

When a judgment is entered against a trustee for trust money in his hands, a ca. sa. may be issued thereon against the said trustee.

Where there is nothing on the record to show that the issuing of an execution is irregular, the refusal of the Court to set it aside is not a subject of review on writ of error.

Error to the Common Pleas No. 1, of Philadelphia County. Appeal of Henry G. Harris from a judgment of the same Court dismissing his exceptions to the report of a referee under the Act of June 16, 1836.

Account render by John M. Sheldon, and Mary C. his wife, in right of said wife, against Henry G. Harris, trustee for said Mary C. Sheldon. An account of Henry G. Harris, as trustee for Mary C. Sheldon, was on file. The two were consolidated, and referred to George Junkin, Esq., as referee, under the Act of June 16, 1836. On November 7, 1887, the referee filed his report, awarding to Mary C. Sheldon the sum of $2081.56. Exceptions filed by Harris to the report were dismissed by the Court, and judgment entered thereon. A ca. sa. was then issued against Harris, and a rule taken by him to quash the same discharged.

Harris thereupon took this appeal, assigning for error the dismissal of the exceptions to the referee's report. He also took a writ of error, assigning for error the discharging of the rule to quash the ca. sa.

In the Supreme Court, a rule obtained by the appellee to quash the appeal was made absolute, but the Court permitted the assignments of error in the appeal to be transferred to the writ of error.

Henry G. Harris, for the plaintiff in error.
Joseph A. Abrams, for the defendant in error.

January 28, 1889. THE COURT. This was an action of account render in the Court below, and was brought by Sheldon and wife against Henry G. Harris, trustee. There was also pending in the same Court an account filed by Harris as trustee of Sheldon and wife. This account appears to have been consolidated with the action of account render, and the whole matter was referred to George Junkin, Esq., as referee, under the Act of 1836. The referee awarded to Mary C. Sheldon the sum of $2081.56. Numerous exceptions were filed, which were dismissed. A ca. sa. was then issued in the Court below against Harris, and a rule taken by him to quash said writ, which rule, the Court below, after a hearing, discharged. A writ of error was then taken by Harris in the action of account render, and the single error assigned, that the Court erred in refusing to quash the ca. sa. At the same time an appeal was taken from the award of the referee, and upon that appeal numerous assignments of error were filed. We quashed the appeal when this case was reached, for the reason that no appeal lies under the circumstances, but we allowed the errors assigned in the appeal to be filed on the writ of error. We have thus the case consolidated here, and are enabled to dispose of all the questions in it. The thirteen assignments transferred from the appeal to the writ of error might be dismissed with the remark that they are not in compliance with the rule of Court, and therefore not entitled to be considered. As, however, there seems to

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have been an attempt at compliance, and the substance at least of most of the exceptions below is stated in the assignments, we have considered them with as much care as if properly assigned. We are unable to see any substantial error. On the contrary, the referee has, in our opinion, done full justice to the plaintiff. It is proper to say, however, referring to the eleventh assignment, that inasmuch as the trustee has been surcharged with the principal of the ground-rent ($750), while the title thereto is in Mrs. Sheldon, we think it the duty of the Court below to see that this ground-rent is properly reconveyed to the trustee.

There is nothing upon the face of the ca. sa. to show irregularity. It was said by LEWIS, C. J., in Neil v. Tate (27 Pa. 208): "Where there is nothing on the record to show that an execution is irregular, the refusal of the Court of Common Pleas to set it aside is not the subject of review on writ of error. This has been repeatedly decided." The record shows that the judgment or decree upon which the ca. sa. was issued was for trust money in the hands of a trustee. That this form of execution may be issued under such circumstances is too obvious to require discussion.

Judgment affirmed.

PER CURIAM.

February 18, 1889. Re-argument refused.

L. L., Jr.

Jan. '88, 210. February 12, 1889.

Kennedy v. Pennsylvania Railroad Co.

Railroad companies — Negligence — Train of gravel cars pushed by locomotive—Railroad employés—Risk of employment.

An employé of a railroad company assumes the risk of his employment, and when the railroad company in straightening its track had been for over a year running a train of gravel cars about six times a day over the portion of its track where an employé worked as a trackman, and had been accustomed to run the train with the engine in the rear pushing the cars, and the employé had been in the company's employ several weeks, and had lived in that locality during all the time that the company had run this gravel train, it must be presumed that the employé knew that the company ran that train and in that manner, and that he assumed the risk of being struck by said train as part of the risk of his employment, and therefore on his being struck by said train and killed, his widow cannot recover damages for his death.

Error to the Common Pleas of Chester County.

Case, by Mary Kennedy against the Pennsylvania Railroad Company to recover damages for the killing of the plaintiff's husband by the alleged negligent running of a train of cars on defendant's railroad.

On the trial the plaintiff's witnesses testified that the decedent was in the employ of the Pennsylvania R. R. Co. in October, 1884, for one month as a trackman at or near the town of Atglen. He had lived at Atglen for two years alongside of the railroad, and during the winter of 1884 worked for the farmers in the neighborhood until the following May, when he went back to the service of the railroad company, and was again employed by them as a trackman from May 4, 1885, until his death, June 22, 1885. He was killed by a train of gravel cars. For over a year previous to the accident the defendant company had, in straightening its track, been running this train of gravel cars, making six trips daily over the section on which the decedent worked, and during all that time the engine was attached to the rear of the train and pushed it. It was so run on the day that decedent was killed, he and two other employés being struck by the train while engaged at their work. There was evidence that this gravel train usually contained nine or ten cars, was about 340 feet in length, ran irregularly, and very quietly.

The plaintiff offered to prove by two witnesses familiar with the locality and the running of defendant's train, that it was dangerous to run the train with the cars pushed in front of the engine, and that it was dangerous to the men employed as track hands at that particular point. Evidence objected to. Objection sustained and evidence rejected. Exception. (First and second assignments of error.)

At the conclusion of plaintiff's testimony the Court below granted a nonsuit which the Court in banc refused to take off. Whereupon the plaintiff took this writ, assigning for error the rejection of the above evidence, and the refusal to take off the judgment of nonsuit.

R. Jones Monaghan (*Alfred P. Reid* and *J. Frank E. Hause* with him), for plaintiff in error.

John J. Pinkerton, for defendant in error.

February 25, 1889. THE COURT. It was not error to reject the offer of evidence contained in the first and second specifications. If we concede that it was dangerous to run a train of gravel cars by pushing them with the locomotive at the place in question, it was a danger well known to the deceased. He had been in the employ of the company for some time, and was working at the spot where the accident occurred. He had seen several trains daily passing and repassing in this manner. When he entered upon his employment he took the risk of that employment. The danger of being run down by one of these

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gravel trains whilst at his work was constantly before him, and there is no room for an allegation that he did not know it. No elaboration could make this any clearer and authorities upon a principle of law so well settled are not needed.

Judgment affirmed.

PER CURIAM. C. K. Z.

Common Pleas.

C. P. of Montgomery Co. May, 1889.

Florey v. Haverford College.

Mechanic's lien—Amendments—Act of June 11, 1879 (P. L. 122)—Construction of—Apportionment of lien—Under above Act an amendment to a mechanic's lien may be allowed at any stage of the proceeding, when it is conducive to justice and a fair trial upon the merits—An apportionment of a lien, otherwise valid, is such an amendment—It is not necessary to allege in the bill of particulars that the materials were furnished upon the credit of the building, where they have actually entered into its construction—Hommel v. *Lewis (8 Out. 465) followed.*

Sur motions to amend and strike off a mechanic's lien, filed by James Florey against a double stone house on College Avenue, Lower Merion, naming the corporation of Haverford College owner, and Wm. H. Brunner, contractor.

The lien was filed September 19, 1888, in due time, and was not apportioned. The building was one of several known as a "duplex cottage," consisting of two distinct dwelling houses under one roof. The title to the property at the time of filing the lien was, and still is in the corporation of Haverford College. There are no liens against the property other than mechanics' liens and no known equities have arisen subsequent to the filing of the lien. An attachment execution on a judgment against the contractor was served on the corporation of Haverford College in July, 1888.

On February 20, 1889, more than six months after the material was furnished, the plaintiff took a rule upon the defendant to amend the lien by adding an apportionment.

Subsequently the defendant moved to strike off the lien. These motions were argued together.

Henry Pleasants, Jr., for plaintiff.

This amendment is allowable under the Act of June 11, 1879, § 2 (P. L. 122; Purd. Dig 1168, pl. 52).

Fahnestock *v.* Wilson, 9 WEEKLY NOTES, 385.
Snyder Chapel *v.* Baer, 3 Penny. 535.

The fact that the ownership of the property against which the lien was filed has remained unaltered, and that there are no known equities arising subsequent to the filing of the lien, indicates how entirely free is this case from the provisos of the Act of June 11, 1879.

George Vaux and *Neville D. Tyson*, for defendant.

Failure to apportion the claim in a mechanic's lien is a fatal defect, for which the Court will strike off the lien.

Mersereau *v.* Kohler, 2 Pearson, 119.
Boas *v.* Birmingham, Id. 334.

The bill of particulars does not allege that the materials were furnished to the building described in the lien. So far as appears, they might have been furnished for any other building being erected by the same contractor.

June 3, 1889. THE COURT. This lien was filed September 19, 1888, against a double stone house. More than six months thereafter it was discovered that it should have been described against the structure as two houses. The claimant moves to amend his lien by adding the proper description, and apportioning his claim under the Act of June 11, 1879 (P. L. 122), which provides, "That in case of any mechanic's claim or lien filed according to existing laws in any county of this Commonwealth, the Court having jurisdiction in such case is hereby authorized and required in any stage of the proceedings to permit amendments conducive to justice and a fair trial upon the merits," etc.

We have here a lien regularly filed and something to amend by. It was a mistake arising from the peculiar construction of the building. We think this is a case contemplated by the Act as necessary to a fair trial upon the merits and conducive to justice. Its effect as against other creditors cannot now be considered. The case of Knox *v.* Hilty (3 Crum. 430; 20 WEEKLY NOTES, 524) does not apply. That was an attempt to introduce a new party after the expiration of the statutory period for filing the lien. Here we have only a proceeding to reform a lien filed in due time. This disposes of the exceptions to the lien, except the fourth, which is ruled by Hommel *v.* Lewis (8 Out. 465).

And now, June 3, 1889, motion to strike off lien is overruled, and motion to amend allowed by adding a proper description of the structure as two adjoining buildings and apportioning the lien.

Opinion by WEAND, J. S. H. T.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, OCT. 4, 1889.* [No. 23.

Supreme Court.

Jan. '89, 366. May 1, 1889.

Commissioners of Erie County v. Commonwealth.

Bridges—Duty of building and repairing as between counties and townships—Method of procedure—Acts of June 13, 1836, April 13, 1843, April 6, 1854, and May 5, 1876.

At common law it is the duty of the township officers to keep in repair the highways between its boundaries; the Act of June 13, 1836, provides, however, that the counties shall build bridges where the expense is too great for the township.

Method of proceeding under the Act of 1836 discussed.

The Act of April 13, 1843, imposed the duty of repairing bridges upon the county, but certain counties, including Erie, were afterwards excepted from the operation of this Act.

The Act of 1843 does not authorize the rebuilding of the bridge, for which purpose proceedings under the Act of 1836 were necessary, and in order to overcome the delay involved in such proceeding, the Act of May 5, 1876, was passed, which provided that where a county bridge has been "blown down, destroyed or partially destroyed, or swept away by floods," etc., it should be the duty of the county to rebuild the same, subject, however, to inspection in the same manner as an original construction.

Township officers petitioned the Court for a mandamus to compel the commissioners of Erie County to repair a county bridge, setting forth that the bridge had been constructed by the county in 1836, its maintenance since then by the township; that it had been partly destroyed by floods, ice, etc., and the refusal of the county to repair the same, although so requested:

Held, that this was not a proceeding under the Act of 1876, but simply a demand on the county to make repairs which it was the duty of the township to make. If the bridge is so dilapidated as to necessitate rebuilding, under the Act of 1876, a mandamus may yet issue, or if a new bridge is necessary, the township may resort to the Act of 1836. But if, as it appears, the question is only one of ordinary repairs, this duty falls upon the township.

Error to the Common Pleas of Erie County.

This was a petition by road commissioners of Le Bœuff Township for a mandamus to compel the commissioners of Erie County to repair a bridge over French Creek in Le Bœuff Township.

The petition set forth the construction of the bridge by the county in 1836, and that the same had since been maintained by the township; that the bridge had been partly destroyed by floods, ice, etc., and that the commissioners of the county had been requested to rebuild and reconstruct the bridge, so as to make the same safe for public travel, but that the said county commissioners had refused to do this.

The county commissioners filed an answer denying that the bridge had been partially destroyed by floods, ice, etc., and alleged that only slight repairs were necessary, which it was the duty of the township officers to make.

The case was tried before GUNNISON, P. J., without a jury.

Counsel for plaintiffs presented the following point:—

"The Court is respectfully requested to find as a matter of law, that if the bridge in question is a county bridge, it was and is the duty of the county commissioners to keep the said bridge in safe condition and good repair, at the expense of the county of Erie." *Answer*. "Having found the bridge to be a county bridge and built under the Act of 1802, the point is affirmed." (First assignment of error.)

The Court filed the following opinion:—

"The testimony disclosed the following material facts:—

"Upon the petition of a number of the inhabitants of Le Bœuff Township, representing that a bridge was much needed over French Creek in said township, where the public highway from Waterford to Union Mills crossed said creek, and that the erection of said bridge would require more expense than it was reasonable the said township should bear, the Court of Quarter Sessions, on May 5, 1836, ordered a view, under the provisions of section 21, of the Act of April 6, 1802, which provided the manner of establishing and erecting county bridges.

"No record of the report of the viewers then appointed, or of the action of the Court of Quarter Sessions, grand jury, or county commissioners thereon, can be found. But that, upon the report of the viewers, it appeared to the Court, grand jury, and commissioners that such bridge was necessary, and would be too expensive for the township to erect; and that it was thereupon established as a county bridge, appears from the subsequent records and papers which were offered in evidence. By them it appears that on December 28, 1836, the county commissioners contracted with William Boardman and Calvin Avery to erect the bridge for $870. On the 17th day of October, 1837, the commissioners presented their petition to the Court of Quarter Sessions, setting forth the prior proceedings, and that the bridge had been completed agreeably to the contract, and praying for the appointment of six fit persons to inspect the said bridge, etc. Whereupon the Court appointed six fit persons as prayed

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for, five of whom reported November 6, 1837, that they had inspected the bridge and the workmanship thereof; that it had been built and finished according to the agreement, and was a permanent and substantial structure. It must be taken therefore as proved that the bridge was a county bridge.

"The testimony as to the present condition of the bridge is somewhat conflicting. But from it all I find that the abutments of the bridge, especially the east one, are in a dangerous condition. This condition is partly the result of natural wear and tear, and partly the result of the action of the water and the floods and ice; that they have become partially undermined by the current of the stream, the bed of which has become lower, exposing the wood foundation under the stone abutments at low stages of water to the action of the atmosphere, causing it to become decayed to such an extent as to cause the settling of the abutments This settling has been gradual for a few years past, and the abutments are now, partly in consequence of the settling and partly from the action of the frost, floods, and ice, cracked, bulged out towards the stream, with some of the stone washed out, and in need of thorough repairs. I cannot find, however, that the particular damage done by floods and ice amounts to the destruction, partial destruction, or blowing down of the bridge, within the meaning of the Act of 1876. Floods and ice contributed, with the other causes I have named, to gradually affect the abutments and render the repairs necessary.

OPINION.

"Having found as a matter of fact that the damage to the bridge caused by floods and ice did not amount to such destruction or partial destruction as is contemplated by the Act of 1876, requiring in certain cases the county to reconstruct or rebuild county bridges, it follows that the provisions of that Act do not apply to this case.

"The question then is, is there any liability imposed upon the county to repair, aside from that imposed by that Act?

"By the Act of April 13, 1843, P. L. 221, it was enacted 'that, from and after the passage of this Act, it shall be the duty of the county commissioners of the several counties of this Commonwealth to repair all bridges erected by the county, and to pay such expenses out of the treasury in the usual manner,' excepting as to certain counties named. By the Act of April 6th, 1854, P. L. 295, the exemption of the counties mentioned in the Act of 1843 from liability to repair county bridges was extended to the county of Erie. Each of these Acts is entitled: 'An Act supplementary to an Act entitled "an Act relating to roads, highways and bridges,"' which is the title of the Act of June 13th, 1836.

"The Supreme Court in construing an Act repealing the Act of 1843 so far as it extended to Crawford County in Howe *v.* Commissioners of Crawford County (47 Pa. St. 361), held that the Act of 1843 imposed upon the county the duty of repairing only such bridges as were erected under the Act of 1836, to which it was a supplement; that the repeal of that Act as to Crawford County relieved it from the duty of repairing such bridges only; that the bridge in question in that case having been built in 1820, under the provisions of the Act of 1802, the duty of repairing it was imposed upon the county by the judicial proceedings of 1820, by which it was established as a county bridge, 'and it was a continuing duty the repeal of the Act of 1843 in nowise affected.'

"It was strenuously argued by the counsel for the defendants, upon the authority of Commonwealth *v.* Monroe County (2 W. & S. 495), in which the Supreme Court held that 'when a county bridge has been once legally built, such ordinary repairs as are necessary to preserve it fit for use are to be made by the supervisors of the township, as in the case of roads,' and expressly concurred in the opinion of the Court below 'that the county only erects bridges when the township is unable to do it, and in no case repairs bridges after they are erected;' that the county is not liable for any repair to any county bridge excepting such as are within the meaning of the Act of 1876.

"If the decison in Howe *v.* Commissioners of Crawford County had not been since rendered I would be inclined to agree with this construction. But as I understand that case, which is a later utterance of the Supreme Court upon the question, [the liability here depends upon whether this bridge was originally erected under the Act of 1802 or the Act of 1836.

"If under the former, the county is liable. If under the latter, it is not liable.]

"In the case of Howe *v.* Commissioners of Crawford County, the bridge was clearly erected under the Act of 1802. In this the proceedings were begun prior to the passage of the Act of 1836, and completed after it went into effect, which was September 1, 1836. The order for the original view was made May 5, 1836. There is a hiatus in the record from that date until October 17, 1837, when on the petition of the county commissioners six fit persons were appointed to inspect the bridge and workmanship thereof and make report, etc. There is no record of the report of the viewers appointed May 5, 1836, nor of the action of the Court, grand jury, and commissioners thereon. In the absence

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of such record, it must be presumed that the proceedings were regular and timely: *omnia præsumuntur rite esse acta.*

"In due course the report should have been made to the next term of the Court following the appointment of viewers, and the action of the Court, grand jury, and commissioners thereon taken at the same time. The next term began on the first Monday in August, 1836, which was prior to the time prescribed for the Act of 1836, to take effect. If the report of viewers was then made and it then appeared to the Court, grand jury, and commissioners that such bridge was necessary, and would be too expensive for the township to erect, the Act provided that it should be entered on record; and its character as a county bridge then became established.

"The proceedings in 1837 were supplementary to the fixing of this character upon it. That such was the action is apparent from the subsequent proceedings, although the record of it is missing. That it was had at that time, before the Act of 1836 took effect, must be presumed.

"It may well be questioned whether if the report of the viewers, with the finding upon it, was had after Sept. 1, 1836, the proceedings would not be considered as under the Act of 1802, the original view having been ordered under that Act. The repealing clause of the Act of 1836 is as follows: 'All laws hereby altered or supplied so far as are inconsistent with this Act are hereby repealed.' But the Act of 1802 was not inconsistent with the Act of 1836 in respect of the proceedings to be taken in constructing county bridges.

"In opening roads there was a change in the manner prescribed; but in respect to county bridges the provisions in the two Acts were substantially identical, so that the Act of 1802 was not expressly repealed in that respect, nor was it by implication. 'When a late statute is repugnant to a former one only in part, it repeals the former one only so far as the repugnancy extends, and leaves all the remainder in force.' (*In re* Contested Election of Barber, 86 Pa. St. 392; see also Erie *v.* Bootz, 72 Pa. St. 196; The Hickory Tree Road, 43 Pa. St. 139; Spring Garden Road, 43 Pa. St. 144; Uwchlan Township Road, 30 Pa. St. 156.)

["Being of the opinion that the bridge was established as a county bridge under the Act of 1802, it follows under the authority of Howe *v.* Commissioners of Crawford County, that the duty of repairing it devolves on the county of Erie.]

"As to the extent of the repair necessary the testimony is conflicting. Whether the abutments should be taken down and rebuilt, or whether they can be made safe without rebuilding is not clear. It seems to me better that the commissioners should exercise their discretion after a thorough examination, than that they be explicitly directed by mandamus to rebuild them as is prayed by the plaintiff in its petition.

DECREE.

"And now Aug. 6, 1888, I find for the plaintiff and against the defendants. The prothonotary is directed to give notice of this finding to the parties or their attorneys, and if no exceptions are filed hereto within 30 days after service of such notice let judgment be entered by the prothonotary hereon, that a peremptory mandamus be awarded against the county commissioners of Erie County, commanding them to repair the bridge in the plaintiff's petition mentioned."

The defendants filed several exceptions to the action of the Court, which were dismissed.

Defendants then took this writ, specifying for error (1) the answer to plaintiffs' point, (2 and 3) the portions of the opinion in brackets, and (4) the dismissal of their exceptions.

Clark Olds, for plaintiffs in error.

Theodore A. Lamb (*J. W. Sproul* with him), for defendants in error.

June 4, 1889. THE COURT. The duty to make repairs in a highway rests, at common law, on the town, or other subdivision of the State, on which the duty of opening and making the highway rests. The local road officers represent the district for which they are chosen, and must discharge the duty of opening and repairing the highways within it. Until the law making power intervenes and separates the duty to open from that to repair, and imposes each upon different bodies or officers, the duty is one and rests on the officers of the township in which the road lies. It will sometimes happen, however, that the line of a road crosses a river or other considerable stream of water, and that the expense of carrying the road across the water by a bridge is greater than the township is able to bear. In that case the law provides that the county shall come to the aid of the township and build the bridge. The Act of 13 June, 1836, regulates the manner in which this may be done.

The facts must be made known to the Court of Quarter Sessions of the proper county by a petition. Viewers are then appointed by the Court to examine into and report the facts stated in the petition. The report of the viewers must be submitted to the grand jury for its approval. If this is obtained the Court and the county commissioners must also concur before the expenditure of one dollar by the county is permissible. If the bridge is finally determined upon, an estimate of the cost must be made and the building of the bridge may then be entered upon. After

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it is completed it must be inspected by another view to be appointed by the Court of Quarter Sessions, and if they report to the Court that the work has been properly done, the money may be safely paid out of the county treasury. The object of this legislation is to relieve the township by imposing a part of its duty on the county and paying the costs of discharging that duty out of the funds of the county which otherwise would not be applicable to such a purpose. But the law does not make provision for its care after its erection. That duty remains on the township, and the finished bridge when opened for travel becomes a part of the highway and passes as such under the care of the township officers. The county has no road officers. Its duty is simply to build, when the township cannot, the bridge; and that duty done, it has no further responsibility.

Such was the law in Pennsylvania until the Act of 1843, as was clearly shown in Comm. *v.* The Com'rs of Monroe County (2 W. & S. 495). By the Act of 1843 the duty of repairing county bridges was placed upon the county, but by the terms of the proviso and by subsequent Acts about one-half of the counties of the State were excepted from its provisions. The county of Erie was taken from under its operation by the Act of April 6, 1854, and has since been under the rule that prevailed before the Act of 1843 was passed.

If this was not so it is evident that the effect of the Act of 1843 was confined to repairs in the ordinary sense of that word and could not authorize a rebuilding of the superstructure at the discretion of the county commissioners. This would still require all the formal prerequisites provided by the Act of 1836, the petition, view, report, and the action of grand jury, Court, and county commissioners. The delay involved was sometimes found to work great inconvenience, and to relieve against it the Act of May 5, 1876, was passed. It provided that in all cases where a county bridge has been "blown down, destroyed, or partially destroyed, or swept away by floods, freshets, ice, storm, fire, or other casualty," it should be the duty of the county commissioners to rebuild the bridge so blown down, destroyed, or swept away, subject, however, to inspection in the same manner as an original construction. But as the county of Erie is not under the Act of 1843 it is not necessary to inquire particularly into its effects nor to determine the relative duties of county and township under it. This proceeding is not under the Act of 1876, nor is it alleged that this bridge has been blown down or destroyed by casualty. It is a question over the duty to make repairs under the Act of 1836, and we are clearly of opinion that the duty rests on the township and not on the county. The case of Howe *v.* The Com'rs of Crawford County (47 Pa. 361), on the authority of which the learned Judge of the Court below ruled this case, is in conflict with The Commonwealth *v.* Commissioners of Monroe County (*supra*), and with the rule now laid down. If the condition of the bridge is such as to justify its rebuilding under the Act of 1876 it is possible that a mandamus may yet issue. If it is not, but its dilapidation is such that a new bridge is necessary, it will be necessary to resort to a proceeding under the Act of 1836. If, however, it is as we understand it to be a question of ordinary repairs, the township is bound to make them in the county of Erie, and this petition should be dismissed.

The decree made in this case is set aside, and the record remitted for such further proceedings as may be necessary under the foregoing opinion.

Opinion by WILLIAMS, J. W. M. S., Jr.

Jan. '89, 13. January 28, 1889.

Poole & Hunt v. Union Pass. R'y Co.

Mechanic's lien—Contractors—Credit of building—Evidence.

A railway company contracted with A. to furnish and put up machinery in a building to run traction cars. A. contracted with B. to furnish part of the machinery, which was delivered by B. to A. at a point in Maryland, and afterwards placed by A. in the building. B. did not know the exact location of the building. Various alterations and additions were at the same time made to the building by workmen employed and paid by the railway company. A mechanic's lien for the machinery furnished having been subsequently filed by B. against the building, the railway company denied that A. was a contractor to alter and to add to the building, and claimed that the machinery was furnished by B. to A. on A.'s credit alone. The Court left to the jury under the above facts the questions whether A. was the contractor and whether the machinery was furnished by B. on the credit of the building, instructing them that if the machinery were not furnished upon the credit of the building, though used in it, the lien could not be maintained. The jury found for the defendant. On writ of error:

Held, that under the circumstances, the instruction was proper.

Error to the Common Pleas No. 4, of Philadelphia County.

Scire facias sur mechanic's lien filed by Poole & Hunt against the Union Passenger Railway Company, owners, and Malster & Reaney, contractors. The lien was filed for certain parts of the machinery in the engine-house of the railway company defendant, on Columbia Avenue near Twenty-third Street, whereby the traction cars of the said company were operated. The lien was filed against the whole of said building.

On the trial, before ARNOLD, J., the following

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facts appeared: In 1882 the Union Passenger Railway Company made a contract with the firm of Malster & Reaney, mechanical engineers and machinists doing business both in Philadelphia and Baltimore, to furnish and put up the machinery needed by the company to furnish traction power for cable cars. The building against which the lien was filed was altered from its former use as a stable for that purpose, and the machinery was placed by Malster & Reaney therein. The plaintiffs proved that a portion of the said machinery was furnished by the firm of Poole & Hunt, doing business in Baltimore, being delivered by them to Malster & Reaney at Locust Point, Maryland. It appeared that the firm of Poole & Hunt dealt solely with Malster & Reaney. They knew that the machinery furnished was intended for use in Philadelphia, but did not know the location of the building in which it was to be placed. Defendants proved that they had no contract with Malster & Reaney except for the furnishing and putting in place of the machinery, and that the carpenter work and brick work necessary in the alterations of the building were all done by men employed and paid directly by the railway company.

The plaintiffs requested the Court to charge, *inter alia*, as follows: "It is unnecessary for the plaintiffs to allege in their claim or to affirmatively prove that the machinery was furnished on the credit of the building. It must be true in fact that the machinery was so furnished, and such fact will be presumed where the plaintiffs have complied with the provisions of the statute relating to the lien which they claim." *Refused.* Exception. (Fifth assignment of error.)

The Court charged, *inter alia*, as follows:—

"The question here arises upon the claim of the plaintiffs, the firm of Poole & Hunt, against the Union Passenger Railway Co., for a lien against the building used as an engine-house, formerly a stable, upon Columbia Avenue near Twenty-third Street. The law is well settled that unless materials are furnished on the credit of a particular building there is no lien, although such materials may have been used in erecting it. The first question for you to determine is, upon what credit did Poole & Hunt furnish this traction machinery. The correspondence was between Malster & Reaney (who seem to be contractors for doing machine work) and Poole & Hunt, who manufactured machinery. Malster & Reaney wrote asking what they could get certain machinery for, and Poole & Hunt replied, for so much, and the material is delivered at Locust Point, Md., and not at Twenty-third and Columbia Avenue. [Now if it was sold by Poole & Hunt to Malster & Reaney for the purpose of being put into a particular building known to the plaintiffs, Poole & Hunt, and upon the credit of that building, delivered to Malster & Reaney this machinery at Locust Point, Md., the plaintiffs would be entitled to a lien for it."] (Exception; first assignment of error.) ["The point, however, is to determine upon what credit was this machinery furnished. It is stated here that the plaintiffs knew that Malster & Reaney wanted it for the Union Passenger Railway Co. Well, a railway company is a person as much as a man; but for what building of the Union Passenger Railway Co. was the machinery required? I recollect no evidence fixing the place where this machinery was to go which was pointed out to Poole & Hunt."] (Exception; second assignment of error.) "Now if they did not therefore furnish this machinery to Malster & Reaney upon the credit of a building belonging to the Union Passenger Railway Co., they are not entitled to a lien, although the machinery was used in that building—you can understand that—because it was a personal credit to Malster & Reaney and not to a building. [If you find that the machinery was not furnished upon the credit of this building, although used in it, that is an end of the case, and the verdict ought to be for the defendant."] (Exception; third assignment of error.) "If you find it was furnished upon the credit of this building, you are to inquire what were Malster & Reaney. Were they contractors for erecting, or mere suppliers of material? That is a question for you to determine. If they were mere suppliers of material they had no right to confer a lien upon other parties from whom they got the materials. The right to file a lien might exist in themselves, but it could not be transmitted by them. If, however, they were contractors for erecting the machinery in a building, and bought machinery from Poole & Hunt for that building, and Poole & Hunt furnished it on the credit of that building, then the verdict may be given for the plaintiffs for the amount of their claim. It seems to me that is the whole case in a nutshell—these two questions.

"As to the questions upon what credit did Poole & Hunt furnish this machinery. Did they furnish it on the credit of the building or on the mere personal credit of Malster & Reaney? If they sold it to Malster & Reaney it is an obligation of Malster & Reaney, and they have no claim against the Union Passenger Railway Co., unless at the time they had in mind the building, and sold it and furnished it on the credit of that building. On the other question, as to what they were, whether they were contractors or parties simply acting for themselves, I leave to you to say. If Malster & Reaney were contractors for furnishing any substantial part of the building, machinery, or otherwise, and they bought the

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machinery from Poole & Hunt, and Poole & Hunt furnished it upon the credit of the building for that building, then the lien may be sustained and the verdict must be for the plaintiffs, otherwise the verdict will be for defendants."

Verdict and judgment for defendants. The plaintiffs thereupon took this writ, assigning for error, *inter alia*, the answer to their point as above, and the portions of the charge of the Court included in brackets.

Rowland Evans and *Richard L. Ashhurst*, for the plaintiffs in error.

There was sufficient evidence to go to the jury that the articles were furnished on the credit of the building.

Hinchman *v.* Graham, 2 S & R. 171.
White *v.* Miller, 6 Harris, 54.
Church *v.* Allison, 10 Barr, 415.
Von Billiard *v.* Nace, 1 Grant, 234.
Wolf *v.* Batchelder, 6 Smith, 89.
Hommel *v.* Lewis, 8 Out. 471.
Noar *v.* Gill, 1 Amer. 492.

David W. Sellers, for defendants in error.

February 11, 1889. THE COURT. The learned Judge below fairly submitted to the jury the two important questions of fact in this case, viz: (*a*) whether Malster & Reaney were contractors for erection and construction, and (*b*) whether the articles for which the claim was filed were furnished upon the credit of the building, or were sold to Malster & Reaney upon their personal credit. Material that is furnished to a contractor for the erection of a particular building is *prima facie* upon the credit of such building. If it be furnished for and entered into the construction, the burden is upon the defendant to show that it was furnished upon the credit of the contractor alone (Hommel *v.* Lewis, 104 Pa. 465; Noar v. Gill, 111 Id. 488). In the case in hand the defendants alleged that Malster & Reaney were not contractors; that they had no authority as contractors to build the building; that the articles referred to were sold by plaintiffs to Malster & Reaney upon their personal credit, and that the plaintiffs, whose place of business was in Baltimore, could not have furnished the machinery upon the credit of the particular building in which it was placed, for the reason that they had no knowledge of any such building. It was under such circumstances that the Court instructed the jury that "if you find that the machinery was not furnished upon the credit of the building, although used in it, that is an end of the case, and the verdict ought to be for the defendants." This means, in view of the facts, that the credit must have been given to the building and not to the contractor. We see no error in this instruction. The language in the plaintiffs' second point, taken from the opinion of this court in Noar *v.* Gill, *supra*, is entirely accurate in the sense in which it was used in that case; it is not equally applicable here. There was enough in the defendants' case to rebut the presumption that plaintiffs had furnished the materials upon the credit of the building; and there was no evidence that Malster & Reaney had authority as contractors to bind it. Under such circumstances it was not error to refuse the plaintiffs' second point. None of the assignments of error is sustained.

Judgment affirmed.

PER CURIAM. L. L., Jr.

Jan. '88, 428. January 15, 1889.

Martin, Fuller & Co. v. Bray.

Partnership—Agreement under seal—Evidence.

In a suit upon a partnership agreement under seal the plaintiff offered the agreement in evidence which was admitted to be signed by one of the partners, to be followed by proof of the assent of the other partners prior to its execution or of their subsequent ratification thereof. The offer was objected to but the objection was overruled and the agreement admitted. The plaintiff then introduced without objection proof of parol assent and ratification by the other partners. On writ of error:

Held, that there was no error in admitting the agreement in evidence and that if the defendants had wished to take advantage of the assent and ratification being parol only and not under seal, they should have specifically objected to the admission of the evidence on the point and excepted to the admission thereof.

Error to the Common Pleas No. 3, of Philadelphia County.

Covenant, by Wilson Bray against Martin, Fuller & Co., upon an agreement under seal for the payment of royalties upon a patented invention.

On the trial, before FINLETTER, P. J., the plaintiff offered the agreement in evidence which was signed and sealed thus:—

In witness whereof the parties hereto have set their hands and seals the day and year first above written.

WILSON BRAY, [Seal.]
MARTIN, FULLER & CO. [Seal.]

The counsel for the defendants admitted that Joseph J. Martin signed the name of "Martin, Fuller & Co." to it, opposite the seal, but objected to the agreement being admitted in evidence, because one partner has no right to bind his co-partners by an agreement under seal. Counsel for plaintiff stated that their offer was to follow the agreement with proof of the assent thereto previous to its execution, or the subsequent ratification thereof, by the other partners.

Objection overruled; agreement admitted to be followed by proof of the assent of the other partners prior to its execution or their subsequent ratification of it. Exception.

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The plaintiff afterwards testified as follows: "The terms of that agreement were fixed and determined upon at a meeting between myself and the defendants at the Abattoir Hotel, on the west side of the Schuylkill, which took place between the Christmas, 1876, and the 1st of January, 1877. All the defendants, Joseph J. Martin, Alfred M. Fuller, William M. Fuller, and Thomas B. Shriver were then present and took part in the discussion, and assented to the agreement. The terms agreed upon were the same as those expressed in the agreement. All the defendants were afterwards actively employed in the shipments that were made pursuant to the agreement."

Verdict and judgment for plaintiff for $7763.09. Whereupon defendants took this writ assigning for error the admission of the agreement in evidence.

Theodore F. Jenkins, for plaintiffs in error.

One partner cannot bind his co-partner by deed, although it be given in a transaction in the course of the business of the firm, and the benefit of the contract be received by the firm.

Hart *v.* Withers, 1 P. & W. 285.
Gay *v.* Waltman, 8 Nor. 453, 456.
Hoskinson *v.* Eliot, 12 Smith, 393.

Thomas H. Speakman (*J. Warner Goheen* with him), for the defendant in error.

The power of one partner to bind his co-partners may be given by prior or subsequent ratification on their part.

Schmertz *v.* Shreeve, 12 Smith, 457.
Johns *v.* Battin, 6 Casey, 84.
Fichthorn *v.* Boyer, 5 Watts, 159.
Bond *v.* Aitkin, 6 Id. 165.
Heilner *v.* Battin, 3 Casey, 517.

January 28, 1889. THE COURT. The two assignments of error raise but one question. The paper admitted in evidence was a sealed instrument and was signed by one only of the firm of Martin, Fuller & Co., and in the firm name. When the offer of the paper was objected to, it was stated by counsel for plaintiff below that they proposed to follow it up with proof of the prior assent or subsequent ratification of the other partners. The offer as it was made was unobjectionable. The prior assent or subsequent ratification might have been shown by writing under seal. It is true the proof introduced was of oral ratification. This testimony, however, was not objected to. If the defendant relied upon the doctrine of Hart *v.* Withers (1 P. & W. 285) he should have objected to the admission of this evidence, or have called upon the Court for some ruling in regard to it. He did neither, and we cannot say, under the circumstances, that the Court below erred in admitting the paper. This view of the case renders it unnecessary to consider how far Hart *v.* Withers has been modified in the more recent decisions.

Judgment affirmed.

PER CURIAM. L. L., JR.

Jan. '89, 29. January 29, 1889.

O'Keefe v. Thorn.

Negligence—Minors—Master and servant.

A boy fourteen years of age, who stated that he was unaccustomed to machinery, was put at work by his employer at a tin-stamping machine. The operator of such a machine sits at a high bench in front, adjusts the piece of tin in place with his right hand, and then, by pressing his foot on a treadle, brings down a heavy hammer on the tin. The foreman setting the boy to work did not give him any instruction as to the machine, except by stamping a few pieces of tin to show him how. On the second day of the work the boy was sitting with his foot on the treadle, and put into the machine a piece of tin which slipped out of place. He leaned forward to adjust it with his left hand, and while so doing tilted over, the bench being shaky, pressed his foot on the treadle, started the hammer, and crushed the fingers of his left hand. In an action brought by him against his employer to recover damages:

Held, that a nonsuit was rightly awarded.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by John J. O'Keefe, by his next friend, James O'Keefe, against J. Steinmetz Thorn, to recover damages for the loss of the fingers of plaintiff's left hand, alleged to have been caused by the negligence of defendant.

On the trial, the plaintiff testified on his own behalf as follows:—

He was fourteen years of age, and, being attracted by a notice at defendant's place of business that a boy was wanted, applied for the situation. He informed defendant of his age, and was hired by defendant "to help around the shingle room." Defendant's place of business is a factory at which tin shingles are made. These are pieces of tin stamped by machinery. Plaintiff was told by defendant to report to Decker, the foreman, who would put him to work. Decker asked plaintiff if he had ever worked on a machine before, and he replied that he had not. He was not given any instruction as to operating the machine except that Decker put in five or six pieces of tin and stamped them.

The machine was operated by pressing the foot upon a treadle, which caused a heavy weight, or hammer, to come down with great force upon the tin, which was placed beneath it by the operator, who sat upon a bench in front of the machine. This bench, plaintiff testified, was shaky, and was so high that his feet could

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not reach the floor. He began work after dinner on May 12, 1887; worked all that afternoon and the next morning until dinner time. After dinner, on May 13, Decker requested plaintiff to re-stamp some old shingles, and in a short time the accident happened by which plaintiff lost two fingers and part of the other two of his left hand.

The accident happened in this way: Plaintiff was sitting on the bench in front of the machine with his foot upon the treadle which he had to press. He put in one of the old shingles to be re-stamped, it slipped over the pins which would catch a flat piece of tin, and, leaning over to put it in place with his left hand, the bench tilted over, causing his foot to press upon the treadle, thus starting the machine and causing the accident.

The machine was properly fed with the right hand. There was a slight notch cut in the bed-plate, so that as long as the operative used his right hand it could not be crushed, even if he should accidentally press the treadle while yet holding on to the plate to be stamped.

At the close of the plaintiff's case the court awarded a nonsuit, which the Court in banc subsequently refused to take off. Plaintiff thereupon took this writ, assigning for error the entry of the nonsuit and the refusal to take off the same.

Warren G. Griffith (*Thomas McFarland* with him), for the plaintiff in error.

The negligence complained of on the part of the defendant is:—

(1) Putting a boy of plaintiff's tender years to work at a dangerous machine.

(2) Putting him at such work without any instruction as to the dangers to be avoided.

(3) In not furnishing the proper appliances.

Rummell *v.* Dilworth, 111 Pa. St. 343.
Hickey *v.* Taafe, 105 N. Y. 26.
Coombs *v.* Cordage Co., 102 Mass. 572.
Grizzel *v.* Frost, 3 Yost & F. 622.
2 Thompson on Negligence, 977.

Whether the employé has knowledge sufficient to enable him to appreciate the dangers of the employment or not, is a question for the jury.

Hayden *v.* M'f'g Co., 29 Conn. 548.
Rummell *v.* Dilworth, 111 Pa. St. 343.

The plaintiff was not a co-employé with the foreman; in obeying the orders of the foreman, he was simply obeying the orders of his master, and the master is liable.

Smith on Master and Servant, 257.
R. R. Co. *v.* Fort, 17 Wall. 553.

Silas W. Pettit (*John R. Read* with him), for the defendant in error.

The rule as to the use of machinery is well settled, that an employé, in accepting a service the dangers of which are apparent, and from which he may be liable to receive an injury, assumes the risks incident to the employment; and that the employé is a minor does not alter this rule, provided that he is of an age to appreciate the danger and competent to perform the duty demanded, which, in this case, the plaintiff undoubtedly was.

DeGraff *v.* N. Y. Cent. Co., 76 N. Y. 125–132.
Flower *v.* Penna. R. R. Co., 69 Pa. St. 210–215.
Caldwell *v.* Brown, 53 Id. 453.
Shipbuilding Works *v.* Nuttall, 119 Id. 149.
Sullivan *v.* India Manufacturing Co., 113 Mass. 396.

February 11, 1889. THE COURT. The Court below entered a nonsuit in this case, which is assigned as error. The plaintiff is a boy between fourteen and fifteen years of age, and obtained a situation with the defendant, who was proprietor of a factory where tin shingles are made. These are pieces of tin stamped by machinery, and used for roofing purposes. The business at which the plaintiff was put was to shove the tin plates under the stamping machine. He was injured the second day of his employment, by having his left hand caught under the stamping machine, by which he lost two of his fingers. All machinery is dangerous if not properly used. There was no danger in this particular machine that was not as obvious to a boy of fourteen as to an adult. He could see that if he placed his hand under the stamp it would be crushed. If boys are not allowed to use machinery until they have become accustomed to its use, it would be difficult for them to learn any useful trade or occupation by which to earn a livelihood.

Judgment affirmed.

PER CURIAM. L. L., Jr.

Common Pleas.

C. P. No. 4. September 21, 1889.

Lane & Co. v. White & Co., defendants, and Philadelphia Trust Co. garnishee.

Practice—Foreign attachment—Act of June 13, 1836—Act of May 10, 1889—Constitutional law—The amendment of May 10, 1889, to the foreign attachment Act permitting judgment for want of appearance to be taken at or after the third term after the execution of the writ, provided a declaration has been filed fifteen days before the entry of the judgment, is applicable to actions pending at the time of the passage of the Act, and as so applied, being an Act affecting procedure, and of a remedial character, is constitutional.

Rules to strike off judgment, quash sci. fa. and interrogatories.

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Foreign attachment issued September 17, 1888, returnable first Monday in December, 1888. The sheriff returned that he had attached as commanded, and had summoned the Philadelphia Trust Company as garnishee, and *nihil habet* as to defendant. A statement was filed May 25, 1889, and judgment; for want of appearance, taken July 8, 1889. On July 9, 1889, interrogatories were issued to the garnishee, and a sci. fa. issued against it on the same day was returned "made known." The garnishee took the above rules.

Richard L. Ashhurst, for the rules.

The garnishee has a right to take the present rules.

Melloy *v.* Burtis, 9 Crum. 161; S. C. 23 WEEKLY NOTES, 289.

The judgment should be stricken off, because no declaration was filed before the return-day.

Melloy *v.* Burtis, *supra*.

The Act of May 10, 1889 (P. L. 183), which amends the Act of 1836, § 53, so as to make it provide that the plaintiff may take judgment at and *after* the third term, provided he has filed a declaration fifteen days *prior to the entry of judgment*, can have no effect upon the present case, as it does not contain a word showing an intent that it shall affect pending cases or have a retroactive effect, and because if it had such intent it would be unconstitutional. In Pennsylvania the law is that no statute shall be given this effect unless its express words absolutely require such interpretation.

Neff's Appeal, 9 Harris, 243.
Fisher *v.* Farley, 11 Id. 501.
Becker's Appeal, 3 Casey, 52.
Holman's Appeal, 12 Harris, 174.
Taylor *v.* Mitchell, 7 Smith, 209.
Snyder *v.* Bull, 5 Harris, 54.
Shinkle *v.* Crock, 17 Pa. St. 162.
McCarty *v.* Hoffman, 25 Id. 507.
Chalker *v.* Ives, 5 P. L. S. 84.
Steckel's Appeal, 14 Id. 493.

Legislation which by retroaction would under the guise of changing a remedy virtually take from a defendant property by means of a legislative decree, is a violation of the 9th section of the Declaration of Rights.

Bagg's Appeal, 7 Wr. 512.
Penrose *v.* Erie Canal Co., 6 P. F. S. 46.
Shonk *v.* Brown, 11 Id. 325.
Richards *v.* Rote, 18 Id. 255.
Ervine's Appeal, 4 Harris, 257.
De Chastellux *v.* Fairchild, 3 Id. 20.

In this case the defendant had a right to rely upon the fact that no declaration having been filed by the first Monday in December, the proceeding had then become dead; and an Act passed more than five months after its decease could not revive the proceeding.

James A. Develin (*Theodore D. Rand*, with him), contra.

Procedure Acts apply to pending actions, unless expressly confined to future cases.

Krause *v.* Pa. R. R. Co., 20 WEEKLY NOTES, 111.
Dwarris on Statutes, 234.
Broom's Max., 35.
McFarland *v.* Commissioners, 12 S. & R. 298.
Fenelon's Petition, 7 Barr, 173.
Keene's Appeal, 14 P. F. S. 273.
Phelps's Appeal, 2 Out. 550.
Long's Appeal, 6 Norris, 119.
Kinbray *v.* Draper, L. R. 3 Q. B. 160.
State *v.* Manning, 14 Tex. 402.

Retroactive Acts affecting the remedy only are constitutional.

Cooley, Const. Lim. 456.
Tate *v.* Stooltzfoss, 16 S. & R. 35.
Penrose *v.* Erie Canal Co., 6 P. F. S. 46.
Foster *v.* Gray, 10 Harris, 16.
Underwood *v.* Lilly, 10 S. & R. 97.
Hepburn *v.* Curts, 7 Watts, 300
Schenley *v.* Commonwealth, 12 Casey, 38.
Lane *v.* Nelson, 79 Pa. St. 407.

THE COURT. Rules discharged. H. B.

[NOTE.—There is some conflict in the cases upon the question whether a garnishee may or should interfere on behalf of the defendant. There are positive utterances of the Courts on both sides of the question. Some cases adjudge that the garnishee cannot be allowed to question the validity of the *judgment* after it has been entered (McCormac *v.* Hancock, 2 Pa. 310; Hampton *v.* Matthews, 14 Pa. 105; O'Connor *v.* O'Connor, 2 Grant, 245; Black *v.* Nease, 37 Pa. 433; Ruff *v.* Ruff, 85 Pa. 333; Gill *v.* Joaquin, 2 WEEKLY NOTES, 139); while other cases decide that a garnishee is bound to make every legal defence that a *claimant* of the fund may make. (Baldy *v.* Brady, 15 Pa. 103; Bank *v.* Munford, 3 Grant, 233.) It will be observed that the word claimant, and not defendant, is used, and it appears in those cases that the defence was made on behalf of others than the defendant. In Bohner *v.* Cummings (91 Pa. 55), on the trial between plaintiff and garnishee, evidence was admitted to prove that the defendant was merely a trustee for his wife of certain judgments which were attached as his property. If there is a judgment against the defendant, but damages have not been assessed, the garnishee may take advantage of the defect. (Pancake *v.* Harris, 10 S. & R. 109; Thornton *v.* Bonham, 2 Pa. 102.) If it appear on the face of the record that the proceedings are void or grossly irregular, or a valid cause of action does not exist, the Court may, on motion of the defendant, or the garnishee in his behalf, quash the writ; and the assignee of the defendant for the benefit of his creditors was allowed to intervene in his behalf (Steel *v.* Goodwin, 113 Pa. 288); but subsequently attaching creditors of the defendant cannot (Howard *v.* McLaughlin, 98 Pa. 440); nor will the defendant be permitted to contradict the answers of the garnishee, admitting an indebtedness to the defendant (Cole *v.* Bowden, 5 WEEKLY NOTES, 296); because the defendant is not bound by the result (Ruff *v.* Ruff, *supra*). In Morris *v.* Turner (3 Clark, 423), Judge SHARSWOOD said the garnishee is *permitted* to intervene only to protect the interest of the absent defendant, without requiring a formal authority; and in Melloy *v.* Burtis (124 Pa. 161) it is said that the general rule is that the garnishee is bound to see that the proceedings to judgment against the defendant are not illegal, and that it is *his right as well as his duty* to do so.]

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C. P. No. 4. June, 1889.

Datz et al. v. Phillips et al.

Equity—Cross bill—A cross bill must be confined to the subject-matter of the original bill, and cannot embrace new aud distinct matters not embraced in the original suit. If it do so no decree can be founded on those matters.

Sur exceptions to Master's report.

The facts of the case are sufficiently set forth in the opinion of the Court.

James A. Develin, for plaintiff.

M. Hampton Todd, for defendant.

June 15, 1889. THE COURT. The plaintiffs filed a bill against the defendants to enforce specific performance of an agreement to close and build up certain windows which the defendant, Cyrus Phillips, had opened in a party wall dividing the defendants' property from the plaintiffs' property. The plaintiffs' property fronted on Fourth Street, and the rear portion of it abutted upon the defendants' property, which fronted on Arch Street. In 1880, the defendant, Cyrus Phillips, erected a large brick building upon the Arch Street lot belonging to him, and after it was finished the plaintiffs erected upon the Fourth Street lot a new building, abutting, in the rear, on the property of Cyrus Phillips. The party wall between them was built by Cyrus Phillips. When the plaintiffs built they left an open space 10 feet 6 inches wide by 34 feet long between their property and that of Phillips. They built up to the party wall as high as the second story, and the open space extended from that point upwards, and was entirely over their own ground. The defendants broke into the party wall opposite this open space and built in it nine windows opposite to and overlooking the plaintiffs' premises. This was done in pursuance of a contract between them, by which it was stipulated that the defendants might put in the windows and use them during the pleasure of the plaintiffs in consideration of the fact that Cyrus Phillips would relieve the plaintiffs from the payment of their share of the expense of the party wall, but it was further agreed that this license given to the defendant, Phillips, might be terminated at any time on notice from the plaintiffs, in which event the plaintiffs agreed to pay for the party wall so far as they had used it, and the defendant agreed thereupon to close up the windows. The defendant himself admitted without reserve that he had received the license upon this condition. The plaintiffs subsequently, being dissatisfied with the existence of the windows, notified the defendant, Phillips, to that effect, and having, on July 7, 1886, paid him his share of the expense of the party wall, with interest thereon, demanded from the defendant, Cyrus Phillips, performance of the agreement upon his part, viz., to close up the windows. The defendant refused so to do. Thereupon the plaintiffs filed their bill. The position of Milton Phillips in the controversy is understood to be that of a tenant only of the premises owned by the other defendant.

So far the case is clearly with the plaintiffs, and the Master so reports. It is entirely clear that the bill is maintainable upon two grounds. First, to maintain windows in a party wall without authority to do so is to maintain a nuisance, and is an act within the restraining powers of equity. The appropriate remedy is an injunction to restrain the maintenance of the nuisance, and a decree requiring the defendant to abate the same by building up the windows in conformity with the residue of the party wall. (Vollmer's Appeal, 61 P. S. R. 118; Vansyckel *v.* Tryon, 6 Phila. R. 401.) Secondly, the defendant having agreed to build up the windows upon being paid for the party wall, and having been paid, and having refused to perform his part of the contract, a proper case is presented for a decree for specific performance, that being the only complete and adequate remedy for the injury.

The defence set up in the answer was, that before the parties rebuilt there existed on the premises of the plaintiffs a certain privy well, which was for the common use of both properties; that in consideration of the defendant's abandoning his right to the easement on the plaintiffs' lot, the plaintiffs promised that they would lay down for the defendants' use a properly constructed drain from the rear of the defendants' property into the Fourth Street sewer, and that they have not done so, but have broken their contract relating to that matter. In point of fact, it appears from the evidence that the plaintiffs have built such a drain, but the defendants contend that it is not of the character or capacity of the drain they promised to put down. On the other hand, the plaintiffs claim to have fully complied with their contract relating to the drain. Now the two contracts, viz., the contract relative to the windows and that relating to the privy well and drain, are plainly independent contracts. There is nothing to show that the one was dependent upon the other. That seems to have been the opinion of the Master, for he says in his report: "The plaintiffs' title or legal right to have the windows closed and the nuisance abated is clear and free from doubt. Both parties are practically agreed as to the nature and extent of the agreement with respect to the windows. In that sense the agreements are separate and distinct. The rights of the plaintiffs under that part of the agreement are not in

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any way subordinate to or dependent upon their performance of the other agreement, which has reference to a separate and distinct subject." And in another place he speaks of the agreements as two, "the two agreements, if we may so designate them, were made at or *about* the same time." Certain it is that Mr. Cheyney was employed by the defendants to draw up an agreement upon both subjects, but the plaintiffs refused to sign it, and it never was signed. Mr. Cheyney admits that the plaintiffs objected to it when it was shown to them. He says that he drew the paper "from his recollection of what took place." Mr. Cheyney's testimony is very vague, uncertain, and unsatisfactory. He gives no conversations with Mr. Datz, but only his own conclusions, or the inferences which he drew from them. There had been a great deal of conversation between the parties relative to both subjects. Cheyney also had conversations with both parties. Being employed by the defendants to draw up an agreement, he did so. It did not suit the plaintiffs, and they refused to sign it, and that is the whole of it. After a careful examination of all the testimony, we are of the opinion that there is no satisfactory evidence that these agreements were ever intended by the parties to be dependent upon each other, or that the performance of one was in any sense conditioned on the performance of the other. The subjects of the agreements were totally different. The considerations were different. They were never blended, and one agreement was not a consideration for the other.

The breach of the agreement which the defendants set up in their answer cannot be set off in this case, because the remedies upon the two agreements are totally different. The plaintiffs seek a specific performance and that only. It is no answer to that to say that the plaintiffs have broken another agreement relating to another subject. The proper remedy of the defendants for a breach of the agreement to lay the drain pipe is an action at law to recover damages. The defendants have imported into the case something that has nothing to do with it, but which may be proper ground for an action at law. As to the cross bill filed by the defendants, it was altogether irregular and ought to have been demurred to. Indeed it is not properly a cross bill, but an original bill under the guise of a cross bill. A cross bill is a mode of *defence*. The original bill and the cross bill are one cause. The office of a cross bill is to enable a defendant to have a discovery, or to obtain relief for himself in reference to the matter contained in the original bill. A cross bill must be confined to the subject-matter of the original bill, and cannot embrace new and distinct matters not embraced in the original suit. If it do so no decree can be founded on those matters. This has been settled by many authorities. (3 Dan. Ch. Prac. 1743; May *v.* Armstrong, 3 J. J. Marsh. 262; Daniel *v.* Morrison, 6 Dana, 186; Galation *v.* Ervin, 1 Hopk. 48; Field *v.* Schieffin, 7 Johns. Ch. 252; Gouveneur *v.* Elmendorf, 4 Johns. Ch. 357.) The cross bill must be confined to the subject-matter of the original bill, and cannot introduce new matters not embraced in the original bill. If it do so the cross bill becomes itself an original bill, and there cannot be two original bills in the same cause. (3 Dan. Ch. Pr. 1746; Story Eq. Pl. 401; Jennison's Ch. Prac. 391; Andrews *v.* Kebbee, 12 Mich. 94; Galation *v.* Cunningham, 8 Cowen, 361.) The neglect to observe this simple and well established rule must necessarily produce confusion and land the parties in a labyrinth of litigation from which it would be difficult to extricate them, and in which the Judge himself might be hopelessly lost. In the case now before us, we have, on the one hand, a bill for specific performance of an agreement to close and build up certain windows in a party wall, and on the other hand, a cross bill by the defendants to restore a privy well and to enjoin the plaintiffs from any interference with the free use thereof by the defendants. Before the Master the defendants, without any alteration of their cross bill, substituted a claim for specific performance by the plaintiffs of an agreement to build a drain and a claim for damages for not building it. That specific performance cannot be decreed of such a contract is too clear to require argument, the defendants having a full, complete, and perfectly adequate remedy at law for the breach of the contract. The Master, while awarding to the plaintiffs the specific performance which they prayed for, and to which they were justly entitled, awarded at the same time to the defendants specific performance by the plaintiffs of the contract to build the drain, and damages for not having built it. This is to introduce chaos into equity proceedings. But it was not the learned Master's fault. The plaintiffs having neglected to demur to the cross bill, and having put in an answer to it, the Master very naturally proceeded to take cognizance of it, and to inquire into and report upon the subject-matter of it. Of course the cross bill must be dismissed, but without prejudice to the defendants' right to bring an action at law to recover damages for the alleged breach by the plaintiffs of their agreement to construct the drain for the use of the defendants.

The plaintiffs' exceptions are sustained. The defendants' exceptions No. 1 and No. 2, relative to costs, are also sustained. No. 3 and No. 4 are dismissed, and it is now ordered and decreed that the defendants, Cyrus Phillips and Milton Phillips, be forever restrained and enjoined from

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maintaining the windows in the party wall described in the plaintiffs' bill; that the defendant, Cyrus Phillips, cause the window sashes and frames of said windows to be taken out and the spaces to be built up with brick so as to conform as nearly as possible in thickness, material, and general appearance with the other portions of said party wall, and that the said Milton Phillips suffer and permit the said Cyrus Phillips, his agents, workmen, and artificers to have free access to said building for this purpose. It is further ordered and decreed that the cross bill filed by the defendant, Cyrus Phillips, be dismissed, without prejudice to his right to bring and maintain an action at law against the plaintiffs for their alleged breach of the contract to build the drain mentioned and described in the Master's report, and that the said Cyrus Phillips pay the costs of this cause.

Opinion by THAYER, P. J. J. P. C.

Orphans' Court.

Cooper's Estate.

Decedent's estates—Claims against, for services, where no contract is proved—Relationship—Wages, presumption as to, where no demand is made until after services terminated.

Sur exceptions to adjudication.

The facts of the case sufficiently appear in the opinion of the Court.

Henry Trumbore, for exceptants.

William A. Manderson and *Isaac S. Sharp*, contra.

June 29, 1889. THE COURT. Claims of this character are so frequently presented to this Court that it seems hardly necessary, in each case, to refer to the reasons upon which they are rejected.

The claimant was a sister-in-law of the decedent, who was an officer in the United States Navy, and necessarily obliged to be away from home almost all of his time. Upon the death of his wife the claimant left her mother and took charge of his house and three motherless children, and served in that capacity for upwards of five years. There can be no question but that her services were most meritorious and valuable, but the Auditing Judge has found as facts that: "There was no contract to pay her wages or compensation. No promise to pay her. No admission of indebtedness. No demand for the payment of wages during the entire five years. No proof that any was paid or expected to be paid by her." And further, "the evidence showed that the family relation existed between the parties."

It was contended that, as the relation existing between the claimant and decedent was by marriage merely, and not one of blood, it was not of itself sufficient to overcome the legal presumption of a promise to pay what the services were reasonably worth. While this may be true it must be borne in mind that the services rendered were almost wholly for the benefit of the three children of claimant's dead sister, to whom she would naturally be drawn by the strongest ties of blood, as well as by the consideration of their desolate condition, without a mother, and a father whose duties required him to be constantly away from home.

Be this as it may, if we should decide that these services were not rendered out of natural love and affection, but in view of wages, and thus put this claimant in the position which she now places herself, but which we do not think she ever contemplated during the time when the services were being rendered, then this claim must be rejected upon another ground.

"Servants' wages are presumed to be paid weekly or monthly, or at other stated periods, and when a person lives in that capacity for a considerable period of time and no demand for the payment of wages is made until after such service has terminated, the presumption is, either that the wages have been paid or that the services were rendered on the footing that none were to be paid." (McConnell's Appeal, 1 Out. 31; Houck *v.* Houck, 3 Out. 553.)

If this is the law in a case where a contract for wages is shown, it certainly is to be applied when the fact of a contract is to be presumed, and if it is to be invoked to defeat a claim of this kind when made against a living person, how much stronger reason exists for its application where the claim was never heard of until after the death of the person against whose estate it is presented?

As there was no express contract proven, and, upon the facts as they appeared, all the presumptions are against the validity of this claim, the Auditing Judge did right in rejecting it.

The exceptions are dismissed, and the adjudication is confirmed.

Opinion by FERGUSON, J. W. M. S., JR.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, OCT. 11, 1889.* [No. 24.

Supreme Court.

Jan. '89, 227. April 5, 1889.

Forepaugh v. Delaware, Lackawanna, & Western R. R. Co.

Constitutional law—Comity—Conflict of laws—Foreign law—Effect of, here—Common carriers—Limitations of liability in case of negligence—Public policy—Lex loci contractus.

A contract of carriage by a common carrier was made in New York, to be wholly performed in New York. The contract contained a stipulation that in consideration of the reduced rates charged, the carrier was released from all liability for damages although caused by the negligence of the carrier, its agents, or employés. This stipulation is valid by the law of New York. A loss was occasioned in New York by reason of the negligence of the carrier's employés. In an action in Pennsylvania for damages therefor:

Held, that while the above stipulation was invalid by the law of Pennsylvania, yet the rights of the parties were to be determined by the law of New York, and therefore the plaintiff was not entitled to recover.

It is not contrary to the public policy of the State of Pennsylvania to enforce a contract releasing a common carrier from liability for damages occasioned by the negligence of its own agents or employés, when such contract is valid by the law of the State where it was made and in which it was to be wholly performed. STERRETT and WILLIAMS, JJ., dissented.

There is no distinction between the binding effect of the decisions of a State in questions of commercial law and on statutes, and therefore the law declared by State Courts to govern contracts made within their jurisdiction is conclusive everywhere. The departure made by the United States Courts with respect to questions of general commercial law is to be regretted and will not be followed in Pennsylvania.

Per MITCHELL, J. There is no such thing as a general commercial, or general common law, separate from, and irrespective of a particular State or government whose authority makes it law. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a State stands upon precisely the same basis as a decision upon any other branch of the common law.

Whether a railroad company in making a contract to furnish motive power for the transportation of a circus train over its own tracks acts as a common carrier, and whether such contract is to be governed by the ordinary rules governing the contracts of common carriers, not decided.

Error to the Common Pleas No. 1, of Philadelphia County.

Case, by Adam Forepaugh against the Delaware, Lackawanna, and Western Railroad Company, to recover damages to plaintiff's property, incurred while being transported on the defendant's railroad.

At the trial, before BREGY, J., the jury found a verdict for plaintiff for $10,841.07, and also found the following special facts:—

(1) On March 18, 1886, the following contract was entered into in the city of New York, in the State of New York:—

Agreement, between the Delaware, Lackawanna, and Western Railroad Company, of the first part, and the Great Forepaugh Show, of the second part, witnesseth:—

That the said party of the first part agrees to have at Binghamton, in the State of New York, by 11.50 o'clock on the evening of the fourteenth day of May next, sufficient motive power for the purpose of transporting, and to transport from Binghamton aforesaid to Cortland, in the State of New York aforesaid, five passenger cars, two box cars, nine stock cars, twenty-three platform cars, three advertising cars, three elephant cars, to be furnished by said party of the second part, for the transportation of their show; and by 11.50 o'clock of the evening of the fifteenth day of May next to furnish and have at Cortland aforesaid sufficient motive power for the purpose of transporting, and to transport from there to Syracuse, in the State of New York, the above-named and number of cars for delivery to Railroad Company.

The said party of the first part to furnish engineers, conductors, and brakemen; said party of the second part to (at their own expense) do all loading and unloading of said cars; but the party of the first part will furnish an engine to assist in shifting the cars during the loading and unloading. The said party of the first part also agrees to transport the three advertising cars of the said party of the second part once over the same route, in connection with such regular passenger train of said party of the first part, and upon such days as the party of the second part may name; and the said party of the second part agrees to pay said party of the first part, for said transportation, the sum of $750, $250 thereof to be paid before the departure of the above-named and number of cars, from each of the following-named places: Binghamton, Cortland, from which they are to be transported as above provided. And in consideration that the said party of the first part agrees to perform the said service for the said sum, which is much less than the ordinary, usual, and legal rates charged other parties by said party of the first part for a like amount of transportation, and in consideration of one dollar, by said party of the first part to said party of the second part in hand paid before the execution hereof, the receipt whereof they do hereby acknowledge, the said party of the second part do hereby release and discharge the said party of the first part, and all other railroad companies over whose roads the said transportation is to be done, and all the officers, agents, and employés of the said party of the first part, and all other railroad companies over whose roads the said transportation is to be done, from all liability and responsibility for or on account of, or connected with, the loss of the life of, or injury to the person of, or any of the persons, or for or on account of, or connected with the loss of, or damage to, or injury to any of the animals, property, or things thus transported, although such loss, damage, or injury may be caused by the negligence of the said party of the first part, or other railroad companies over whose roads the said transportation is to be done, its or their agents or employés; and the said party of the second part do also, for the consideration

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aforesaid, agree to indemnify and save harmless the said party of the first part, and all other railroad companies over whose roads the said transportation is to be done, its and their officers, agents, and employés, from and against all claims and demands whatsoever, for or on account of any such loss or damage or injury.

WM. S. SLOAN,
General Freight Agent, Delaware,
Lack. & West. R. R. Co.
M. COYLE,
Agt. Forepaugh Show.

Dated March 18, 1886.

(2) The party specified in this contract as the Great Forepaugh Show was Adam Forepaugh, for whom said M. Coyle was the duly authorized agent.

(3) On May 14, 1886, after the making of said contract, certain circus cars, with certain circus apparatus loaded thereon, all of which were the property of the said Adam Forepaugh, were delivered to the officers and agents of the Delaware, Lackawanna, and Western Railroad Company for transportation from Binghamton to Cortland, in the State of New York, upon the following receipt:—

No.
The Delaware, Lackawanna, and Western Railroad Company.

Rates of storage.—For every hundred pounds of freight left at the station over one day a charge for storage will be made. All claims for damages to a deficiency must be made before their removal.

BINGHAMTON STATION, May 14, 1886.

Forepaugh's Circus to the Delaware and Lackawanna Railroad Company, Dr.

For handling and transportation from Binghamton to Cortland, five passenger cars, two box of stock, twenty-three platform, three elephant (forty-two cars) $250 00
Back charges, prepaid.
Received payment,
C. G. MERRILL,
Agent.

(4) On May 15, 1886, in the course of said transportation, while under the control and management of the servants and employés of the said Delaware, Lackawanna, and Western Railroad Company, the injury occurred, to recover damages for which the present suit has been brought.

A motion by the defendant for judgment *non obstante veredicto* was argued before the Court in banc, who granted the motion, and entered judgment for the defendant in an opinion by BREGY, J., as follows:—

"The plaintiff, who was a circus proprietor, owning his own cars, and desiring to go from point to point with his show, made the following contract with the defendant. (Here follows the contract):—

"On the journey from Binghamton to Cortland, by the negligence of an engineer, the train parted, an accident occurred, and considerable property was damaged.

"The place of the making and performance of the contract and scene of the accident was in the State of New York.

"It was proved at the trial and admitted on the argument of this motion, that this contract is perfectly valid by the law of that State.

"In Lockwood *v.* Railroad Co. (17 Wallace, 357) Justice BRADLEY, in delivering the opinion of the United States Supreme Court, holds that such contracts are void as against public policy. The jurisdiction of that Court is unfettered by State lines, and they have decided to hold invalid all such contracts made within its jurisdiction, and if we were construing a contract of our own State we would probably come to the same conclusion.

"But the position of a State Court in passing upon the validity of a contract made and to be performed in another State is quite different from that occupied by the United States Supreme Court, in which State lines are obliterated.

"We feel that, in passing upon this question, the comity between States requires us to hold this contract to be a valid one.

"Such is the law, repeatedly declared by the State of New York, the State of the contract. (Cragin *v.* Railroad, 51 N. Y. 61; Mynard *v.* Railroad, 71 N. Y. 180.)

"There is no harshness or injustice in holding plaintiff to the contract he made, and in deciding that he cannot, by stepping across the State line, acquire rights here that he would not have had if suit had been brought in the State where his contract was made and was to be performed.

"For these reasons the rule is made absolute, and judgment entered for defendant on the point reserved."

Thereupon the plaintiff took this writ, assigning for error the entry of judgment for defendant and not for plaintiff.

John G. Johnson (*John A. Brown* with him), for the plaintiff in error.

The defendant acted as a common carrier and is liable as such.

The validity of this contract is a question of commercial law, and the Courts of this State are at liberty to follow their own decisions in the absence of any local statutes, or local common law, in New York, varying such commercial law. This has been decided in the United States Courts.

Lockwood *v.* Railroad, 17 Wallace, 357.
Green *v.* Neel, 6 Peters, 291.
Beauregard *v.* New Orleans, 18 Howard, 497.
Chicago *v.* Robins, 2 Black, 418.
Gelpcke *v.* Dubuque, 1 Wallace, 175.
Taylor *v.* Ypsilanti, 105 U. S. 60.
Russell *v.* Southerd, 12 Howard, 139; 13 Id. 268.
Swift *v.* Tyson, 16 Peters, 1.

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Oates *v.* Nat. Bank, 100 U. S. 239.
Railroad Co. *v.* Nat. Bank, 102 Id. 14.
Myrick *v.* Mich. Cent. R. R., 107 Id. 102.
Bucher *v.* Cheshire R. R. Co., 125 Id. 555.

There is no higher duty upon our Supreme Court to follow the decisions of the Courts of other States, than rests upon the Supreme Court of the United States.

Of course there may be a local common law, *i. e.*, the common law proper, modified by usage and custom in each particular State. In such case, however, such local common law is the law of a State equally with its statute. It must be enforced by the Supreme Court of the United States as well as by the Supreme Court of every State. It will be held by all to be what it is held to be by the highest Court of the particular State. Where the State Courts, however, pass upon questions of general commercial law or of the common law, and interpret either without pretending that they do more than interpret it, no other State Courts are bound to follow their interpretation.

This has been expressly decided in a case analogous to this one.

Faulkner *v.* Hart, 82 N. Y. 416.

We concede that a contract will be construed in accordance with the law of the State in which it is made, and that if it be legal in such State it will be generally enforced in other States. We assert, however, that no Court will enforce a contract which is contrary to public policy, even though it was valid in the State in which it was made.

Lawson on Carriers, page 31.
Laing *v.* Colder, 8 Pa. St. 479.
Wharton's Confl. of Laws, p. 388, § 490.
Story's Confl. of Laws, p. 371, § 244.
Bank of Augusta *v.* Earle, 13 Pet. 519, 589.
Hope *v.* Hope, 8 De G. M. & G. 730.
Rousillon *v.* Rousillon, L. R. 14 Ch. Div. 351.
Oscanyan *v.* Arms Co., 103 U. S. 276.
Flagg *v.* Baldwin, 38 N. J. Eq. 219.
R. R. Co. *v.* Lockwood, 17 Wallace, 357.
Keller *v.* Paine, 107 N. Y. 83.

The contract of release will not be enforced because it was executed under circumstances amounting to duress and was unreasonable.

Lawrence Lewis, Jr., and *Hampton L. Carson* (*J. Bayard Henry* with them), for the defendant in error.

In entering into the contract in this case the railroad company was not a common carrier and was therefore at liberty to stipulate for exemption from liability, even for negligence.

Coup *v.* Wabash, St. L. & R. R. Co., 56 Mich. 111.
Beckman *v.* Shaus, 5 Rawle, 179.
Transportation Co. *v.* Hope, 95 U. S. 297.

The owners of tow-boats have not been held to the liabilities of common carriers.

Leonard *v.* Hendrickson, 18 Pa. St. 40.
Brown *v.* Clegg, 63 Id. 51.
Hays *v.* Miller, 77 Id. 238.

Under the law of New York, as laid down by the Court of Appeals, the contract was valid. As the contract was made within the State of New York, and as the accident occurred in that State, the law of New York in regard to the validity of the contract must govern, and the Courts of Pennsylvania will decide accordingly.

Story on Conflict of Laws, § 242.
Addison on Contracts, § 195.
Wharton on Conflict of Laws, § 471 *et seq.*
Miller *v.* Tiffany, 1 Wallace, 310.
Scudder *v.* Bank, 91 U. S. 416.

The principle has been directly applied in many cases to contracts made by common carriers.

Brown *v.* C. & A. R. R. Co., 2 Norris, 316.
Brooke *v.* N. Y., L. E. & W. R. R., 12 Out. 529.
Knowlton *v.* Erie R. R., 19 Ohio St. 260.
Talbott *v.* Merchants' Dispatch Co., 41 Iowa, 247.
Robinson Bros. *v.* Merchants' Dispatch Trans. Co., 45 Id. 470.
Hale *v.* New Jersey Steamship Co., 15 Conn. 539.
Fairchild *v.* Penna. Co., 69 Ill. 260.
Gray *v.* Jackson, 51 N. H. 49.
Carter *v.* Bennett, 39 Texas, 203.
Ryan & Co. *v.* M. K. & T. R. Co., 65 Id. 13.
First Nat. Bank *v.* Shaw, 61 N. Y. 283.
McDaniel *v.* Chicago & N. Y. R. R. Co., 24 Iowa, 412.
P. & O. Steamship Co. *v.* Shand, 11 Jurist N. S. 771.
Jacobs *v.* Credit L. L. Agency, 53 L. J. Q. B. 156.

The position taken by the Supreme Court of the United States should not be followed by the State Courts.

Hare on Const. Law, 1107 *et seq.*

It cannot be followed because State Courts have not jurisdiction equal and co-ordinate with the Courts of another State as the United States Courts claim to have. State Courts may not impair the obligation of contracts. (See Gelpcke *v.* Dubuque, 1 Wallace, 175.) And because it would lead to great inconveniences.

The case of Faulkner *v.* Hart is distinguishable from the present case, is inconsistent with the cases above cited relative to the construction and validity of contracts of common carriage made in other jurisdictions, and is directly opposed to a case strictly analogous to the one now under discussion, viz:—

Milwaukee & St. Paul R. R. Co. *v.* Smith, 74 Ill. 197.

The contract in this case being valid according to the laws of the State of New York, where it was made, is not in any way contrary to the public policy of the State of Pennsylvania, and will therefore be recognized and given due effect in our Courts.

Story on Conflict of Laws, § 38.
Wharton on Conflict of Laws, § 401.
Greenwood on Public Policy, Rule LXIV.
2 Kent's Commentaries, 458.
Bless *v.* Brainard, 41 N. H. 256.
Greenwood *v.* Curtis, 6 Mass. 658.

The cases cited by plaintiff in error are well-recognized exceptions.

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There was no duress in this case, nor was the contract so unreasonable as to prohibit its enforcement.

October 7, 1889. THE COURT. Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars, upon certain conditions and terms, elaborately set out in writing, among which was a stipulation that in consideration that the service was to be performed "for much less than the ordinary, usual, and legal rates charged other parties for a like amount of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage, or injury to any of the animals, property, or things thus transported, "although such loss, damage, or injury may be caused by the negligence of the (defendant), its agents, or employés." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question before us is whether it can be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained. (Cragin *v.* N. Y. C. R. R. Co., 51 N. Y. 61; Mynard *v.* R. R. Co., 71 Id. 180; Wilson *v.* R. R. Co., 97 Id. 87.)

Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York Courts are not binding, and in the absence of any statute in New York expressly authorizing such a contract, the Courts of this State must follow their own views of the commercial, as part of the general common law, though different views may be held as to such law by the Courts of New York.

This is the main argument of the plaintiff, and as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial, or general common law, separate from, and irrespective of a particular State or government whose authority makes it law. Law is defined as a rule prescribed by the sovereign power. By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized States are substantially the same, and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a State, or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction it is not law at all; with such sanction it is law without reference to its origin, or the concurrence of other States or people. Such sanction it is the prerogative of the Courts of each State itself to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law. It is universally conceded that, as to statutes, the decisions of the State Courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law, for what the latter determine, equally with the former, is the law of the particular State. The law of Pennsylvania consists of the Constitution, treaties, and statutes of the United States, the Constitution and statutes of this State, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences, and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania Court. To take a familiar illustration. In the United States the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The Court of Chancery of New Jersey, in Robeson *v.* Pittenger (1 Green Ch. 57) (1838), held that the same doctrine was part of the common law of New Jersey. The Supreme Court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles, but proceeding cautiously from the dictum of ROGERS, J., in Hoy *v.* Sterrett (2 Watts, 331) (1834), to the unanimous decision of the Court in Haverstick *v.* Sipe (33 Pa. 368) (1859), held that the doctrine of ancient lights by prescription was not part of the common law of Pennsylvania. No tribunals of any other State presume to question that the common law of New Jersey and the common law of Pennsylvania differ on this point.

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What is law in one State is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective States. And, though it rests only on the decisions of the Courts, it is none the less absolutely and indisputably the law than if it had been made so by statute.

I have purposely selected an illustration from the law relating to real estate, because, if I took one from the commercial law, it might seem like assuming the very question under discussion. But the example is none the less pertinent. The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a State stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either, is, that it does not agree with the premises or the reasoning of the Court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this it is universally conceded no foreign Court can do. There is no difference in principle. The decisions of a State Court, upon its common law and on its statutes, must stand unquestioned, because it is the only authority competent to decide, or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusion.

It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in Swift *v.* Tyson (16 Peters, 1). Since then the Courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the State where the question arose. It is argued now that as to such questions the State Courts also have similar liberty. It would be sufficient answer to this argument that such a a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is in principle and in practical effect impairing the obligation of the contract, which even the sovereign power of a State is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists: "Questions growing out of contracts made and to be performed in a State, are decided by the national Court of last resort, not in accordance with the unwritten or customary law of the State where they originated, as expounded by its Courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The State Courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. . . . Whether a recovery shall be had on a promissory note, which has been taken as collateral security for an antecedent debt against a maker, from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and if that is federal the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. . . . The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American Courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality.

"The several States of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters through their representatives in the local Legislatures, expressly, or by long-continued acquiescence in the rules enunciated by their Judges, it cannot be set aside by Congress short of an amendment of the Constitution. Had the New York Legislature declared that notes made and negotiated in that State should follow the rule laid down in Coddington *v.* Bay (20 Johnson, 627), the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national Legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this respect than the legislative." Hare on Constitutional Law, pp. 1107, 1117, and see Lecture 51 *passim.*

We conclude, therefore, that the distinction between the binding effect of decisions on commercial law, and on statutes, is utterly unten-

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able; that the law declared by State Courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States Courts is to be regretted and certainly not to be followed.

In entire accordance with this view are our own cases of Brown *v.* R. R. Co. (83 Pa. 316), and Brooke *v.* R. R. Co. (108 Id. 530); and the decisions in Ohio, Knowlton *v.* Erie R. R. Co. (19 Ohio St. 260); in Illinois, Penna. Co. *v.* Fairchild (69 Ill. 260); Milwaukee & St. P. R. R. Co. *v.* Smith (74 Id. 197); in Iowa, Talbott *v.* Dispatch Co. (41 Iowa, 247); Robinson *v.* Dispatch Co. (45 Id. 470); in Connecticut, Hale *v.* Nav. Co. (15 Conn. 539); in Kansas, R. R. Co. *v.* Moore (29 Kans. 632); in South Carolina, Bridger v. R. R. Co. (27 So. Ca. 462); in Georgia, R. R. Co. *v.* Tanner (68 Ga. 390); in Mississippi, McMaster *v.* R. R. Co. (65 Miss. 271); in Texas, Carter *v.* Bennett (39 Texas, 203); Ryan *v.* Ry. Co. (65 Id. 13), and perhaps in other States. I will not notice them in detail further than to quote the terse and forcible summary made by SCOTT, J., in Knowlton *v.* R. R. Co.: "As the contract was made within the jurisdiction of New York, and contempleted no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution, cannot be affected by the laws or policy of other States. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio."

Holding therefore that the validity of this contract is to be determined by the law of New York, as decided by the Courts of that State, is there any reason why the Courts of this State should not enforce it? The general rule is that Courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State or of its citizens. (Story on Conflict of Laws, sections 38, 244.) The injury may be indirect by offending against justice, or morality, or by tending to subvert settled public policy (2 Kent, 458; Greenwood *v.* Curtis, 6 Mass. 358; Bliss *v.* Brainard, 41 N. H. 256). But this does not imply that Courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the Courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this State. (Ralph *v.* Brown, 3 W. & S. 395; Wood *v.* Kelso, 27 Pa. St. 243; Irvine *v.* Barrett, 2 Grant, 73.)

The contract in the present case does not directly affect the State or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the State that it would have been invalid if it had been made here. It has some exceptional features, which it is argued take it out of the ordinary rules governing the contracts of common carriers, and the case of Coup *v.* R. R. Co. (56 Mich. 111) is a strong authority for that position. But without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State, any more than would a foreign contract for what would be usurious interest here, and that as already said the Courts have never hesitated to enforce.

The argument of duress may be briefly dismissed for want of any evidence in the case to sustain it. There is no evidence that defendant was unwilling to accept the ordinary and usual rates for the transportation of plaintiff's cars and property. If they had been offered by plaintiff and refused, there might have been some ground for the present argument, though in view of the peculiar nature of the property and the special facilities required, even that is far from clear. But in fact plaintiff got a large reduction of rates, and part of the consideration for such reduction was the agreement that he should be his own insurer against loss by accident. There was nothing compulsory about such a contract, and plaintiff comes now with a very bad grace to assert a right that he expressly relinquished for a substantial consideration.

The learned Court below was right in entering judgment for the defendant on the facts found in the special verdict.

Judgment affirmed.

Opinion by MITCHELL, J.

Dissenting opinion by WILLIAMS, J.

I dissent from the judgment in this case because I cannot agree that a well-settled rule of public policy of this Commonwealth must give way to considerations of mere comity. The contract set up as a defence to this action is a release to a common carrier from liability for its own negligence. It is well settled in this State that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus* when not subversive of the public policy of our own State. This

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has been distinctly held by the Court of Appeals of New York, in which this release was executed, and in whose behalf comity is asked. I would follow the Court of Appeals because comity can require no more of us in any given case than the Courts of the place of the contract would yield to us for comity's sake; and because I believe the rule to rest on solid ground.

STERRETT, J., concurs in foregoing dissent.

PAXSON, C. J., and CLARK, J., absent.

C. K. Z.

Jan. '89, 165. May 9, 1889.

First National Bank of Warren v. Fair.

Judgment—Payments thereon—Lien—Vendor and vendee—Affidavit of defence.

A bank held a judgment against X. for $625 to secure the payment of notes to that amount. X. sold land against which this judgment was a lien to Y. The bank afterwards issued execution on the judgment, and the sheriff paid the bank out of the funds in his hands a sum sufficient to satisfy the judgment as it stood on the record. Subsequently Y. brought suit against the bank, claiming that he had paid full price for the land, and knew nothing of the existence of the judgment; that before the execution was issued X. had paid the bank $300, which was to be applied on said judgment, and that accordingly there had been an over-payment, after allowing for interest, etc., of $126.35, which he claimed. He also alleged that he did not know of X.'s payments on account at the time of the sale. The bank's affidavit of defence alleged that the money received from the sheriff was on account of X.'s indebtedness to it, and that the sum realized was not sufficient to satisfy this, but the balance had to be secured from X.'s indorsers. The lower Court gave judgment for want of a sufficient affidavit of defence:

Held, that this was error. The bank was entitled to the money as against X., and Y., who claimed title to the land under X., was in no better position than X. There was no allegation in Y.'s statement that the bank had agreed to apply moneys received on account of the judgment.

Error to the Common Pleas of Warren County.

Sur rule for judgment for want of a sufficient affidavit of defence.

The plaintiff filed the following statement of claim:—

"The plaintiff in this case, by his attorneys, Allen and Higgins, files this his statement of demand in this case as follows: Said First National Bank (the above defendant) held a judgment against Frank O'Connor and Edward Reid, which judgment was entered to No. 378, September Term, 1883, and on which execution was issued on the 27th day of March, 1884, to No. 74, June Term, 1884; that between the date of the entry of said judgment, and the issuing of said execution, the said plaintiff, John M. Fair, purchased from the said O'Connor and Reid a certain piece of land, which was situate in Sheffield Township, in said county of Warren, and containing fifty acres of land. The said judgment was for the sum of $625, and was entered in the Court of Common Pleas of Warren County, and therefore was a lien upon the said land at the time plaintiff purchased same. That at the time said plaintiff purchased said land, he did not know of the existence of said lien, and paid the full purchase price for the same. That before the said execution was issued, the said O'Connor and Reid had paid to the said bank the sum of $300, which was to apply on the said judgment. That said judgment was given to the said bank for the purpose of securing six notes (five notes of $100 each, and one note of $125), which said bank had discounted for said O'Connor and Reid. That said O'Connor and Reid had, prior to the issuing of said execution, paid three of said $100 notes to said bank, and which should have been credited on said judgment, as of the dates the same were paid. That no credit has ever been given by the said bank on the said judgment, for the said $300, paid as aforesaid. That the sheriff on receiving the execution as aforesaid against said O'Connor and Reid, levied upon the said land which said plaintiff had purchased as aforesaid, and sold the same for the sum of $500. That said purchase-money was applied as follows: $38.65 costs on the execution, and $461.35 on the debt and interest. That said defendant bank received from the sheriff, through its attorneys, Brown and Stone, the said sum of $461.35, being the balance on said sale of said land, after paying said costs. That there was at that time only due to said bank from said O'Connor and Reid on said judgment and execution the sum of $325, and $10, interest on the same, making the sum of $335 then due and payable to said bank on said execution. That the said balance of $126.35 belonged to the said plaintiff, who was the owner of said land, subject to what was justly due on said judgment. That said O'Connor and Reid, both being away at the time of the said sale, said plaintiff did not know that anything had been paid to apply on said judgment, and therefore did not make a demand on the sheriff for the amount belonging to him. That as soon as the said plaintiff learned that said payments of $300 had been made as aforesaid, he demanded of the said defendant the said sum of $126.35, and the interest on the same, but said defendant refused to pay the same or any part thereof, and still refuses. Whereby said plaintiff says he is entitled to recover in this suit the sum of $200."

"The First National Bank of Warren, Pa.

"*To* JOHN M. FAIR, *Dr.*

"To money received from sheriff on sale of real estate, on execution No. 74, June Term, 1884, over and above the amount due on same execution."

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The defendant filed the following affidavit of defence:—

"M. Beecher, being duly sworn according to law, deposes and says that the money complained of by the plaintiff was paid to the defendant by E. A. Allen, Esq., then sheriff of Warren County; that the money so paid to it was made by the said sheriff upon lawful process issued from this court against Frank O'Connor and Edward Reid for that purpose, and paid to the defendant by the said sheriff; that the said money was received by the said defendant upon the indebtedness to it from said O'Connor and Reid, and that the same did not pay all their indebtedness to said bank, but there was still a balance due it from them which has been paid since by indorsers. Deponent further says that he is cashier of the First National Bank, the above-named defendant, and that he was cashier of said bank at the time the said money was paid to it by the said sheriff. And further deponent said not."

The Court gave judgment for the plaintiff for want of a sufficient affidavit of defence. Defendant took this writ assigning for error, *inter alia*, this action of the Court.

D. I. Ball (*C. C. Thompson* with him), for plaintiff in error.

George H. Higgins (*O. C. Allen* with him), for defendant in error.

June 28, 1889. THE COURT. Upon the facts set forth in the plaintiff's statement and defendant's affidavit of defence we are of opinion that the plaintiff is not entitled to judgment. The plaintiff's statement does not aver that the defendant knew that Fair had bought the land of O'Connor and Reid and paid the full value of it, and therefore he has no right to the inference of such a fact from the omission of the defendant to deny it. As the affidavit of defence avers that the money was received by the bank upon the indebtedness to it from O'Connor and Reid, and that it was not sufficient to pay all of said indebtedness, and that the balance of the indebtedness was subsequently paid by indorsers of O'Connor and Reid, it is difficult if not impossible to discover any element of *mala fides* on the part of the bank in receiving and retaining the whole amount of the money paid to them by the sheriff. The bank held a judgment against O'Connor and Reid for $625 to secure the payment of notes to that amount. Three hundred dollars, being for three of the notes, had been paid to the bank by O'Connor and Reid. The plaintiff's statement alleges that the $300 "was to apply on the said judgment," but it does not allege that the bank had agreed to so apply it or that O'Connor and Reid had made any such application of it when money was paid. Without such an averment the statement that the $300 "was to apply on the said judgment" is nothing more than the expression of the affiant's opinion to that effect. The same is true of the allegation that the amount "should have been credited on said judgment." The case then is, that, without any averments of a special application of the money paid to the extinguishment of the judgment *pro tanto*, by either of the parties to the judgment, the plaintiff in the judgment having issued execution thereon and sold the real estate of the defendant therein, the sheriff voluntarily paid to the plaintiff out of the proceeds in his hands a sum sufficient to satisfy the judgment as it stood of record. This amount was in excess of the amount which would have been due if the $300 paid by the defendants in the judgment previously, had been credited on the judgment when paid or at any time after, but was not enough to pay the whole amount of the indebtedness due by the defendants to the plaintiff. Clearly as between the defendants and the bank, the latter had the legal, as well as the moral, right to retain the whole amount of the money received, for it would be no more than a debtor to the defendants for the amount of the excess, and this indebtedness it would have a right to apply to the remaining indebtedness due by the defendants to the bank. Indeed it would be a grave question whether the bank might not be required to make such application by the indorsers of the other paper held by the bank. This being so how does it become unconscionable for the bank to retain the money? The defendants in the judgment owed it to the bank, and so far as appears on the record of this case they make no objection to this action of the bank. If the bank owed no duty to return the money to the defendants in the judgment how do they owe such a duty to Fair, who claims title to the land under the defendants? He was a voluntary purchaser from the defendants. The judgment of the bank was at that time a lien on the property purchased, ostensibly for its whole amount, and Fair took the title with full record notice of the judgment for its whole amount.

The bank owed him no duty of information. If he failed to know of the judgment it was his own fault for which he cannot hold the bank responsible in any manner whatever. He had ample opportunity to intervene and assert any rights he may have had as a purchaser before the sheriff's sale, but he did not see fit to do so. He allowed the sale to proceed and the purchase-money to be paid over to the bank without objection, and after all this has been done and the bank has simply received money made by lawful process of execution, and which as against its judgment debtors, the defendants in the execution, it had a perfect right to retain, he brings an action against the bank to recover for himself the money so received. We know of no principle

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of law or morals upon which a recovery can be had in such circumstances, and we are referred to no authority which has ever sanctioned it.

Judgment reversed, and procedendo awarded.

Opinion by GREEN, J. W. M. S., Jr.

July '88, 203. January 24, 1889.

Kern v. Middleton.

Equitable ejectment — Fraud — Rescission — Evidence.

When an action of ejectment is brought to rescind an executed contract for the sale of real estate on the ground of fraud, the evidence of the fraud must be clear, precise, and indubitable, and must preponderate so greatly as to satisfy the conscience of the Court that the alleged fraud has been perpetrated. If the evidence does not come up to this standard it is the duty of the Court to withdraw the case from the jury.

Error to the Common Pleas No. 1, of Philadelphia County.

Ejectment, by Walter R. Kern against Louis M. Simpson and Edwin Middleton, for a lot of ground on the south side of Spring Garden Street west of Thirty-Seventh Street in the city of Philadelphia. Simpson filed a disclaimer of title.

On the trial, before ALLISON, P. J., the facts of the case appeared to be as follows: In 1883 plaintiff acquired title to the lot in question, and put the same into the hands of Charles F. Hall, a real-estate agent, for sale. The price asked was from $6000 to $6500. In January, 1884, Louis M. Simpson entered into some negotiations with Hall for the purchase of the lot. The latter, according to Simpson's testimony, offered the lot as low as $5500 cash, but this Hall denied. On January 7, 1884, Simpson proposed to give six $1000 bonds of the Bankers and Merchants' Telegraph Company in exchange for the lot. At the same time he produced and exhibited a letter from one Dimmick, president of the telegraph company in New York, in answer to an inquiry about the bonds, giving an address in New York, and stating that full information as to them could there be obtained. This letter he gave to Hall, telling him that he could inform himself as to the bonds at that address. Simpson testified that this letter stated among other things that the bonds were not on the market and had no present market value, and that they were part of an issue of $10,000,000. Hall testified that he did not remember any such statements in the letter. At the request of Hall, Simpson wrote his offer on a slip of paper as follows:—

"$6000. First mortgage six per cent. Bankers and Merchants' Telegraph bonds, for lot Spring Garden west of 37th Street, 50 by 120, and back strip. To be accepted this week. L. M. Simpson, January 7, 1884, 187 Broadway, New York."

At the time these transactions took place there was in existence a corporation known as The Bankers and Merchants' Telegraph Company, having its chief office in New York and various local corporations of the same name in Pennsylvania and other States, the lines of which were all leased by the parent company in New York. The lines of the Pennsylvania company were subject to a mortgage of $300,000 to secure bonds for a like sum which sold in the market for about 98 per cent. of the par value. The property of the parent company was subject to a mortgage of $10,000,000, covering, *inter alia*, the leases of the local companies. The bonds secured by this mortgage were not on the market.

Hall submitted Dimmick's letter and Simpson's offer to plaintiff by whom it was accepted. The transaction was thereupon closed. Six bonds of the New York company were delivered to Kern and a conveyance made to Simpson of the lot. Kern admitted that Dimmick's letter was handed to him by Hall and that he saw in it the statement of the address in New York and the statement that he could there write for information as to the bonds. He also testified that he had made inquiry as to the bonds, but did not state how or where.

On January 28, 1884, before the delivery of the deed to Simpson, he agreed to sell the lot to his father-in-law, Edwin Middleton, for $5000 cash, and accordingly subsequently conveyed to Middleton for that sum.

Plaintiff contended that he had been deceived as to the character of the bonds given him, and that he had supposed he was to receive the bonds of the local company. He testified that several months after the transaction the following conversation took place between himself and Simpson: "I called on Mr. Simpson and said, 'Mr. Simpson, these are not the bonds you have agreed to give me; I find they are of a different issue and I prefer to have the lot or the bonds agreed upon. I prefer to have the bonds originally agreed upon or the lot.' He said that is so, but those bonds were better than the first mortgage bonds for they covered the entire franchises, the entire plant of the company. He said it was too late to return the lot, that he had parted with it."

In the spring of 1884 the bonds of the Bankers and Merchants' Telegraph Company, of New York, were selling at 81½. In August the company failed and its bonds became worthless. Simpson stated that he had a conversation with Kern prior to the failure, in the course of which Kern said, "Those bonds that you gave me for that lot were not what I thought they were, but it makes no difference."

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He further testified to another conversation with Kern after the failure as follows: "He said, 'I would like you to give me back my lot and I will give you those bonds.' I told him I couldn't do that, for I had sold the lot to Mr. Middleton. That is the substance of what occurred."

As to the first of the above conversations, Simpson was corroborated by a bystander, one Dorphly.

The theory of the plaintiff was, that the sale by Simpson to Middleton was not *bona fide*, but that Simpson had acted throughout as the agent of Middleton. Some evidence was introduced upon this point.

The Court refused numerous points presented by plaintiff, and instructed the jury to find for defendant, on the ground that there was no sufficient evidence of fraud in the transaction. Verdict and judgment accordingly. Plaintiff thereupon took this writ, assigning for error the action of the Court as above.

Hood Gilpin (*Leonard R. Fletcher* with him), for the plaintiff in error.

The contract between Kern and Simpson was voidable on the ground of fraud.

Pearsoll *v.* Chapin, 44 Pa. 9.
Hazard *v.* Irwin, 18 Pick. 102.
Edwards *v.* McLeay, 1 Coop. 308.
Phipps *v.* Buckman, 30 Pa. 401.
Small *v.* Atwood, 6 Cl. & Fin. 232.
Bigley *v.* Jones, 114 Pa. St. 515.
Bracken *v.* Miller, 4 W. & S. 102.
Reed's Appeal, 10 Casey, 209.
Houseman *v.* Building Association, 31 Smith, 256.
Miles *v.* Lewis, 19 WEEKLY NOTES, 262.

The question should have gone to the jury as to whether Middleton occupied the position of a *bona fide* holder for value.

Lowe *v.* Dalrymple, 117 Pa. St. 564.
Bredin *v.* Bredin, 3 Id. 81.
Gibbs *v.* Neely, 7 W. 305.
Rogers *v.* Hall, 4 Id. 361.
Drakers *v.* Temple, 41 Pa. St. 234.
Confer *v.* McNeal, 74 Id. 112.
MacKinley *v.* McGregor, 3 Wh. 397.
Brinks *v.* Heise, 84 Pa. St. 246.
McDowell *v.* Rissell, 37 Id. 164.
Crawford *v.* Ritter, 1 Penny. 33.

George L. Crawford (*George M. Dallas* and *Robert H. McGrath* with him), for defendant in error.

There was no evidence of fraud to go to the jury.

Morton *v.* Weaver, 3 Out. 47.
Mead *v.* Conroe, 3 Amer. 220.

February 4, 1889. THE COURT. This writ of ejectment must be regarded as the equivalent of a bill in equity to rescind, and is governed by the same principles. The contract has been fully executed, the deed delivered, and the purchase-money or consideration paid. In such case it is not sufficient to show that there was some evidence of fraud, by means of which the plaintiff was overreached in the transaction; nor is it perhaps a question of the weight of evidence. A Chancellor will never rescind an executed contract merely because the scales incline slightly in favor of the plaintiff; the preponderance must be so great as to satisfy his conscience that the alleged fraud has been committed. The evidence to set aside a deed must be clear, precise, and indubitable. This has been said so often that we may well be excused citing the cases.

The evidence in the case, so far from measuring up to this standard, is vague and unsatisfactory. It was so slight that the learned and careful Judge of the Court below declined to submit it to the jury. It is true the bonds accepted by the plaintiff did not prove as valuable as he perhaps expected, and he may have made a bad bargain in exchanging his land for them, but we see no such fraud in the transaction as entitles him to rescind.

We need not discuss the rulings of the Court below upon the plaintiff's points. The plaintiff had no facts to which his points could attach themselves.

Judgment affirmed.

PER CURIAM. L. L., JR.

Jan. '89, 257. April 12, 1889.

Kern v. Simpson.

Fraud—Deceit—Evidence.

In an action of deceit an actual intent on the part of defendant to defraud must be proved. There can be no such thing as constructive deceit.

The evidence in this case held insufficient to sustain an action of deceit for an alleged false and fraudulent representation as to certain bonds given by defendant to plaintiff as the purchase-money of real estate.

Error to the Common Pleas No. 3, of Philadelphia County.

Case, by William H. Kern against Louis M. Simpson, for deceit. Plea, "not guilty."

On the trial, before GORDON, J., the facts developed by the plaintiff's evidence were substantially those set forth in the preceding case of Kern *v.* Middleton. The action was brought to recover damages for an alleged false representation by defendant as to the character of the bonds given by him to the plaintiff.

At the close of plaintiff's case the defendant moved for a compulsory nonsuit, which the Court granted, delivering the following opinion:—

"This is an action on the case for deceit—making certain false and fraudulent representations in connection with the sale of real estate with an intent to defraud the plaintiff. Of course, the gist of such an action is the intent to defraud. As was said by Judge GIBSON in a leading case on the subject: 'A constructive deceit is a new thing

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under the sun.' There can be no such thing as a constructive deceit. It is either deceit, or it is not; and if a deceit, the vital element is that of an intention to defraud.

"Keeping that principle of law in mind as the ruling principle of this cause, the evidence shows simply this: That the plaintiff had a plot of ground in West Philadelphia to sell; he employed as his agent a person named Hall, who brought to the plaintiff the slip of paper which the plaintiff received. It was signed, apparently, by L. M. Simpson, and was on its face a proposition to exchange $6000 first mortgage bonds of the Bankers and Merchants' Telegraph Company for the lot of ground.

"It is also undoubtedly in evidence that at the same time the plaintiff was given a further communication, which he says he never read, and which also was from the defendant upon the same subject-matter. The plaintiff never had any conversation with the defendant, and there is no testimony in the case of any further declaration, or pretence, or acts by the defendant, from which anything can be inferred or proven as to his intent. The only other instance in which the defendant appeared was subsequently, when the plaintiff had executed a deed ready for delivery. Then the defendant comes to the office of the plaintiff, and presents to him the six bonds which are in evidence, which are indorsed in legible characters, and the nature of which is proclaimed by their indorsement. He hands them to the plaintiff, a man of intelligence, who was thereby enabled to advise himself fully of exactly what the bonds were. He received them, and he delivered the deed; and whatever right of action he may have had for deceit culminated then. Up to that point all the facts were done, all the declarations made which constituted, if they constituted at all, a deceit which was actionable.

"[I do not see in all this testimony a scintilla of evidence from which an intent to defraud can be found. That which the defendant gave he gave openly. Its character was proclaimed by the indorsement; and this plaintiff was enabled fully to advise himself of everything relating to these bonds.]

"Moreover, there is no evidence of any declaration by the defendant at any time prior or subsequent to the delivery of the deed, which shows that he did not believe that those bonds were first mortgage bonds, which, in fact, by the evidence in this case, they were to some extent; because the evidence is that divisional bonds were a first mortgage bond upon certain of the property, and did not cover other of the property, and that the bonds delivered were second mortgage bonds as to some of the property, and first mortgage bonds as to other of the property.

"We therefore have a case in which there was nothing done by the defendant which could have deceived a person who was put upon his guard at all points as to what he was receiving.

"As to Mr. Simpson's declaration subsequent to the consummation of this transaction, to my mind it does nothing more than show, taking it to be true in every respect, that he did believe that he was giving this plaintiff a better security than that which the plaintiff thought he ought to receive.

"Now, there is an absence of testimony in this case to which a Judge cannot close his eyes. Mr. Hall was in Court—the person to whom this defendant made every declaration that was made respecting this transaction. He was called at the end of the proceedings yesterday, and was withdrawn from the stand. Presumably he is in Court now. He was the agent of this plaintiff. There is no evidence that he was the agent of the defendant. He has full knowledge of anything which the defendant said. He is not called. The presumption, therefore, is that nothing was said by the defendant to this agent which would show an intent to defraud. On the other hand, the legal presumption is, that if there were any declarations made, they were such as would have shown the entire integrity of the defendant's conduct.

"I may also say that I do not see any proof of damage in this case. There is no competent proof to show that these bonds, at the time they were delivered, were not worth as much as what are termed the first mortgage bonds.

"I am not with the defendant in his proposition respecting the pendency of the ejectment suit. It is unnecessary, however, to discuss that as it does not influence my mind in the decision which I am about to make.

"On the whole case I do not see any proof of an intent to defraud, or any testimony sufficient to maintain an action for deceit. For these reasons I shall therefore grant the motion of defendant's counsel and enter a nonsuit in the cause."

The Court in banc subsequently refused to take off the judgment of nonsuit, whereupon plaintiff took this writ, assigning for error the refusal of the Court to take off the nonsuit.

Hood Gilpin (*Leonard R. Fletcher* with him), for plaintiff in error.

George L. Crawford, *George M. Dallas*, and *Robert H. McGrath*, for defendant in error, made no oral argument, citing in their brief—

Cox *v.* Highley, 100 Pa. St. 252.

April 29, 1889. THE COURT. The reasons given by the learned Judge of the Court below for entering a nonsuit in this case are so satisfactory that a discussion of it here is unnecessary.

Judgment affirmed.

PER CURIAM. L. L., Jr.

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July '88, 25. January 16, 1889.

Siemens Regenerative Gas Lamp Company v. Horstmann & Sons.

Principal and agent —Agency—Evidence of—Contract.

An agent of a gas lamp company offered in writing on the company's letter-head to introduce the lamps into a certain manufacturing establishment, and if within a year they did not answer the purpose to buy them back at half the cost. The letter was signed "General Agent." The offer was accepted and the lamps introduced. A letter from the president of the company was afterwards received by the purchasers, asking that the company should have the privilege of inspecting the lamps from time to time, so as to keep them in order. Up to within a month of the foregoing proposal it was conceded that the agent was practically the representative of the company, and that no notice had been given to the public of his withdrawal from that position. Before the expiration of the year the purchasers desired the lamps removed, claiming that they were unsatisfactory, and demanded back half the price paid. The company refused to comply, and denied the authority of the agent to enter into the above agreement, whereupon suit was brought upon the agent's proposal:

Held, that there was evidence of the authority of the agent to go to the jury.

Held, further, that as the company defendant had had the benefit of the contract, they could not repudiate the authority of the agent who made it.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit, by William H. Horstmann & Sons against the Siemens Regenerative Gas Lamp Company, upon a certain contract entered into with plaintiffs by J. W. Baker, agent for the company defendant.

On the trial, before FINLETTER, P. J., the facts appeared to be as follows: In December, 1884, Baker was acting as an agent for the sale of defendant's lamps, having a separate office from defendant. In pursuance of some conversation with plaintiffs, Baker, on December 22, 1884, made to plaintiffs a written proposal to introduce the lamps into plaintiffs' manufacturing establishment at a fixed price. The proposal was signed by Baker as "general agent." In pursuance of further conversation with plaintiffs, Baker, on January 5, 1885, wrote to them the letter following, incorrectly dated "1884":—

PHILADELPHIA, January 5, 1884.

MESSRS. HORSTMANN & SONS.

GENTLEMEN—If you put the Siemens burners in the mill and store, and after using them for one year, you find they do not answer your purpose, or that they get out of order, I will purchase them back from you at one-half the price they cost you in putting them in.

Respectfully,

J. W. BAKER,

918 Filbert. *General Agent.*

Defendant objected to the admission of the above letter in evidence on behalf of the plaintiffs. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Plaintiffs having agreed to this proposition, the lamps were introduced and were paid for by checks drawn to the order of the company defendant. The receipts for the checks were signed by the company.

Subsequently plaintiffs received the following communication from the company defendant:—

MESSRS. HORSTMANN & SON, Philadelphia.

GENTLEMEN—We are desirous that our Siemens lamps shall, at all times, be in proper working order, and give perfect satisfaction. With this object in view an employé of this company will make regular calls for the purpose of examining the lamps, and when necessary place them in good order.

Please accord to him the privilege of inspection. Should anything occur in the meantime requiring prompt attention, please notify us at once. Yours truly,

E. STEIN, *Manager.*

Before the expiration of the year plaintiffs claimed that the lights were not satisfactory, and requested the company defendant to purchase them back again as per the letter of January 5, 1884. To this request the following reply was made:—

MR. CLARKSON, care, HORSTMANN BROS., City.

DEAR SIR—Mr. Baker called here to-day, and from his explanation regarding the purchase of the Siemens lamps, we do not feel inclined to interfere in this matter. Mr. Baker claimed that his agreement with you was to satisfy you as to the durability of the lamp; that you were not sure on that point when you purchased it. In referring to the statement that you made, that you desired first to have a lamp placed in order to test it, and that he insisted they should all be placed at once, he claims that you are mistaken on that point, for the lamp was put up on trial, and that it was perfectly satisfactory, afterwards the order was given for the rest of them. We are very sorry that, after continuing in the use of the lamps with apparently satisfactory results for nearly ten months, you so suddenly conclude they are not what you want.

We remain, very truly,

E. STEIN, *Pres.*

The present suit was then brought.

It was in evidence that up to December, 1884, the sole management of the company had rested with Baker, who was "practically the representative of the company." It was further in evidence that no notice had ever been given to the public that Baker had ceased to hold this position as manager and practical representative of the company. It was also in evidence that Baker advertised himself as "General Agent" for the company, using as part of his advertisement a wood-cut furnished by the company, and that these facts were known to the secretary and treasurer. All of the correspondence between Baker and the plaintiffs was written on paper bearing the letter head and address of the defendant company.

Defendant requested the Court to charge, *inter alia*, as follows:—

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(1) In this case the plaintiffs cannot recover without showing affirmatively that J. W. Baker was authorized by the defendant to make for it such a contract as that sued on. There is no such evidence and therefore your verdict must be for defendant. *Refused.* (Second assignment of error.)

(2) The construction of the contract sued upon in this case is for the Court, and I instruct you that it does not bind the Siemens Regenerative Gas Lamp Company, the sole defendant in this case, and therefore your verdict should be for the defendant. *Refused.* (Third assignment of error.)

The Court charged the jury as follows: "As a general thing an agent for the sale of goods is authorized to make the terms of sale. In this case it is not denied that Baker was the agent of the defendants to make the sale. It is for the jury to say from the evidence he had the authority to make the terms of this sale; and if you believe he had the plaintiffs are entitled to a verdict for the amount claimed, with interest. (Fourth assignment of error.)

Verdict and judgment for the plaintiffs for $304.88. Whereupon defendant took this writ, assigning for error the admission of the above evidence, the answers to the points, and the charge of the Court as above.

Silas W. Pettit (*John R. Read* with him), for the plaintiff in error.

It is true that Baker, the salesman, wrote under his name "Gen. Agt.," but such assertion was no evidence of the fact.

The fact of agency cannot be proven by the declarations of the alleged agent, nor by his acts done without the knowledge or authority of the principal.

Telephone Co. *v.* Thompson, 112 Pa. St. 118.
Whiting *v.* Lake, 91 Id. 349.

And even if it was evidence that he was a general agent it was competent for the defendant to rebut the presumption and to prove the precise extent of his authority. The agent can only bind his principal within the scope of his authority.

Telephone Co. *v.* Thompson, *supra.*

There is no other evidence of agency. The agreement of Baker was a personal one.

N. Dubois Miller (*John Sparhawk, Jr.*, with him), for defendants in error.

The question of agency was properly submitted to the jury.

Schuchardt *v.* Allen, 1 Wall. 359.
Deering *v.* Thom, 29 Minn. 120.
Oster *v.* Mickley, 35 Minn. 245.

January 28, 1889. THE COURT. The question here is whether J. W. Baker was such an agent of the company as authorized him to bind it by his letter of January 5, 1884, addressed to the plaintiffs below, by which he offered to put the Siemens burners in their mill, with the agreement that if "after using them for one year you find they do not answer your purpose, or that they get out of order, I will purchase them back from you at one-half the price they cost you in putting them in." This letter was signed by Baker as the general agent. The plaintiffs below accepted the offer, had the burners put in their mill upon the faith of it, and after a trial of them for several months notified the defendant to take them out as they were not satisfactory. The company declined to take them back at half the cost, upon the ground that Baker had no authority to make such a contract, and was not in fact the general agent of the lamp company. The jury have found the agency and the company are bound by such finding if there was sufficient evidence upon this question to submit to them. We think there was not only enough evidence to take the case to the jury but also to justify their verdict. Without specifying it in detail we may refer to the letter of E. Stein, the President, to the plaintiffs, which to some extent, at least, recognizes Baker's agency. Aside from this the defendant company have had the benefit of the contract, and they cannot now repudiate the authority of the agent who made it. This is familiar law.

Judgment affirmed.

PER CURIAM. L. L., JR.

Common Pleas.

C. P. No. 2. August, 1889.

Queen City Suspender Company v. Adamson et al.

Set-off—Against what claims set-off may be allowed—Money received in a fiduciary capacity—What constitutes a fiduciary relation—Suit for the proceeds of a note sent to the defendant to be discounted for the plaintiff—Moneys received by a merchant without instruction as to their disposition.

Sur rule for a new trial.

All of the facts appear in the opinion of the Court.

Rudolph M. Schick, for the rule.

Elias P. Smithers, contra.

August 20, 1889. THE COURT. This was an action of assumpsit for the proceeds of a promissory note, discounted for the plaintiff through the efforts of the defendants, in which action there was filed a plea of set-off. In the early part of 1884 the defendants, who were merchants, were creditors of the plaintiff for goods

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sold and delivered in the sum of $1322.86, and on account of this amount had received promissory notes as follows: One for $860.54, due February 25, 1884; one for $202.09, dated January 19, 1884, at ninety days, and one for $113.27, dated February 6, 1884, at ninety days.

February 19, 1884, the defendants received the following letter:—

"CINCINNATI, Feb. 18, 1884.

Messrs. Jos. Adamson & Co.:

Gentlemen: Inclosed I hand note dated February 11, for $1000, indorsed by B. W. Sowles, of Urbana, Ohio. He is the father of our C. W. Sowles, and is worth seventy to eighty thousand dollars in real estate in the city of Urbana, without a dollar of incumbrance on it, and does not owe a dollar in the world; his name is "gilt edge," is better than a mercantile name, because his financial strength is not weakened by large liabilities, as he indorses for nobody but his son, we use this paper in the banks here at the very lowest rates of interest without question, but with the flood on our city it is impossible to use paper here if it had Vanderbilt's name on it; the banks here are compelled to renew all of our merchants' paper, so cannot take any new at present. Will you please get this discounted for us in your city, and wire us, at our expense, what the proceeds will be. Bradstreet rates Mr. Sowles fifty to seventy-five thousand dollars; see their book. If you will do this will greatly oblige,

Yours very truly,
BENJ. C. SMITH, V. P."

Inclosed in this letter was a promissory note for $1000, drawn by the plaintiff to the order of D. W. Sowles, and indorsed by him, dated February 11, 1884. The defendants indorsed the note and got it discounted, receiving as proceeds, February 19, $986. They then sent a telegram to the plaintiff, telling what were the proceeds, and saying in effect that they would apply part of the sum to the payment of the note for $860.54, and would send a check for the balance. They also wrote a letter to the plaintiff, setting forth substantially the same facts and inclosing a check for $125.46. The plaintiff returned the check in a letter dated February 25, 1884, saying: "We return herewith your check for one hundred and twenty-five dollars and forty-six cents, as we do not propose to accept of any such an arrangement; we offered the money at bank to-day and demanded our note, it was not there."

The notes for $202.09 and $113.27 were paid at maturity. The plaintiff company subsequently went into the hands of receivers, who paid the defendants dividends of $1.97 and $2.57. Suit was brought March 19, 1884. The Court instructed the jury that the defendants were entitled to set off the amount of the note for $860.54, and there being no dispute as to these facts instructed them further that upon the evidence their verdict should be for the defendants for $26.96. The jury found a verdict in accordance with this instruction. The plaintiff moves for a new trial, upon the ground that the Court erred in so instructing them.

The sole question raised is as to whether or not the defendants are entitled to set off against the proceeds of the note discounted for the plaintiff the amount of the debt due to them from the plaintiff.

It is contended on the part of the latter that the note was received by the defendants as agents or trustees, and that, therefore, they held the proceeds in a fiduciary relation, in consequence of which, under the principle maintained in Tagg *v.* Bowman (3 Out. 376, and 12 Id. 273), and other cases, there can be no set-off. There have been a number of cases in Pennsylvania holding that where money has been received in a fiduciary capacity and suit has been brought for its recovery, the defendant cannot set off a debt due to him by the plaintiff. They seem, however, to have all of them been cases in which either a specific duty in regard to the disposition of the moneys was imposed by the terms of their acceptance, or such a duty was necessarily inferred from the relation between the parties.

Thus in Tagg *v.* Bowman the plaintiff appointed the defendant his attorney in fact to collect certain rents, and out of them to pay first, taxes and water-rents, then the interest on two successive mortgages, then the interest on a mortgage to the defendant, and the balance to pay over to the plaintiff. The defendant collected the rents, but did not apply them to the payment of the water-rent and taxes, nor to the interest on the two mortgages, but in a suit for them claimed to set off the amount due him upon a judgment upon the bond accompanying the mortgage held by him. The set-off was not allowed, upon the ground that the defendant, in accepting the letter of attorney, had assented to the terms imposed by it, and had assumed an obligation to distribute the moneys in accordance with the specific trust contained in it. The decision is based upon the theory of an implied agreement to waive the set-off. The Court say: "The receipt of money by one person from another, to be applied to a specific purpose, implies an agreement upon the part of the former not to apply it to any other use, and, of course, not to his own, by pleading a set-off."

In Simpson *v.* Pinkerton (38 Leg. Intell. 303) it was held that an attorney-at-law, employed to collect a claim, cannot, as against the amount collected, set off an antecedent debt due to him from his client. The duties of an attorney-at-law are

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incident to the office which he holds. They are clearly defined, and require him, when moneys have been collected, to pay them over promptly to the client to whom they belong. He receives compensation for the performance of these duties. The trust upon which he receives the moneys is as specific, therefore, as though it was defined in writing in each case in which his services are required.

In like manner an officer of a corporation who has collected its moneys, cannot, in a suit for them, set off a debt to him from it because of the duty which arises from his official relation to it. (Turnpike Co. *v.* Watson, 1 Rawle, 330; Smuller *v.* Canal Co., 1 Wright, 68.) Does the principle upheld in these cases determine the one before us? It certainly cannot be claimed that a duty was imposed upon the defendants here because of any relations existing between the parties. The defendants were the creditors of the plaintiff, and nothing more. They were merchants who sold goods, and not bankers. There is no evidence to show that they ever before got a note discounted. They received no compensation for any supposed service, and, in fact, in discounting the note, incurred a liability, since they indorsed it themselves, and might have been compelled to pay it at maturity. If, therefore, there is any obligation upon the defendants to dispose of the proceeds in a specific way, such as would prevent them from claiming a set-off, it must be because of their acceptance of the note upon the terms of the letter of February 18, 1884. What are the directions contained in that letter? The defendants were creditors. There was a note coming due in seven days, and the proceeds of the note sent to be discounted would just about pay this note and the unsettled balance of the book account for which no notes had been given. Under the circumstances, the plaintiff writes that there was a flood in the city of Cincinnati; that it was impossible to use paper there, and that the banks there were compelled to "renew all our merchants' paper." Then follows the direction, which is: "Will you please get this discounted for us in your city, and wire us, at our expense, what the proceeds will be." There is no request that the proceeds be disposed of in any particular way, and the inference, from the fact that directions were given to telegraph the amount of them, rather is that no such request was intended. From the facts stated in the letter and its language, and from the existing condition of the accounts between the parties known to both of them, it would seem to be a justifiable inference upon the part of the defendants that the plaintiff intended to provide for the note coming due. At all events, what is there in the letter which imposes a duty or obligation upon the defendants otherwise? The plaintiff relies upon the words "for us," but these words convey no such implication when we consider that they might have been used in either event. If the purpose had been expressed to apply the money to the payment of the note coming due it would still have been "for us." These words seem rather to refer to the trouble imposed upon the defendants, to the act itself, than to be a direction as to the disposition of the proceeds resulting from the act. If the plaintiff had written "here is our check," and inclosed a check for the sum of $1000, would any one have doubted that, in a suit for its recovery, a set-off would be permitted? How does this differ, except in the fact that in one case the money would have been already raised, and in the other it was to be raised. It is difficult to draw any distinction between money sent and property, such as a note, sent to be converted into money. How then can there be a greater duty imposed where property is forwarded to be converted into money "for us," than where money is received known to belong to the plaintiff? This letter is in effect a request to the defendants to raise money, and the reason for the request is given in the existence of a flood preventing the money from being secured in Cincinnati.

In the case of Rose *v.* Hart (2 Smith's Leading Cases, 315) GIBBS, C. J., says: "We think, therefore, this shows that the Legislature meant such credits only as must in their nature terminate in debts; as where a debt is due from one party, and credit given by him, on the other hand, for a sum of money payable at a future day, and which will then become a debt; *or where there is a debt on one side and a delivery of property, with directions to turn it into money, on the other;* in such case the credit given by the delivery of the property must, in its nature, terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with."

In the case of French *v.* Fenn, cited in Rose *v.* Hart, the facts were as follows: "Cox, the bankrupt, was indebted to Fenn and had entrusted him with his share or interest in a string of pearls to be sold by Fenn and the profit on such share to be paid to Cox. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for his share of the profit. On the part of the defendant it was insisted that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other."

The Court determined that Fenn was protected by the clause of mutual credits in the statute.

In Colson *v.* Welsh (1 Espinasse, 378) the declaration set out that Hunter, the plaintiff's assignor, then being the owner of forty barrels of pork which were in the possession of one Atkinson, a wharfinger, and Hunter being indebted to

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the defendant in the sum of eighty pounds, and to Atkinson in the sum of fifty pounds, it was agreed by and between Hunter and the defendant that Hunter should give to the defendant an order upon Atkinson to deliver the forty barrels of pork to the defendant at and after the price of sixty-five shillings per barrel; that the defendant should pay himself forty pounds of his debt, the fifty pounds to Atkinson, and pay over the remainder, to wit, the sum of forty pounds; and that in consequence of this agreement the pork was delivered to the defendant. He paid the fifty pounds to Atkinson; but contrary to his agreement, after reserving forty pounds to himself on account of his own debt, refused to pay over the residue to Hunter or to the assignees. The defendant gave notice of set-off. Lord KENYON held: "That the statute of set-off went to cases only of mutual debts; if, therefore, the plaintiff had been forced to have had recourse to the common count for money had and received in such case the set-off would be admissible, but not in the present case, where the plaintiff had proved the special count and ground of his action."

In Fruit Company *v.* Roberts (39 Legal Intelligencer, 236; 15 Phila. 192) it appears to have been held that a consignee of goods to be sold on commission, and to be accounted for at a fixed price, less commission, could, in a suit for money due upon the consignments, set off a claim for merchandise sold and delivered.

For the reasons given above, and upon the authorities cited, the rule for a new trial is discharged.

Opinion by PENNYPACKER, J.

Orphans' Court.

And now, October 5, 1889, it is ordered that the following be adopted as an additional rule, to wit:

RULE X.

SECTION 12. Petitions for the sale of a decedent's real estate at private sale for the payment of debts, as authorized by Act of May 9, 1889, P. L. 182, shall set forth the date of his death, the name of his personal representative, and of the persons interested in his estate under his will, or under the intestate laws, as the case may be, stating such as are married women, minors, or lunatics, with the name of husbands, guardians, or committees. Such petitions shall also set forth a description of all real estate of which the decedent died seised, a copy of the inventory of personal property filed in the register's office, a copy of the will, if any, a list of debts of the decedent; and shall be accompanied by a certificate from the board of revision of taxes of the official valuation of the real estate proposed to be sold, and affidavits of at least two competent and disinterested persons acquainted with the value of real estate in the particular locality, that the price offered for the real estate or undivided interest therein is a full and fair price and better than can be obtained at public sale.

SECTION 13. Such petition shall be filed with the clerk of the Court, and notice of the filing thereof shall be given by personal service upon the widow, if any, of the decedent, and his children, if of full age, and upon their guardians, if minors, when resident within this county, at least ten days prior to the day the Court will act upon said petition. If said parties reside out of the jurisdiction of the Court, said notice may be served by mail addressed to their last known abode. Further notice of the filing of said petition shall be published by the petitioner twice a week for two weeks in a daily newspaper of this county, and once a week for two weeks in the Legal Intelligencer; and unless exceptions to the granting of said petition, or objections to the proposed sale, be filed with the clerk before the second Saturday after the expiration of said notice, the Court will then take action upon said petition, at which time due proof shall be presented of the service of notice and publication thereof, as above required. Where the value of the real estate, or any interest therein, exceeds one thousand dollars, the petition may be referred by the Court to a competent person to examine the facts of the case and report upon the propriety of granting the prayer thereof.

SECTION 14. The form of the notice to be given, as directed by the preceding section, shall be as follows:

"In the Orphans' Court of Philadelphia County.
In the matter of the Estate of ———, deceased.

To the heirs, legatees, creditors, and other persons interested in said estate:

Notice is hereby given that ———, executor (or administrator, as the case may be), has filed in the office of the clerk of the Court his (or their) petition, praying for an order of sale of the real estate of said decedent described in said petition at private sale for payment of debts. If no exceptions be filed thereto or objections made to granting the same, the Court will take action upon said petition upon Saturday, ———, A. D. 188 .

(Signed) A. B.,
Attorney for Petitioner."

By the Court.

WILLIAM B. HANNA,
President Judge.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, OCT. 18, 1889.* [No. 25.

Supreme Court.

Jan. '89, 122. February 15, 1889.

County of Lancaster v. Fulton.

Attorney and client—County commissioners—Power of, to contract with counsel for their fees—County solicitor under act of February 18, 1870 (P. L. 160)—Contingent fees.

The solicitor of the county of Lancaster, elected under the provisions of the Act of February 18, 1870 (P. L. 160), is a public officer within the meaning of Art. III., sec. 13, and Art. XIV., secs. 1 and 5, of the Constitution.

The commissioners of Lancaster County appointed F. attorney for the county to obtain credit for it in its accounts with the Commonwealth for all unpaid taxes for personal property, his compensation to be 25 per cent. upon the amounts credited. At that time F. was the duly elected solicitor of the county under the Act of February 18, 1870 (P. L. 160), at a salary of $500 per annum, part of his duties being to represent the board of commissioners in all proceedings in law or equity wherein the county was a party or had any interest. F.'s term of office having expired, he continued to act under the agreement with the knowledge of the commissioners, and finally recovered a sum of upwards of $20,000, and brought suit to recover the percentage of 25 per cent:

Held, that the agreement in question was contrary to public policy, and null and void, and that no recovery could be had by plaintiff for any services rendered in pursuance thereof, whether such services were rendered during the time he held the office of solicitor or afterwards.

Such contracts, whether intended to be so or not, are in effect evasive and subversive of law, contrary to public policy and void, and are incapable of ratification.

Chester County *v.* Barber (97 Pa. 455; S. C. 10 WEEKLY NOTES, 350) followed.

Error to the Common Pleas of Chester County.

Assumpsit, by Hugh R. Fulton against the county of Lancaster, to recover for professional services rendered to the county. Plea, *non assumpsit.*

The suit was brought in Lancaster County, but upon plaintiff's application there was a change of venue to Chester County.

The facts are fully set forth in the opinion of the Supreme Court.

Upon the trial, before FUTHEY, P. J., the plaintiff called expert witnesses as to the value of his services. Certain questions put to these witnesses were objected to, the objections overruled, and the evidence admitted. The overruling of the objections was the subject of the first to the eighth assignments of error, which set forth the questions objected to, but not the answers thereto.

Defendants requested the Court to charge as follows:—

(1) The contract of June 28, 1882, given in evidence by the plaintiff, having been made between the plaintiff and the commissioners of Lancaster County when the plaintiff was a public officer, solicitor of Lancaster County, an office to which he was duly elected in pursuance of an Act of Assembly, at a salary of $500 a year, is contrary to public policy, and null and void, and no recovery can be had by the plaintiff for any services rendered by him in pursuance thereof.

(2) The said contract of June 28, 1882, given in evidence by the plaintiff, was contrary to public policy and void, and there can be no recovery by the plaintiff in this action for services rendered under or in pursuance of said contract, whether said services were rendered while the plaintiff held the office of solicitor of Lancaster County or after the expiration of his term of office.

THE COURT. "I have probably fully answered these points in what I have said in the general charge. I may simply repeat what I have already said, that if the services of Mr. Fulton had been rendered while he was county solicitor then there could have been no recovery; but as the services were rendered largely after he was solicitor under his election, if the county commissioners recognized his services after that time, and he went on under the employment after his term of office expired, that would be a ratification by the commissioners of the agreement made by Mr. Fulton with them, and Mr. Fulton would be entitled to recover whatever reasonable amount the jury may find to be due him for the services rendered and for the expenses incurred." (Seventeenth assignment of error.)

(3) There is no evidence in this case from which the jury can imply any contract on the part of the defendant to compensate the plaintiff for any services rendered by him or for any expenses incurred or payments made by him. *Answer.* "This point is disaffirmed. There is evidence upon that subject." (Eighteenth assignment of error.)

(4) Under all the evidence in the case the verdict should be for the defendant. *Answer.* "This point is disaffirmed. Questions of fact are for the jury under the instructions which I have already given you." (Nineteenth assignment of error.)

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The 9th to the 16th assignments of error were to certain portions of the general charge of the Court, which covered substantially the same ground as the answer to defendants' first and second points.

Verdict for plaintiff for $5083.54 and judgment thereon, whereupon defendants took this writ and assigned error as above.

E. K. Martin and *H. M. North* (*George A. Lane*, county solicitor, *A. F. Schenck*, and *Samuel D. Ramsey* with them), for plaintiffs in error.

The contract between the commissioners and the plaintiff was against public policy, and therefore null and void.

Chester County *v.* Barber, 97 Pa. 455.
Const. of Penna., Art. 3, § 13; Art. 14, § 5; and Art. 14, § 1.
Apple *v.* Crawford County, 14 Weekly Notes, 332.
Geiser *v.* Northampten County, 20 Id. 259.
Hays *v.* Oil City, 35 Pitts. L. J. 117.
Smith *v.* Whelden, 10 Pa. 39.

The holding of the Court that if the commissioners recognized the plaintiff's employment after he went out of office, it was a ratification of the contract, and that the plaintiff could recover for all services rendered by him in pursuance of the contract from the time of its date, was clearly error. The contract was a legal fraud and contrary to public policy, and was therefore incapable of ratification or confirmation.

Chamberlain *v.* McClurg, 8 W. & S. 31.
Negley *v.* Lindsay, 67 Pa. 217.
McHugh *v.* County of Schuylkill, Id. 391.
Miller's Appeal, 30 Pa. 478.
Shisler *v.* Vandyke, 92 Id. 447.
Seylar *v.* Carson, 69 Id. 301.
Hunter *v.* Nolf, 71 Id. 482.

W. U. Hensel and *J. Hay Brown* (*W. T. Fulton* with them), for defendant in error.

The county commissioners are the proper authorities to look after the financial affairs of the county, to protect its rights, and collect its claims; and are duly authorized to make contracts like the one in question.

Although an improvident exercise of the power may affect the agents personally, it furnishes no reason for the avoidance of the contract.

Grove *v.* Lameter Twp., 8 W. 125–132.
Van Kirk *v.* Clark, *et al.*, 16 S. & R. 289.
Hunter *v.* Albright, 5 W. & S. 423.
Jefferson Co. *v.* Slagle, 66 Pa. 202.
Schwamble *v.* The Sheriff, 22 Id. 19.
Dauphin Co. *v.* Bridenhart, 16 Id. 461.
Hamilton *v.* Lycoming Ins. Co., 5 Id. 345.
Luzerne Co. *v.* Day, 23 Id. 143.

The Act of Feb. 18, 1870 (P. L. 160), under the provisions of which plaintiff was elected, does not prohibit the commissioners from employing additional counsel to "conduct their proceedings in law and equity."

The case of Barber *v.* Chester Co. (97 Pa. 455) does not decide whether or not the commissioners may pay extra compensation to their own solicitor for extra and unusual services.

As to the power to employ additional counsel, see—

Smith *v.* Mayor of Sacramento, 13 Cal. 533.
Smith *v.* City of Waterbury, Am. Dig. for 1887, 886.

The matter in question is not such a "proceeding in law or equity" as is contemplated by the Act of 1870.

Evans *v.* City of Trenton, 4 Zab. (N. J.) 765.
Bright *v.* Supervisors, 18 Johns. 242.
Mallory *v.* Supervisors, 2 Cowen, 531.

Though a contract be contrary to public policy, it is nevertheless, if fully executed, binding on the parties.

Fox *v.* Cash, 11 Pa. 211.

Admitting that the original contract was void, a ratification or renewal of it is nether immoral nor impossible.

Where valuable services are rendered, with the consent, and under the authority of the beneficiary of them, the law implies and will enforce a contract to pay a fair compensation.

Herzog *v.* Herzog, 29 Pa. 465.
Dillon on Mun. Corp. §§ 385, 386, 399.

There was no fraud in making the contract.

October 7, 1889. The Court. In his statement and affidavit of claim, plaintiff below avers that his demand is founded on a contract between himself and the county commissioners, dated June 28, 1882, by which he agreed to collect from the Commonwealth all overpaid taxes on personal property then due; for which services the county, by its commissioners, agreed to pay him twenty-five per centum on the amount or amounts which might be credited to it in its account with the Commonwealth; that said contract was evidenced by a resolution, adopted and entered on the minutes of said commissioners, as follows:—

Resolved, That H. R. Fulton, Esq., be and he is hereby appointed attorney for the county to take proceedings to obtain credit for the county in its accounts with the Commonwealth for all unpaid taxes on personal property: Mr. Fulton's compensation is to be twenty-five per centum upon the amount or amounts which may be credited, and is to be in full settlement for all costs and expenses as well as of fees."

That, "In pursuance of said agreement and resolution the plaintiff, after five years of work, labor and great expense . . . . procured a credit settlement in favor of the county . . . . in its accounts with the Commonwealth, of $20,823,50, of overpaid taxes included in the terms of said contract," etc; and the plaintiff's compensation for services, etc., as specified in said agreement and resolution, is $5205.87½, which sum is now due him with interest thereon from June 20th 1887.

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In substance, the defence interposed by the county was, that at the time the resolution of June 28, 1882, was adopted, plaintiff below "was the duly elected and qualified solicitor" of the county, serving under the Act of February 18, 1870, at a salary of $500 fixed by that Act; and, for that reason, neither he nor the county commissioners had any power or authority to enter into the contract, under which the services were rendered, and on which the claim is founded.

It is conceded that when the contract was made and for a considerable time thereafter, plaintiff below was the duly elected and qualified solicitor of the county. The 4th section of the Act under which he was elected, declares: "The salary of the officer, elected as hereinbefore provided, shall be five hundred dollars per annum, payable quarterly; and the officer so elected shall be the legal adviser of the board of commissioners of Lancaster County, and shall represent the said board in all proceedings in law or equity wherein the said county is a party or has any interest." He was undoubtedly a public officer within the meaning of the Constitution, Article 3, section 13, and Article 14, sections 1 and 5, the first of which declares, "No law shall extend the term of any public officer or increase or diminish his salary or emoluments, after his election or appointment."

The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the "solicitors of Lancaster County," as defined by the Act of February 18, 1870. He "shall be the legal adviser of the board of commissioners of Lancaster County, and shall represent the said board in all proceedings in law or equity wherein said county is a party or has any interest." What authority then had either the plaintiff below or the county commissioners to enter into a contract to compensate the former for services within the sphere of his duties as solicitor of the county? We are of opinion that they had none; that the Act of the commissioners in undertaking to bind the county, to pay the compensation provided for in the contract was *ultra vires*. Doubtless the very object of the Act in creating the office of county solicitor, providing for his election and fixing his salary, etc., was to take the power out of the hands of the county commissioners and place it beyond their reach. But be that as it may, we think the contract was *ultra vires* and void, and that the first and second points for charge, submitted by defendant below, should have been affirmed. Those points are as follows:—

1st. "The contract of June 28, 1882, given in evidence by the plaintiff, having been made between the plaintiff and the commissioners of Lancaster County, when the plaintiff was a public officer, solicitor of Lancaster County, an office to which he was duly elected in pursuance of an Act of Assembly, at a salary of five hundred dollars a year, is contrary to public policy and null and void, and no recovery can be had by the plaintiff for any services rendered by him in pursuance thereof."

2. "The said contract of June 22, 1882, given in evidence by the plaintiff was contrary to public policy and void, and there can be no recovery by the plaintiff in this action for services rendered under and in pursuance of said contract, whether said services were rendered while the plaintiff held the office of solicitor of Lancaster County or after the expiration of his term of office."

These points were answered together by the learned Judge as follows: "I have probably fully answered these points in what I have said in the general charge; I may simply repeat what I have already said, that if the services of Mr. Fulton had been rendered while he was county solicitor, then there could have been no recovery; but, as the services were rendered largely after he was solicitor under his election, if the county commissioners recognized his services after that time, and he went on under their employment after his term of office expired, that would be a ratification by the commissioners of the agreement made by Mr. Fulton with them, and he would be entitled to recover whatever reasonable amount the jury may find due him for the services rendered and for the expenses incurred."

In the ninth to sixteenth specifications, inclusive, the subjects of complaint are certain portions of the general charge. These specifications of error present substantially the same questions that are involved in the foregoing points and answer thereto, and hence they do not require separate or special consideration.

In saying, as he correctly did, that if the services of plaintiff below "had been rendered while he was county solicitor, then there could be no recovery," the learned Judge rightly assumed that the contract in question was unauthorized and illegal. All such contracts, whether intended to be so or not, are in effect evasive and subversive of law, contrary to public policy, and therefore void. They are no more capable of ratification than was the contract in Hunter *v.* Noel (71 Pa. 282). Speaking of the illegal contract under consideration in that case, Mr. Justice SHARSWOOD said: "It is undisputed law that such a contract is illegal as against public policy, and cannot be enforced. Even if there had been an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy."

A case more nearly parallel with this, in some of its features, is Chester County *v.* Barber (97

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Pa. 455). Barber, one of the plaintiffs below, was attorney for the county of Chester, but it did not appear whether he was serving under an annual salary fixed by Act of Assembly, or under a special agreement with the commissioners. The county commissioners, however, made a contract with him and two other attorneys to pay them fifty per centum of the amount they recovered from the State for taxes improvidently paid into the State treasury. Speaking for the Court, the present Chief Justice said: "The commissioners had no power to bind the county by such a contract. . . . It was against public policy, and therefore null and void. . . . These commissioners were acting in a fiduciary character. They were but trustees of the money when received for the use of the county. When, therefore, they contracted to give one-half of it to the plaintiffs for their services they exceeded their power. They were giving what did not belong to them. As well might a trustee contract to give away one-half of the trust estate as compensation to counsel for services in connection therewith. And, if he may give away one-half, why not three-fourths, or even a greater proportion? Can it be doubted that a court of equity would strike down such a contract as improvident and a legal fraud? . . . Whether the plaintiff, Barber, can recover anything will depend upon the terms of his previous engagement as solicitor to the commissioners."

If it had appeared in that case that Barber was acting under a salary, fixed by Act of Assembly (as was Mr. Fulton in this case), and that his defined duty was to act as the legal adviser of the commissioners, and represent them in all proceedings at law or in equity, wherein the county had any interest, it is not likely that any doubt, as to his legal status, would have been suggested. According to the reasoning of the opinion, the contract as to him, would have been declared illegal, contrary to public policy, and absolutely void.

We are, therefore, of opinion that the learned Judge erred in holding that plaintiff below might recover if the commissioners recognized his services after the expiration of his term of office as county solicitor; that such recognition would be a ratification of the original illegal agreement, etc.

Plaintiff's statement of claim avers, and his own testimony proves most conclusively, that all the services for which he claims to recover compensation were rendered under and in pursuance of the original illegal contract. In his cross-examination he said, in substance, that all he did was in pursuance of the contract. "I commenced under this contract." "I never rejected the contract, as a matter of course." "I continued in this service, beginning on this contract." "I went on under this contract," and many similar expressions in his answers to questions put to him on cross-examination.

There is no pretence that any new agreement was entered into, or the terms of the original in any manner changed after the expiration of his term of office. Neither the subject of a new contract nor the modification of the original even appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, so far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover. The ninth to nineteenth assignments of error, inclusive, are sustained. The first to eighth assignments are immaterial; but, aside from that, they are not according to rule, and therefore not entitled to any consideration.

Judgment reversed.

Opinion by STEHRETT, J.

MITCHELL, J., dissented. H. C. O.

July '89, 64. May 23, 1889.

Bitner, Executor, v. Boone.

Evidence—Competency of witness—Husband and wife—When testimony of either for the other excluded on the ground of interest—Act of May 23, 1887 (*P. L.* 158).

A wife is not a competent witness to testify in favor of her husband, in cases where the husband's testimony is excluded upon the ground of interest, on account of the unity of interest between the husband and wife; nor is a husband a competent witness in the wife's behalf in similar cases.

Before the Act of 1869 a wife was not competent to testify for her husband, but was rendered so by the Act, except in actions by or against executors, etc., although it was not so understood at first.

A husband having brought suit against an executor for personal services rendered to his decedent, plaintiff's wife was called as a witness in his behalf:

Held, That she was not rendered a competent witness by the Act of May 23, 1887.

Error to the Common Pleas of Lancaster County.

Assumpsit, by George S. Boone against John R. Bitner, executor of James Boone, deceased, to recover for personal services rendered to decedent in his lifetime. Plea, *non assumpsit.*

Upon the trial, before PATTERSON, J., Annie Boone, the wife of plaintiff, was called as a witness in his behalf as to matters occurring in the

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lifetime of the decedent. The competency of the witness was objected to and the objection overruled.

A verdict for $1600 having been rendered (subsequently reduced to $1200), defendant took this writ, assigning for error, *inter alia*, the admission of Mrs. Boone as a witness.

A. C. Reinœhl and *J. Hay Brown*, for plaintiff in error.

The Act of May 23, 1887 (P. L. 158), relating to the competency of witnesses does not change the law as laid down in—

Taylor *v.* Kelly, 80 Pa. 95,

where it is settled that in suits against estates of decedents, husbands and wives are not competent to testify for each other in claims against the estate.

Benjamin F. Davis, for defendant in error.

A careful examination of the opinion in Taylor *v.* Kelly (*supra*), will show that in a case like this, the wife may be a competent witness for her husband.

Levan *v.* Bickel, 5 Pa. C. C. Rep. 610.
Sahms *v.* Brown, 44 Leg. Int. 512.

October 7, 1889. THE COURT. This action was brought by George S. Boone against John R. Bitner, executor of the last will and testament of James Boone, deceased, to recover for personal services rendered to the decedent in his lifetime. At the trial of the cause the plaintiff called his wife, Mrs. Annie Boone, who was permitted to testify to matters occurring in the lifetime of the decedent. Her competency having been objected to, and an exception taken, the defendant's counsel has assigned this action of the Court for error.

The cause having been tried since the passage of the Act of May 23, 1887 (P. L. 158), the question of her competency must be determined upon a construction of that Act. It was a general rule at common law that when the wife was interested, the husband was not a competent witness to testify, either for or against her interest. The converse of this rule was equally true, and the wife was not competent to testify in her husband's behalf; nor could she be called to testify against him. (Pipher *v.* Lodge, 16 S. & R. 214; Pringle *v.* Pringle, 59 Pa. 283.) By the first section of the Act of 1869, however, it was provided that "no interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding; provided, that this Act shall not alter the law as now declared, etc., so as to allow husband and wife to testify *against* each other," etc. Whilst by this provision a wife remained incompetent as a witness to testify against her husband, she was rendered competent to testify for him. (Yeager *v.* Weaver, 64 Pa. 425; Balentine *v.* White, 77 Id. 20.) But by the same section it was further provided, that "this Act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, except," etc.

By this second clause of the proviso the competency of the wife to testify in *favor* of her husband was stricken down in actions by or against executors, etc.; and in all that class of cases the law practically remained as if the Act of 1869 had not been passed. The Act, it would seem, was not so understood at first (Dillinger's Appeal, 71 Pa. 425), but this was the construction which was ultimately placed upon it. (Taylor *v.* Kelly, 80 Pa. 95.) It is plain, then, that under the Act of 1869 the witness, Mrs. Boone, would have been incompetent for the purpose offered.

The Act of 23d May, 1887, provides that no liability for costs, nor right of compensation, nor any interest in the question, "nor any other interest or policy of the law," shall, in any civil proceeding, etc., render any person incompetent as a witness except as provided in section five of the same Act. Referring to section five we find at clause (b) that neither husband nor wife is competent to testify to confidential communications made to the other unless the privilege is waived; and at clause (c) that neither is competent to testify against the other except in certain cases, which are specified. From this it is clear that the husband and wife may testify each in favor, but not against, the other, as heretofore, excepting as stated in clause (b). In clause (e), however, it is provided that where any party to a thing or contract in action is dead, etc., and his right thereto or therein has passed, either by his own act or the act of the law, to a party on the record who represents his interest in the subject in controversy, the surviving or remaining party to such thing in contract shall not, nor shall any other person whose interest shall be adverse to the said right of said deceased be a competent witness to any matter occurring before the death of the decedent, etc. Under this clause it is clear that George S. Boone himself would not be competent to testify to any matter occurring in the lifetime of James Boone, deceased; he is not only the surviving or remaining party to the thing or contract in action, but he is a person whose interest is adverse to the decedent's right His wife was not a party to the thing or contract in action, and was not rendered incompetent on that ground, but was she a person whose interest is adverse within the meaning of the Act of 1887? Can she be considered a competent witness when upon the ground of interest her husband is incompetent? Mr. Greenleaf, in his Law of Evidence (section 334), says that the common law exclusion of husband and wife from being witnesses in any

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cause where the other is a party is founded partly on the identity of their legal rights and interests and partly on principles of a public policy affecting the marital relation. In Phillipps on Evidence, page 78, it is said: "The reason for excluding the husband and wife from giving evidence either for or against each other is founded partly on their identity of interest and partly on a principle of public policy which deems it necessary to guard the security and confidence of private life even at the risk of an occasional failure of justice. They cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other, because this is inconsistent with the relation of marriage, and the admission of such evidence would lead to disunion and unhappiness and, possibly, to perjury." This is quoted with approval in Hitner's Appeal (54 Pa. 117). "Prior to the enactment of this statute" (1869), says Justice MERCUR, in Taylor *v.* Kelly (80 Pa. 97), "both interest and policy excluded husband and wife from testifying for and against each other." Notwithstanding the remark of Mr. Justice SHARSWOOD, in Pringle *v.* Pringle (59 Pa. 288), to the contrary, we think this rule of exclusion is founded upon the twofold consideration of interest and policy. If the husband must be excluded on account of interest, so also must his wife be excluded on account of her unity of interest with him; although each may not be said to have any direct interest during coverture, she has, nevertheless, an indirect interest derivative from her husband, and so presently joined with his as at all periods in the history of the law placed her in the attitude of an interested person, in cases where her husband's rights came into controversy. So closely connected in interest are they that in equity, in controversies affecting the interests of either, the testimony of both is considered as the testimony of one person only. (Sowers *v.* Weaver, 78 Pa. 443.) If the Legislature had intended to change the law in this respect against the theory of both the common and the statute law and the habits of centuries, it is reasonable to suppose that the change would not have rested upon any mere implication, but would have been expressed in plain words. We are of opinion that Mrs. Annie Boone was an incompetent witness, and upon this ground

The judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. H. C. O.

[See next case.]

July '89, 65. May 23, 1889.

Daisz's Appeal.

Evidence—Competency of witnesses—Husband and wife—When testimony of either for the other excluded on the ground of interest—Act of May 23, 1887 (P. L. 158)—Specific performance—Evidence necessary to decree.

Neither husband nor wife is a competent witness to testify in favor of the other, in cases where the testimony of either is excluded upon the ground of interest.

Appeal of William C. Daisz, one of the executors of the estate of Christopher Daisz, from the decree of the Orphans' Court of Lancaster County, dismissing exceptions to an Auditor's report.

The executors of Christopher Daisz, of whom appellant was one, having filed an account, which was referred to an Auditor, it was then agreed by all parties in interest that the Auditor (D. McMullen, Esq.), should pass upon the question "whether the right to a house and lot, No. 506 West Lemon Street, is in the estate of Christopher Daisz, or in Mrs. Annie M. Bush. If in the estate, then the executors to pass deed, now held by them, to Mrs. Bush, who shall take the property as part of her share in the estate, at a valuation of $1500. If in Mrs. Bush, the deed to be surrendered to her."

Upon this question the Auditor found as follows:—

"The facts connected with this title are as follows: On May 2, 1882, Christopher Daisz purchased the house in dispute from Silas L. Tucker for the sum—according to the deed—of $1575, and had the title made to 'Annie M. Bush, wife of Matthew Bush.' The deed was delivered to Mrs. Bush, and she took possession of the property. Mr. Daisz on several occasions told Mr. Tucker that he had bought the house for his daughter, Mrs. Bush; and in his will, executed August 10, 1883, he charged her with an advance of $1575, 'for money advanced to her for a house.'

"On September 5, 1884, Mrs. Bush bought from John Q. Mercer, by deed of that date, a two-story brick dwelling house, No. 128 New Street, and the lot of ground belonging thereto, for the sum of $2600.

"M. D. Bush, the husband of Annie Bush, testified: 'We had some money in Reed & Henderson's bank; my wife and I; and we drew it out and got a house on New Street; bought it from Captain Mercer. . . . . We had $1000 in Reed & Henderson's bank between us; the price of the house was $2600, and he gave us back $50, the insurance and sewerage in the

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alley; the deed was made to my wife, on her father's advice; I had about $1500 in my pocket at the time we drew that out of bank; I don't know that her father advanced any money for this house; I don't know of any.'

"J. Q. Mercer, who sold the New Street house to Mrs. Bush, testified that he received from Mrs. Bush, in part payment thereof, a check for $575, drawn by Christopher Daisz to the order of Annie M. Bush, dated September 4, 1884, and indorsed by her. This check was produced, identified by Mr. Mercer, and offered in evidence. How the balance of the purchase-money was paid was not stated by Mr. Mercer.

"William Henderson was then called and testified that he was a clerk in his father's banking-house in 1884. He produced a ledger, which he says was the individual ledger of his father's bank, and pointed out an entry in an account of Christopher Daisz, headed 'store account,' as follows: 'September 5, 1884, check to Bush, $575.' He also pointed out in the same book another entry in the account of Christopher Daisz, as follows: 'September 5, 1884, to Bush, $1000,' which entry, he says, indicates that Mr. Daisz's check to Bush for this amount was paid this date.

"Mr. Henderson further testified, 'I have no recollection of the $575 check independent of this book. I have of the $1000 check; my recollection is that Mrs. Bush presented it herself and I think she took bank notes for it. I remember Mrs. Bush came there and I knew she was Mr. Daisz's daughter, and Mr. Daisz always had a good account. She had been in the bank before; I don't know as I recollect any other check I ever cashed for her.

"Mr. Henderson also testified that while Mr. and Mrs. Bush had no joint account in his father's bank at that time, Mrs. Bush had an account in her own name, and that she drew a check to her own order on September 4th, 1884, for $1000.21 which balanced her account.

"Some time before the death of Christopher Daisz, M. D. Bush, the husband of Annie M. Bush, brought the deed from Silas M. Tucker to Mrs. Bush for the Lemon Street house to Charles Frailey, a conveyancer, and requested him to draw a deed for the premises from Annie M. Bush and himself to Christopher Daisz. (The witness does not recollect what was said, but infers that such directions were given from the fact that he wrote such a deed.) Mr. Frailey wrote such a deed and took it, with the deed brought to him by Bush to Christopher Daisz, and left both the deeds with him. Mr. Frailey thinks this happened two or three years ago, but cannot tell the time exactly.

"The deed drawn by Mr. Frailey was never executed and remained with the Silas Tucker deed in Christopher Daisz's possession until his death.

"The evidence also shows that the Lemon Street house from May 2d, 1882, to May 2d, 1885, was insured in the name of Annie M. Bush, and since the latter date in the name of Christopher Daisz, and that at least since 1886 it was assessed in his name. It also appears that since September 4th, 1884, the rent was paid to Christopher Daisz.

"Mr. Bush in his testimony says, 'My wife's father generally paid all the taxes and charged them to us, then we paid him.'

"It is claimed on behalf of the estate that the foregoing facts show that the New Street house was purchased by Mrs. Bush in place of the Lemon Street property. That her father gave her $1575 towards the purchase of the former, and that she agreed to re-convey the latter to him, and the Auditor is asked to find that such a contract was made, and then sitting as a chancellor to, in effect, make a decree for specific performance.

"The legal title to the property in dispute is undoubtedly in Mrs. Bush. The deed proved by Silas L. Tucker, and shown to have been in her possession together with the declarations of Christopher Daisz to Tucker, that he was buying the property for Mrs. Bush and the charge of the amount of the purchase-money to her as an advancement in her father's will, fully establish this. This being so, any agreement by Mrs. Bush to convey to Christopher Daisz to be valid, must be in writing according to the requirements of the Statute of Frauds, or else must be taken out of its operation by falling in the line of exceptions recognized by the Supreme Court. There is no evidence here of any written contract."

The Auditor cited Bowers *v.* Bowers (14 Norris 477); Allison *v.* Burns (11 Out. 50); Moyer's Appeal (9 Id. 432); Lord's Appeal (Id. 459) and continued:—

"When such a contract has been proved in a satisfactory manner, the cases above cited and numerous others say it will be enforced in equity where it has been so far executed that it would be unjust to rescind it, but no matter how clear the proof of such contract may be, specific performance thereof will not be decreed where adequate compensation may be made in damages. (Mc Kowen *v.* Donald, 7 Wright, 441; Overmeyer *v.* Koener, 32 Smith, 517; Eberly *v.* Lehman, 4 Out. 544; Myers's Appeal, 9 Id. 432; Bowers *v.* Bowers, 14 Norris, 477.)

"The Court, in Eberly *v.* Lehman, say: 'When possession has been taken in pursuance of the contract, and there has been such part performance that the purchaser cannot reasonably be compensated in damages, the case is taken out of

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the statute. Possession and payment of purchase-money only are not sufficient, for the vendee may be compensated in damages; but when to possession is added permanent improvements of considerable value which cannot be thus compensated, the rule is otherwise.'

"And in Jamison *v.* Dunmock (95 P. St. R.), specific performance was decreed, and a parol contract sustained, where the vendee had entered into the possession and had paid all the purchase-money, although she had made no improvements, because the vendor had in the meantime failed and been discharged in bankruptcy, on the ground that the insolvent vendor shall not have both money and land.

"The parties to the present controversy have entered into the following agreement: 'It is agreed by all parties in interest that the Auditor shall pass upon the question whether the right to the house and lot, No. 506 West Lemon Street, is in the estate of Christopher Daisz or in Mrs. Annie M. Bush. If in the estate, then the executors to pass deed, now held by them, to Mrs. Bush, who shall take the property as part of her share in the estate at a valuation of $1500. If in Mrs. Bush, the deed to be surrendered to her. The executors and Mrs. Bush reserving the right to file exceptions to the report of the Auditor and to appeal to the Supreme Court.'

"Under this agreement it is not quite clear whether the parties intended merely to submit the question of libability on the part of Mrs. Bush to have a decree of specific performance against her, or whether it is also intended to have the Auditor to decide whether she is liable for damages for breach of contract, and if so to liquidate such damages at $1500, and adjust the same in the distribution of the estate; but as this is a final account, and it seems reasonable that the entire estate should be disposed of in this proceeding, the Auditor will proceed to consider the whole matter.

"There is no direct evidence of any contract or agreement on the part of Mrs. Bush to convey this property to her father; not even any declaration on her part of any intention to do so. Mr. Tucker testified that on one occasion he had a conversation with Mrs. Bush while she was living in the Lemon Street house, during which she said she liked the house well enough, but was not altogether satisfied with it, and if she wasn't her father said he would get her another one in the place of that one. This declaration, and the facts that she afterwards bought the New Street house and partly paid for it with her father's check for $575; the receipt by her of $1000 from her father about the same time, and bringing of the deed to the scrivener afterwards to have a deed drawn from herself to her father, would be consistent with such an agreement. But in the opinion of the Auditor falls far short of the clear and unequivocal proof required in Bowers *v.* Bowers, or the full, complete, satisfactory, and indubitable proof demanded in Allison *v.* Burns, to take the case out of the Statute of Frauds.

"The evidence of possession by Christopher Daisz also falls short of being conclusive, for while Mrs. Madden testifies that she paid the rents to Christopher Daisz while she lived there, M. D. Bush testifies—and the Auditor is of the opinion that under the Act of May 23, 1887, he is competent (Levan *v.* Bickel, 5 Lancaster Law Review, 403)—that while Nevins lived there he and Mrs. Bush collected it, and that the 'old man Christopher Daisz generally paid all the taxes and charged them to us, then we paid him.'

"It is the opinion of the Auditor therefore that the evidence produced is not sufficient to move a chancellor to decree specific performance.

"Is it sufficient to charge her with damages for breach of a contract to convey?

"As has been before said, there is no evidence of a direct contract, written or parol. The testimony does establish the fact that Mrs. Bush received from her father on September 4 and 5, 1884, the sum of $1575, and that $575 was used in the payment of the New Street house appears from the testimony of Captain Mercer. But that the other $1000 was so used, or that the sum of $1575 was given to Mrs. Annie Bush for the purpose of buying another house *in place of the Lemon Street property*, cannot be legitimately deduced from any testimony before the Auditor. The conversation with Mr. Tucker, and the receiving of the money about the time of the purchase, in the absence of any steps then taken to get the title of the Lemon Street property put in the name of the father, are circumstances too slight to lead to any such conclusion. The unexecuted deed was not drawn by Mr. Frailey at this time; Frailey fixes that as having occurred two or three years ago, and the date in the acknowledgment would indicate that it was done in 1885. What the intention of the parties was at that time is not material, as whatever it may have been seems to have been abandoned. And if the decedent ever had any idea that Mrs. Bush should re-convey the Lemon Street house to him, his failure to have her execute the deed drawn by Frailey, or in case of refusal on her part to charge her with the value—seems to furnish as strong a presumption of the rescission of such a contract, if it ever existed, as the transactions prior to the drawing of said deed can be said to furnish of the making of such an agreement. As late as July, 1886, the decedent seems to have been careful to take obligations from Mrs. Black his other daughter, for money given her which he intended should be repaid, and it seems strange

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that if he desired to hold Mrs. Bush accountable for what he appears to have given her in September, 1884, he should not have taken some evidence of indebtedness from her.

"The Auditor after careful consideration of all the evidence presented, fails to find anything that satisfies him that this property, the legal title to which has been in Mrs. Annie M. Bush since 1884 does not rightfully belong to her. The exception is therefore dismissed, and it is ordered that the executors of the will of Christopher Daisz surrender the deed to Annie M. Bush."

Exceptions filed to this report were dismissed by the Court, whereupon Daisz appealed, assigning for error (1) and (2) the finding that the legal title to the property had been in Mrs. Bush since 1884, and the order to surrender the deed; and (3) the admission of the testimony of Matthew Bush, husband of Annie M. Bush, objected to on the ground of incompetency.

A. C. Reinœhl, for appellant.

J. Hay Brown, for appellee.

October 7, 1889. THE COURT. Under the ruling of this Court in Bitner *v.* Boone (preceding case), a case from Lancaster County argued at this term and not yet reported, the Auditor erred in not excluding the evidence of Matthew D. Bush, who, as the husband of Mrs. Annie Bush, an interested party, was incompetent. But excluding this evidence, there was sufficient to justify the Auditor's conclusions, and the decree of the Court. There was other evidence from which the delivery of the deed from Silas L. Tucker to Mrs. Bush might fairly be inferred.

Charles Frailey testifies that he found the deed in her husband's hands; that her husband gave him the deed, with instructions to prepare a deed to Christopher Daisz, which he did, and placed both the executed and the unexecuted paper in the hands of Daisz, where they appeared to have remained until the time of his decease. The deed having been passed out of Tucker's hands and found in the hands of the daughter's husband, it is fair to infer, in the absence of all proof to the contrary, that the deed had been delivered. There is evidence that, on the 4th of September, 1884, Daisz advanced $1575 to his daughter, but apart from the fact that Daisz entered into, and remained in, the reception of the rents, there is absolutely no evidence that the daughter at any time in fact agreed to convey the property. The existence of a contract rests upon a mere implication which is supposed to arise from the facts stated. The terms of the contract, if any existed, are not shown; the delay is not explained; the whole matter rests upon mere conjecture. Under such proofs specific performance would not be decreed.

The decree of the Orphans' Court is affirmed, and the appeal dismissed at the cost of the appellant.

Opinion by CLARK, J. H. C. O.

[See preceding case.]

July '88, 61. May 20, 1889.

Pennsylvania Railroad Co.'s Appeal.

Railroads—Right to change the site of a public road—Crossings—Act of March 27, 1848—Practice.

A supplement to the charter of the Pennsylvania Railroad Co., approved March 27, 1848 (P. L. 273), in section 5 provides as follows: "That if said railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road:"

Held, that under this Act, the question whether a change of a public road is necessary, when the railroad changes its grade, is left to be determined in the first instance by the railroad company, and unless the power thus committed to it is abused, its decision is conclusive of the question.

The question in any given case is not what is possible, but what is reasonably practicable.

The Pennsylvania Railroad Company changed its location and grade at a point on its road, where it crossed a public highway. To make a grade crossing as existed before the change would, in the opinion of the company, be dangerous; to cross overhead would require a bridge of 330 feet in length, with a grade of 15 feet in 100; and an underground crossing would require a deep and lengthy excavation and steep grade. In view of these circumstances, the company removed the road a short distance, with a better grade and overhead crossing, and obtained the authority of the Quarter Sessions for laying out the new road. The public took possession of the new road, and occupied it for several years. Then the township supervisors declared their intention of cutting down the embankment and making a grade-crossing at the place of the original one. The company filed a bill to restrain the supervisors from interfering with the crossing, and obtained a preliminary injunction, which the Court afterwards dismissed, on the ground that the railroad company could not change the bed of a road unless it occupied the same longitudinally:

Held, that this was error. If the exercise of the power by the railroad company was unauthorized, objection should have been made before the new road was laid out and the work of reconstruction completed. Objection might still be made by proper legal proceedings, but until that is done the decision of the company must stand.

The proceedings by the railroad company had the effect of vacating so much of the old road as was supplied, and the supervisors cannot, of their own motion and without the aid of legal proceedings, restore a crossing which had been supplied by the company acting under a discretion given them by statute.

Appeal from a decree of the Common Pleas of Lancaster County, dismissing plaintiffs' bill.

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Bill in equity, by the Pennsylvania Railroad Co., for an injunction to restrain and enjoin Martin Diem *et al.*, supervisors of Salisbury Township, from interfering with or attempting to restore or open the Newport Road across the Pennsylvania Railroad at the Gap.

A preliminary injunction was granted, and subsequently the respondents filed an answer, and the matter was referred to David McMullen, Esq., as Examiner and Master.

The Master, after finding the facts, which are sufficiently stated in the opinion of the Supreme Court, continued, *inter alia*, as follows:—

"The foregoing statement of facts, found in reference to this controversy, gives rise to the following questions:—

"(1) Has the Pennsylvania Railroad Company the right, if it shall find it necessary between Philadelphia and Columbia to change the site of any portion of any turnpike or public road, to cause the same to be reconstructed forthwith, at its own proper cost, on the most favorable location and in as perfect a manner as the original road?

"(2) Does the construction by said company of its new road-bed across the Newport Road at Gap in the manner described in the testimony, fall within the provisions of the Act of Assembly authorizing such change of site?

"If these two questions be answered affirmatively, then:—

"(3) Does the construction of the new road-bed along the east side of the railroad and across the overhead bridge unto the old road leading to the Newport Road, as described, constitute such a reconstruction of the Newport Road as is contemplated by the Act of Assembly of March 27, 1848?

"If either of the foregoing questions be determined in the negative, the plaintiff's bill should be dismissed; if all are answered in the affirmative, the injunction should be granted.

"The Pennsylvania Railroad Company was incorporated by Act of Assembly, approved April 13, 1846 (P. L. 312), and authorized to build a railroad from Harrisburg to Pittsburgh, with such lateral roads or branches as the directors might deem advantageous, etc.

"The 13th section of the Act provides, that whenever in the construction of said road or roads, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct said road across such established road or way as not to impede the passage or transportation of persons or property along the same.

"A supplement to said Act of Incorporation, approved March 27, 1848 (P. L. 278), enacts (sec. 5) that if said railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith at their own proper cost, on the most favorable location, and in as perfect a manner as the original road.

"And the Act of March 20, 1849 (P. L. 196), provides a way for compelling the railroad company to comply with the provisions of the last-named Act.

"The Act of Assembly, entitled An Act for the Sale of the Main Line of the Public Works, approved May 16, 1857 (P. L. 519), provides in section 3, that it shall be lawful for the purchasers or their assigns, either to purchase or lease, hold, and use, the railroad of the Harrisburg, Portsmouth, Mount Joy, and Lancaster Railroad Company, and to straighten and improve the said Philadelphia and Columbia Railroad and to extend the same to the Delaware River. And in section 11 it is further provided, that should any company, already incorporated by the Commonwealth, become the purchaser of said main line, they shall possess, hold, and use the same under the provisions of this Act of Incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this Act in addition thereto; and all provisions in said original Act, and any supplements inconsistent with the privileges herein granted, shall be and the same are hereby repealed.

"The foregoing are the charter provisions, relating to crossing or occupation of public roads by the Pennsylvania Railroad, and they appear to the Master to extend all the powers and privileges granted to said company for the construction of its original road, by its charter and the supplements thereto, to its use and occupation of the Philadelphia and Columbia Railroad. There can be no doubt whatever, that if in the extension of the Philadelphia and Columbia Railroad to the Delaware River, as authorized by the 3d section of the Act of May 16, 1857, the company, had, in a case within the purview of the Act of 1848, found it necessary to change the site of any portion of any turnpike or public road, it would have had the power under said Act, and the Act of May 16, 1857, to do so. But the authority to straighten and improve the Philadelphia and Columbia Railroad is granted in the same section as the power to extend it, and the provisions of the 11th section of the Act of 1857 apply to both.

"It was said in the argument of the case before the Master that the changes in the line of the railroad between Philadelphia and Columbia, recently made, were made by the authority of the Act of April 10, 1867 (P. L. 993). But if this is so, it does not imply any previous want of power to straighten and improve the Philadelphia and Columbia Railroad—that power, as we have seen, was granted when the Legislature author-

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ized the sale of the road, together with the authority of the purchaser to hold, possess, and use the same under the provisions of their Act of incorporation and its supplements.

"But it will be observed that while the same Act which authorizes the purchasers or their assigns to straighten and improve the Philadelphia and Columbia Railroad, also authorizes such purchasers, or their assigns, to purchase or lease, hold and use the Harrisburg, Portsmouth, Mount Joy, and Lancaster Railroad, it gives no power to straighten and improve the latter road, nor does it give any power to widen either of said roads nor to enter upon and appropriate lands for additional tracks, sidings, shops, depots, etc. For such purposes the Act of April 10, 1867 was required; but the authority to straighten and improve the Philadelphia and Columbia Railroad, and for that purpose to exercise all the powers over public roads granted by its charter and its supplements, was granted to the Pennsylvania Railroad Company by the Act of May 16, 1857, and is in no way dependent upon the Act of 1867.

"The first question is therefore answered in the affirmative.

"As to the second question: While the railroad company's track at Gap does not cross the Newport Road at right angles, it is still nothing more than a crossing, it cannot be construed to be a longitudinal occupation of the bed of the road; and while the Act of 1848 does not in terms require that the company should first longitudinally appropriate the road, in order to acquire the right to change its site, such seems to the Master nevertheless to be the meaning and spirit of the Act. The Act of incorporation of 1846, section 13, seems to have fully provided for the crossings or intersections of any estabished road or way—there does not appear to have been any necessity for any further legislation on that subject.

"The Act of 1848 provides that if said railroad company shall find it *necessary* to change the site, etc. Now the word "necessary" is defined to mean such as must be; impossible to be otherwise; not to be avoided; inevitable; impossible to be otherwise without preventing the purpose intended, etc.; and it can readily be seen how the longitudinal occupation of a road by a railroad can give rise to such an emergency; the bed of a road cannot for any distance be occupied as a railroad and a common road both, hence the change of site becomes necessary, not to be avoided, inevitable; but in case of a mere crossing, the space necessarily occupied by both roads is so limited that with reasonable precaution it may be used for both purposes, and if the railroad crosses at such an elevation or depression as to render a grade crossing impracticable, it is always impossible to construct either an overhead or undergrade crossing—the testimony in this case shows that either may be done in the present case. It seems, therefore, to the Master [that the Act of 1848 was intended to meet cases where the railroad is laid longitudinally on the bed of a public road, and that a crossing, even if it be at an angle of forty-five degrees, is not such a case as will justify the exercise of the powers conferred by that Act]. Such seems to have been the view of the Supreme Court of Pennsylvania, in Pennsylvania Railroad Company's Appeal (18 WEEKLY NOTES, 418). . . .

"The second question is therefore answered negatively, and this conclusion renders the consideration of the third question unnecessary.

"Upon all the facts in the case, the Master is of the opinion that the bill should be dismissed and so recommends to the Court."

Plaintiff filed exceptions to this report, which the Court, LIVINGSTON, P. J., dismissed, and a decree was entered confirming the report of the Master, dismissing the bill, dissolving the preliminary injunction, and ordering the costs to be paid by the plaintiff.

Plaintiff then took this appeal, assigning for error (1) the portion of the Master's opinion in brackets, (2) the dismissal of plaintiff's bill, and (3) the decree of the Court.

H. M. North (*E. D. North* with him), for appellant.

The company had the power to straighten and improve its line.

Commonwealth *v.* E. & N. E. R. R. Co., 27 Pa. 354.

It had the power to change the site of a public road, whether the change was vertical or horizontal.

Pittsburgh *v.* P. R. R., 48 Pa. 355.
Appeal of Township of North Manheim, 22 WEEKLY NOTES, 149.

It had the power to determine the necessity of such change, and could only be reviewed for the abuse of its discretion, and there is no allegation or evidence of abuse of discretion in this case. It made a new road in place of the old one at its own expense on the most favorable location, and in as perfect a manner as the original road.

Pittsburgh *v.* P. R. R. *supra.*
Parke's Appeal, 64 Pa. 139.
N. Y. & E. R. R. Co. *v.* Young, 33 Id. 182.
Struthers *v.* Dunkirk, etc., R. R., 82 Id. 286.

The making of a new road in place of the old one was a vacation of the old one.

Phillips *v.* Dunkirk, A. & W. R. R., 78 Pa. 181.

G. C. Kennedy and *George Nauman* (*H. C. Brubaker* with them), for appellees.

The railroad company has no power to close up and vacate a public road where it crosses it and sinks its track.

Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. 371.
Danville R. R. *v.* Commonwealth, 73 Id. 29.
Act of March 27, 1848.
In re Road in Sterrett Township, 19 WEEKLY NOTES, 76.

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Nor has it the right to restrain the supervisors from making the road fit for travel, when it neglects to do so itself.

October 7, 1889. THE COURT. This case presents a question which is both interesting and important. The tracks of the Pennsylvania Railroad through the village of Gap in Lancaster County are upon the slope or side of a hill. Prior to 1885 the company undertook the improvement of its line, and the village of Gap was one of the places where it was sought to reduce its grades. For this purpose the tracks were put upon a new location further down the face of the hillside, and the road-bed was dropped still lower by means of a considerable excavation. The Newport Road crossed the tracks as originally located at grade.

The new tracks were twenty-four feet northerly from the old, and the excavation left a perpendicular bank on the upper or southerly side nine feet high. The site of the Newport Road was thus occupied and removed by the railroad company, and the road made impassable. The railroad company proceeded at once to supply the place of the piece of road thus occupied by them by building an overhead crossing at a convenient point near by, and connecting the Newport Road with it. The new road with the overhead crossing has been in use by the public for several years. The supervisors of the township now propose to excavate an approach to the new tracks on the line of the Newport Road, and so open a grade crossing for public use. This bill was filed to prevent such action on their part. It avers in substance that it became necessary to change the site of the Newport Road in consequence of the improvement of the railroad track; that such change was made by the company at its own cost; that the new or substituted road is and has been for some time in actual use by the public; and that the proposed action of the supervisors would interfere with the safety of trains upon the railroad, and open to the public a crossing that would be both difficult and dangerous, without any legal authority therefor. The important facts are not in controversy. The answer concedes and the Master finds that the railroad company built a new road with a safe overhead crossing to take the place of the old road, that the new road is, and has been since its construction in use by the public, and that the crossing at a grade now proposed would be dangerous. The Master was of opinion however, and so reported, that the plaintiff's right to the relief sought depended upon the answers to be given to two questions. These he stated and answered as follows: "1st. Has the Pennsylvania Railroad Company the right, if it shall find it necessary between Philadelphia and Columbia to change the site of any portion of any turnpike or public road, to cause the same to be reconstructed forthwith at its own proper cost on the most favorable location, and in as perfect a manner as the original road?" This question he correctly answered in the affirmative, holding that the company had the power in a proper case to take possession of a public road, and upon such taking to reconstruct it on other ground. The second question is, "Does the construction by the company of its new road-bed across the Newport Road at Gap in the manner described, fall within the provisions of the Act of Assembly authorizing such change of site?" This he answers in the negative upon the ground that a crossing can under no circumstances justify a railroad company in changing the site of a public road, but that the public road must be carried over or under the railroad where a crossing at grade is not practicable, without regard to the difficulty or cost of such work, and without reference to the public convenience or safety. The proposition is maintained that the right to change the site of a public road can be exercised only when the bed of the road is occupied longitudinally by the tracks of the railroad. This is our question. The legislative provision on which it depends is in these words, "That if said railroad company shall find it necessary to change the site of any portion of any turnpike or public road they shall cause the same to be reconstructed forthwith at their own proper expense on the most favorable location, and in as perfect a manner as the original road." The question then in every case is whether a change of the public road is necessary. This is left by the statute to be determined in the first instance by the railroad company. The circumstances out of which the necessity must arise are not enumerated. Whether a longitudinal occupancy of the road-bed for any distance however small will create a necessity, or whether nearness to the public road, a deep excavation across it, a cutting away of the hill-side under it upon a diagonal line to a depth of nine or ninety feet will justify the removal and reconstruction of the road, is a question to be settled in the exercise of a sound discretion by the railroad company. Unless the power thus committed to the company is abused or used without due regard to the public interests it is conclusive of the question. If it is abused such misuse of it may be restrained or redressed through the Courts. Ordinarily the necessity grows out of the appropriation longitudinally of a portion of the public road for the tracks of the railroad, but we cannot say that this is the only way in which a necessity can arise. Nor is the necessity which presents itself in any given case to be an insurmountable one in order to justify the reconstruction of the

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road. It is difficult to set any limits to what is possible to engineering skill and money in this age of marvels.

The question in any given case is not what is possible, but what is reasonably practicable. In the case before us it appears by the findings of the Master that the railroad company encountered the following difficulties in determining what to do with the Newport Road. To make a crossing at grade would require a thorough cut eight feet deep at the side of the railroad, to be continued back from the road fully two hundred feet. At a distance of one hundred feet from the railroad this cut would be five feet deep on one side with a bank twelve feet high on the other. The descent along its whole length would be at the rate of seven and a half feet in a hundred. It would cross the tracks on a diagonal line, the tracks being on a three and a half degree curve. Both the curve in the railroad and the cut for the public road would contribute to make the crossing dangerous to the public and inconvenient to the railroad company. To cross by an overhead bridge would require a structure three hundred and thirty feet long with a grade of fifteen feet in a hundred. An underground crossing would require an excavation under the tracks fifteen feet in depth with an approach from the south of six hundred and fifty feet and one from the north of three hundred and seventy-five feet, with an average grade of eight feet in a hundred. The company decided that neither of these was reasonably practicable but that it was necessary in view of all the circumstances to remove the road a short distance and re-construct it on better ground, with better grades and with an overhead crossing.

This was done. If this was an unauthorized exercise of power the objection should have been made before the new road was laid out by the Court and the work of re-construction completed by the railroad. It might be raised in a proper way even now, but until it is raised and disposed of in an orderly and legal manner the decision of the railroad company must stand. The supervisors are proposing on their motion and by their own authority to restore the crossing which has been supplied. They would overrule the decision of the railroad company on the question of necessity which the Act of Assembly left to it for determination, and proceed to undo what it has done in the premises, without the aid of legal process or the judgment of the courts. This will not do. The supervisors may as well open a grade crossing at any other point on the line of the railroad, without authority, as to do it here. The railroad company necessarily appropriated a part of the Newport Road in the improvement of its tracks. It decided that it was reasonably necessary to remove or re-construct that part of the road. They sought and obtained the authority of the Court of Quarter Sessions of Lancaster for laying out and opening the new road. They did the work of re-construction at their own cost and built a safe overhead crossing at a convenient point. The public took possession of the re-constructed road and has used it for several years. These proceedings have the effect of informally vacating so much of the old road as is thus supplied and there is no power in the supervisors to revise and reverse all that has been done and restore the supplied crossing.

The cases cited by the defendants in error are not in point. The Appeal of the Railroad Company (93 Pa. 150), was a case in which a railroad company sought to justify the appropriation of a street without direct legislative authority therefor. The same is true of the Penna. Railroad Company's Appeal (115 Pa. 514), and the rule was stated to be that the legislature may authorize a railroad company to lay its tracks in a public street, but that without such authority it has not the right to appropriate the highway in that manner. The precise question now decided is not, so far as we are aware, considered in any of our own cases, nor has the research of counsel brought to our attention any decided case in which it is ruled.

The decree is reversed, and the preliminary injunction restored at the costs of the appellees.

Opinion by WILLIAMS, J.

MITCHELL, J., dissented. W. M. S., JR.

Jan. '89, 59. January 31, 1889.

Hayes v. The Press Company, Limited.

Libel—Comment by newspaper upon a record of the Court—Privileged communication—Evidence.

It is the right of a newspaper to publish the fact that a judgment has been entered against a particular person, as shown by the record of the Court; but to publish an inference therefrom that the party is "embarrassed" will, if untrue, constitute a libel and render the paper liable in damages.

Plaintiff sued a newspaper for libel, setting out in his narr. the publication as follows: "*Hotel proprietor embarrassed.*—A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note dated August 6th, and payable on demand, for $1500," and alleging, by way of innuendo, "thereby then and there meaning that the said J. F. Hayes, the said plaintiff, was in bad circumstances, insolvent, and unworthy of credit." At the trial, the plaintiff, having shown that he was not in bad circumstances, requested the Court to charge: (1) "If you believe plaintiff's innuendo to be true, your verdict should be for plaintiff," and (4) "This publication was not a privileged communication." The Court refused to affirm the first point without quali-

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fication, and answered the other point by saying that a fair comment was admissible, but that if the comment was unfair and reckless it took away the privilege:

Held, (1) that, under the circumstances, the first point should have been unqualifiedly affirmed.

(2) That the question of privilege was not properly involved, the publication was in no sense privileged, and the fourth point should have been affirmed.

In the above case it was error to allow the plaintiff to be asked on cross-examination whether the same publication did not appear in other papers.

Error to the Common Pleas No. 3, of Philadelphia County.

This was an action of libel by J. Frank Hayes against The Press Company, Limited.

The narr., after averring that the plaintiff was the proprietor of the St. George Hotel, etc., declared on a libel published by the defendant, as follows:—

"HOTEL PROPRIETOR EMBARRASSED.

"A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes of the St. George Hotel on a promissory note, dated August 6th, and payable on demand for $1,500." (Innuendo) "thereby then and there meaning that the said J. F. Hayes, the said plaintiff, was in bad circumstances, insolvent, and unworthy of credit."

Defendant first demurred, and then filed a single plea of "not guilty."

The facts, as they appeared at the trial, before REED, J., are substantially set out in the opinion of the Supreme Court.

Plaintiff was asked on cross-examination whether the statement was not published in a number of other papers. Plaintiff's counsel objected "to the witness being asked a question as to whether something was printed in the other papers, because it is calling upon the witness to give the contents of a document which ought to speak for itself." Objection overruled and evidence admitted. (First assignment of error.)

Plaintiff requested the Court to charge the jury as follows:—

(1) If you believe the plaintiff's innuendo to be true your verdict must be for the plaintiff. *Answer*. I have answered that point already in my general charge. That point unqualifiedly I cannot affirm. (Seventh assignment of error.)

(2) The libel is on its face actionable, and no defence whatever has been shown. *Answer*. That point I refuse. (Ninth assignment of error.)

(3) It is your duty to infer legal malice in this case. *Answer*. That point I refuse. (Tenth assignment of error.)

(4) This publication was not a privileged communication. *Answer*. I have defined in my charge how far it is privileged by telling you that a fair comment was admissible, but that an unfair and reckless comment, or one made in levity and carelessness, was not admissible; this would take away the privilege. (Eleventh assignment of error.)

The Court charged the jury as follows:—

"The case goes to you on two points of fact which, after careful consideration, I have concluded are within your province and not within mine. But the line of those facts is narrow and will deserve your thorough attention.

"[The defendant in this case, The Press Company, Limited, published a statement about this plaintiff which it had the privilege, in its functions as a public newspaper, to publish. Beyond that they had the right to make upon that, or any other fact of a public or somewhat public character, any reasonable and fair comment; and for the exercise of that right they are not to be liable unless the right has been abused.

"The question of fact important for you to decide and ascertain is whether there was such abuse. That depends upon what conclusion can be drawn from the fact of the entering of this judgment-note or the entering up of a judgment upon the note."] (Second assignment of error.) "That is a matter, not of law, but of business practice, and one, therefore, which falls within your domain rather than within mine. It might well be that the entering of a judgment-note against a man, so far as his credit is concerned, would have an effect upon his business credit so as to cause damage to him; and it might well be that the entering up of a judgment-note would not affect a man's credit at all. It might be that the entering up of a judgment would be fatal to the credit of one man and would not affect the credit of another man. Therefore all these are questions of fact for your decision and not questions upon which I can rule.

"[The only thing that caused me to hesitate in my disposition of the case was a doubt—and in expressing it I do not intend to bind you at all—a doubt as to whether there was sufficient evidence before you to satisfy you as to the plaintiff's case."] (Third assignment of error.) "On that point you have the right and it is your privilege to differ from me, and if you think that I am wrong in entertaining that doubt it is not only your privilege but it is your duty to find in a way which perhaps I would not find if I were in your place.

"['The first point is whether the entering up of this judgment, taken alone and as a solitary fact, was so significant that a newspaper in the ordinary course of its daily work might well find that the person against whom such a judgment was entered up was in an embarrassed condition. That point is for you to consider."] (Fourth assignment of error.) "And in considering it

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you must consider the second point which is—[What is the meaning of the word 'embarrassed' or 'embarrassment,' in connection with a man's business or his credit?"] (Eighth assignment of error.) "In considering that word you are to take it in its ordinary sense, as men ordinarily intelligent would use such a word. You must ask yourselves, how would I describe, or in what condition would I understand a man to be who is described as embarrassed? I take it to be—and I am simply expressing my own opinion, not binding you—that a man who needs money for the purposes of his business, and is not able to get it without some difficulty, without difficulty which he feels, that man may be said to be embarrassed in his pecuniary affairs. A man who needs money, and cannot readily get it by the ordinary means, is a man who in my judgment would be an embarrassed man. But as to that, as in regard to all questions of fact, you will find in whatever way, under your oaths and consciences, you may think you ought to find.

"Now, the evidence in this case is that the plaintiff had a large business, with a considerable profit for one year, involving the expenditure of a large amount of money—in the past and for the future. It was a business, and this is for you to consider, not perhaps of a certain character; that is to say, was it such a business—and I want you to consider this—that it would certainly bring in the second year any profit, because it had brought a profit in the first year? You must consider the nature of the business and the whole situation there. It is for you to ascertain, from all the evidence, whether the plaintiff's returns from that business were certain or uncertain. If they were certain, then it is a question for you to consider what his motives were, under all the circumstances surrounding the borrowing of this money from the Third National Bank. On the other hand, if his returns from the hotel were uncertain; but that is for you to determine. You may find that it was possibly prosperous one year and the next year not so prosperous. You may find that this man had large debts and assets—which may be of great value. There was the hotel lease and the furniture, and you may find that this hotel lease was of a certain value. Then he had a farm in the country of some value; I think he said that he gave six thousand dollars for it. He had outside of those, his apothecary shop, which he says was of the value of about twenty thousand dollars. That was the estimate he put upon it. With these assets you may find that he was a man who was not in a condition of financial embarrassment. But on this point I want you to disregard all the testimony in regard to the policies of insurance. The after proof failed to show that they were assets of any value in his hands. They may have been so, but it was not proven.

"Now you find that this man, in this situation, goes to a bank to obtain money for a certain purpose. He says it was for improvements to his house—for painting and paper-hanging and to buy carpets. He gives a judgment-note for the obligation.

"It is for you to consider, at this point, in justice to him and in justice to the defendant, just how he was situated. You should endeavor to put yourselves in his place in order to see how he stood.

"You find that this man, so situated, undertakes to procure a loan of money from a bank. And the question comes up whether the demand of the judgment-note on the one side and the giving of the judgment-note on the other side, was such a matter as would indicate of itself that the man was in an embarrassed condition. If that was not fairly inferable from all the facts, if it was a reckless assertion on the part of the newspaper, made wantonly, with levity and with carelessness, then the defendant would be liable for the statement. On the other hand if it was a statement which any fair-minded, intelligent man with a knowledge of the circumstances and a knowledge of the community, would naturally make under the circumstances [if it was such an inference as you and I would draw from the facts, then in my opinion they are not liable and it would not be your duty to find a verdict for the plaintiff."] (Fifth assignment of error.) "But the whole matter depends upon questions of fact, which you must find, and which I do not propose to find for you. In expressing any opinion upon the facts I do it only to enlighten you and not to bind you.

"Now, that covers the whole case. In the first place you are to consider the situation of the parties—whether the giving of this judgment note was such a fact from which it might be inferred in this particular case that the man was in a condition of embarrassment; and secondly, whether the word 'embarrassed' described the condition in which you may find that this man was in.

"In this, as in all cases, you are to bring to your decision a careful consideration of all the facts; you are to remember the evidence and try to remember the instructions which have been given to you—as well as the addresses of counsel.

"And you are to remember, in this, as in all cases, that the burden of proof is upon the plaintiff. It is upon him to establish to your satisfaction that the injury which he alleges has been caused to him.

"In regard to the damages [if you find upon all these points or upon the substance of all these points which I have laid before you, against the defendant in this case—if you find for the plaintiff, then it becomes your duty to consider the question of the damage suffered

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by the plaintiff."] (Sixth assignment of error.) "In this case we have two facts or elements—the entering of the judgment-note and the newspaper comment made upon it—the affirmative statement that this man was embarrassed. If you find as a matter of fact in this case that it was not a proper comment to make upon the fact of the entering of the judgment-note it will become necessary for you to consider how far the injury suffered by the plaintiff, if he did suffer any injury, was to be ascribed to the fact of the entering up of the judgment-note—or whether it was to be ascribed to that only, or on the other hand to the use of the word 'embarrassed' by the newspaper. You will remember the statement that the newspaper contained to the effect that the plaintiff was embarrassed; and secondly, you will remember that a judgment was entered against him. That statement was made in the newspaper. Then the paper, the same periodical, on the next day issued a statement about the facts in this case as furnished to them by Mr. Hayes himself, the plaintiff.

"Now, while it is not possible always to overtake a false and mistaken statement by correction, and therefore while the fact of the publication on Monday does not necessarily do away with the fact of the publication on Sunday, yet it is for you to consider this publication as a whole, and say how far you think as a matter of fact the plaintiff's business was injured as he claims it was, by the publication of the comment in the Sunday paper. On that point again it becomes your duty to look particularly into this matter with the greatest possible care, because of the large consequences which may flow from what seems to me a narrow source—from which they are alleged or supposed to flow. You may not take the view of this case which I do on this point. You may think or find if you think you have the evidence to justify you that this comment in the Sunday paper was adequate to produce the result which the plaintiff claims. But you must recollect there is no question that the judgment-notes were entered up; and it is for you to consider on this point as on all the points, that the entering up of a judgment-note carries of itself without comment upon it, or may of itself have a serious effect upon a man's business. You must also remember that on this point as on all points, the burden of proof is upon the plaintiff to show that the damage did follow from the alleged wrongful act. It is for you to consider whether this language which appears in this newspaper on that particular day will account for the condition of the plaintiff's business or the change in his business.

"The plaintiff in his own evidence admits having found serious fault with his manager. He says in his own testimony, although he states differently in another portion of it that the hotel was taken care of and managed by the manager; then he says that Mr. Ward was the real manager, and he explains that he found fault with Mr. Ward's management. But he says in his testimony that he don't ascribe his losses to Mr. Ward's management because this was no worse the second year than the first.

"It is for you to consider whether these consequences flowed from the publication solely, or whether they flowed from something else; and you may distinguish one from the other, and set a value upon the loss which can be fairly traceable to this libel; if it was a libel. And you may find whatever damages you think the plaintiff suffered in his business from that cause.

"So far as the period of time is concerned I stated in ruling upon the evidence that it ought to be brought down to a reasonable time after the event, which in my judgment was the season following, that this was a reasonable time. I think you should confine your attention to the business that followed in the next business season, that is to say from one year to the next.

"But you must recollect all through the case that you are not to make guesses, that no one of you is to put off his responsibilities upon any other one, but that you are, each of you, to do your duty as best you can, to ascertain the truth from the evidence before you, and find as you think the verdict ought to be found. And always, as I have already said, the plaintiff is bound to make out his case."

Verdict for the defendant, and judgment thereon. Plaintiff took this writ specifying for error the ruling on the evidence, the answers to the points, and the portions of the charge in brackets as above noted.

Richard P. White (*George H. Earle, Jr.*, with him), for plaintiff in error.

James H. Shakespeare (*James H. Heverin* with him), for defendant in error.

October 7, 1889. THE COURT. The evidence in this case tended to show that after the plaintiff had been engaged for some time in the retail drug business, he purchased the furniture, etc., of the St. George Hotel, Philadelphia, and leased the building itself for a term of five years from September 7, 1885. During the first year the hotel business showed a net profit of about $8000, with favorable prospects for the next ensuing year. The house was largely patronized by guests who made it their home during the year, except for a few weeks in the summer.

In August, 1886, plaintiff determined to make some needed repairs, such as painting, papering, etc., involving a greater cash outlay than he was then prepared to meet without a temporary loan. For that purpose he had a note for $1500 at four

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months, indorsed by his brother, discounted by the Third National Bank, with which he kept an account; and, as collateral security therefor, he gave the joint judgment-note of himself and brother, for same amount, payable on demand; with the understanding that the latter should be used only in case the discounted note was dishonored. By an oversight of the bank judgment was prematurely entered on the collateral note, but no execution was issued thereon. "The Press Company, Limited," defendant, in its issue of August 9, 1886, published the following notice of the judgment:—

"*Hotel proprietors embarrassed.*

"A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note, dated August 6, and payable on demand, for $1500."

This article constitutes the alleged libel, and is declared on with the following *innuendo*: "thereby then and there meaning that the said J. F. Hayes, the plaintiff, was in bad circumstances, insolvent, and unworthy of credit." Defendant's demurrer to the declaration being overruled, the plea of not guilty was entered, and on that issue the case was tried.

In addition to the facts and circumstances above stated, the evidence adduced by plaintiff tended to show that he was not embarrassed, nor in bad circumstances, insolvent, or unworthy of credit at the time the judgment was entered, nor before; that in round figures his entire liabilities, including drug and hotel business, aggregated about $16,000, and his assets about thrice that sum; that none of his liabilities were pressing, and a very small proportion of same then due. His object in borrowing the $1500 was to provide better accommodation for patrons of the hotel. Plaintiff himself was examined and rigidly cross-examined as to his business affairs, financial condition, etc. His testimony tended to show that the publication was prejudicial to his financial standing, and injurious to his business as proprietor of the hotel. The manner in which it affected both, and the extent of the alleged injury, were stated in detail, and need not be further noticed. The evidence was all for the consideration of the jury in determining questions of fact upon which it was their exclusive province to pass. The hotel books were produced on defendant's call, but it does not appear that they were examined or put in evidence, nor was there any rebutting testimony offered by defendant.

If there was no error in the trial, the verdict for defendant should not be disturbed; but it is alleged the Court erred in several particulars, some of which are worthy of notice.

In plaintiff's first and fourth points for charge, the learned Judge was requested to instruct the jury as follows: "(1) If you believe plaintiff's innuendo to be true, your verdict should be for plaintiff." "(4) This publication was not a privileged communication." In his answer to the first, the learned Judge said: "I have answered that point already in my general charge. That point I cannot unqualifiedly affirm." We fail to discover in the general charge any such affirmance of the point, qualified or otherwise, as the publication itself and the undisputed evidence required. It was for the jury to say whether the publication meant what is alleged in the innuendo. If they found it did, the publication is libellous; and, under the uncontradicted evidence, plaintiff was entitled to a verdict. Written or printed words which are injurious to a person in his office, profession, or calling, or which impeach the credit of any merchant or trader, by imputing to him insolvency, or even embarrassment, are libellous. The law carefully guards the credit of merchants and traders. Imputations on their solvency, or suggestions that they are in pecuniary difficulties, etc., are, as a general rule, actionable. (Odgers on Libel, 19, 29, 80, 81, and authorities there cited.)

In its application to a man's financial condition or standing, the word "embarrassed," employed in the head-line of the article complained of, ordinarily means incumbered with debt, beset with urgent claims and demands, unable to meet his pecuniary engagements, etc. Words of substantially the same import as those used in the innuendo. The office of an innuendo is to aver the meaning of the language published; but, if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libellous meaning to them, an innuendo is not needed, and if used may be treated as useless surplusage. Considered in connection with the rest of the article, the word "embarrassed" means substantially what is ascribed to it in the innuendo. That, however, was a question for the jury. The point should have been affirmed.

In his answer to the fourth point, above quoted, the learned Judge said: "I have defined in my charge how far it is privileged, by telling you that a fair comment was admissible, but that an unfair and reckless comment was not admissible. This would take away the privilege." This answer, we think, was misleading, and erroneous. Strictly speaking, the question of privilege was not involved. It was the common right of any one to publish the fact that a judgment for $1500 had been entered against the defendants, substantially as shown by the record of the Court in which it was entered; but it was neither the right nor the privilege of defendant or any one else to publish in connection there-

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with the declaration, in the form of a head-line, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business; and, if the evidence is believed, it did injure plaintiff's credit and business as a hotel-keeper. Such a declaration, whether it be regarded as an inference drawn by the writer from the fact that the judgment was entered, or be called a comment on a judicial proceeding, was an unwarranted assertion of fact, which, if untrue, was manifestly calculated to impair plaintiff's credit and injure his business. It does not follow that one who authorizes a confession of judgment against himself is financially embarrassed.

The publication, as a whole, including the head-line, was in no sense privileged. The point should have been affirmed.

For reasons already suggested, those portions of the charge recited in the second, fourth, and fifth specifications were misleading and erroneous.

The testimony, elicited on cross-examination of plaintiff, was irrelevant and improper, and for aught that we know it may have prejudiced plaintiff's case.

The remaining specifications of error are not sustained; but, for reasons suggested in connection with the first, second, fourth, fifth, seventh, and eleventh specifications, the judgment should be reversed.

Judgment reversed, and a venire facias de novo awarded.

Opinion by STERRETT, J. W. M. S., JR.

Jan. '89, 191.. April 3, 1889.

In re Widening of Chestnut Street.

Widening of streets—Appeal from report of viewers—Act of June 13, 1874—Jurisdiction of Common Pleas and Quarter Sessions.

The effect of an appeal to the Court of Common Pleas, under the Act of June 13, 1874, P. L. 283—providing that in all cases of damages assessed against a corporation or individual invested with the privilege of taking private property for public use, etc., where such assessment shall have been made otherwise than by a trial in Court, and an appeal is not provided for by existing laws, an appeal may be taken to the Court of Common Pleas within thirty days from the ascertainment of the damages or the filing a report thereof in Court—is to vest in that Court exclusive jurisdiction of the question of damages.

It is error in the Quarter Sessions to assume jurisdiction and sustain exceptions filed in that Court to the report of viewers while an appeal from that report is pending in the Court of Common Pleas.

Certiorari to the Quarter Sessions of Philadelphia County.

The following facts appeared from the report of the Master in the Court below:—

John C. Lucas was seised of a lot of ground and buildings thereon situated at the southwest corner of Chestnut and Juniper streets in the city of Philadelphia. In July, 1887, Mr. Lucas having torn down the buildings for the purpose of erecting another one on this lot, was compelled by the Act of April 28, 1870 (P. L. 1291), to recede for a depth of five feet along the whole length of his Chestnut street front from the former building line. On December 14, 1887, he presented his petition to the Quarter Sessions for a Master and jury to assess the damages sustained by reason of the taking of his ground. A Master and jury were duly appointed, who filed their report on July 17, 1888, and awarded the petitioner $4000 damages.

On August 15, 1888, within thirty days after filing the report of the Master and jury, the city appealed from the report to the Court of Common Pleas, and on September 1, 1888, also filed exceptions in the Court of Quarter Sessions. After argument in the Court of Quarter Sessions the exceptions were sustained.

Mr. Lucas having died his administrators were substituted of record, and their counsel then took a rule to show cause why the exceptions should not be stricken off and the order sustaining them be set aside and vacated; inasmuch as there was an appeal pending at the time the exceptions had been filed.

After the exceptions had been sustained by the Court of Quarter Sessions, counsel for the city took a rule in the Court of Common Pleas to show cause why their appeal filed therein should not be withdrawn. This rule was afterward made absolute against the protest of the petitioner.

Lucas's administrators then took this certiorari assigning for error, *inter alia*, the action of the Court of Quarter Sessions in sustaining exceptions to the report of the Master and jury when an appeal was pending in the Common Pleas whose jurisdiction was complete and exclusive.

Edward H. Weil (*Samuel B. Huey* with him), for plaintiffs in error.

The Act of April 28, 1870 (P. L. 1291), and the ordinance of the city of Philadelphia of March 31, 1884, under which the width of Chestnut Street was changed, have been fully considered in—

City *v.* Linnard, 1 Out. 242.
In re Chestnut St., 3 Crum. 593.

The Court of Quarter Sessions has no jurisdiction when an appeal has been taken to the Common Pleas.

Williams *v.* Pittsburgh, 2 Norris, 71.
Donaldson *v.* R. R. Co., 15 WEEKLY NOTES, 312.
Lentz *v.* Lamplugh, 2 Jones, 344.
Schuylkill, etc. R. R. Co. *v.* Harris, 23 WEEKLY NOTES, 262.
Act of June 13, 1874, P. L. 283.

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James Alcorn (*Charles F. Warwick*, city solicitor with him), for defendant in error.

October 7, 1889. THE COURT. On the petition of John C. Lucas, owner of the lot at southwest corner of Chestnut and Juniper streets in the city of Philadelphia, viewers were appointed by the Court of Quarter Sessions to assess the damages he had sustained by the widening of Chestnut Street at that point.

In July, 1888, the report of the viewers awarding him $4000 damages was duly filed in said Court; and, on August 15th, next ensuing, the city appealed from the award and demanded "that the lawful damages caused by the taking, injury, or destruction of the property of John C. Lucas, for the widening of the said street, beween the points named, and the just and lawful compensation to be paid therefor, shall be determined by a jury, according to the course of the common law, in accordance with the provisions of the Constitution of this Commonwealth and the Acts of Assembly in such case made and provided." Afterwards, on September 1, 1888, while that appeal was pending and undetermined in the Court of Common Pleas No. 3, exceptions to the report of viewers were filed, on behalf of the city, in the Court of Quarter Sessions, complaining that the damages awarded by the jury were excessive and contrary to the evidence; that the petitioner was not entitled to any damages, etc. Without assigning any reason therefor, that Court made an order sustaining the exceptions and setting aside the report, and afterwards refused to revoke said order. Thereupon this writ of *certiorari* was taken, and the action of the Court in assuming jurisdiction and sustaining the exceptions, etc., has been assigned as error.

The Act of June 13, 1874, which was passed to give effect to section 8, Article XVI. of the Constitution, provides that in all cases of damages assessed against any municipal or other corporation or individual, invested with the privilege of taking private property for public use, etc., whether such assessment shall have been made by viewers or otherwise than a trial in Court, and an appeal is not provided for by existing laws, an appeal may be taken by either party to the Court of Common Pleas of the proper county within thirty days from the ascertainment of the damages or the filing a report thereof in Court, pursuant to any general or special Act, and not afterwards. In this case, the appeal was taken in due form by the city within the time named in the Act. The effect of the appeal to the Court of Common Pleas was to vest in that Court exclusive jurisdiction of the question of damages. (Pusey's Appeal, 83 Pa. 67; Williams *et al. v.* City of Pittsburgh, Id. 71.) It will be observed that when the appeal was taken from the Court of Quarter Sessions on August 15, 1888, and for more than two weeks thereafter, no exceptions had been filed in that Court. The Court was clearly wrong in assuming jurisdiction and sustaining the exceptions while the case was pending on appeal in the Court of Common Pleas.

The order of the Court of Quarter Sessions, sustaining the exceptions and setting aside the report of viewers, is reversed and set aside.

Opinion by STERRETT, J. H. S. P. N.

Jan. '89, 42. April 18, 1889.

Reid v. Smoulter.

Constitutional law—Acts of Assembly—Amendments of—When and when not a repeal of the original Act—Public officers—Separate Orphans' Courts—Clerks of, power to appoint assistants—Luzerne County—Acts of April 13, 1887, *and May* 19, 1874.

While, as a general rule, an amendment of a statute declaring that it shall read in a particular way repeals all provisions not retained in the altered form, yet this rule is inapplicable in a case where such an implied repeal would operate to produce an unconstitutional result.

When by an Act of the Legislature a separate Orphans' Court has been created in a particular county in accordance with the provisions of Article 5, section 22 of the Constitution of 1874, said Court exists under the authority of the Constitution, and the register of wills, as clerk of such Court, is thereby vested with the constitutional right to appoint an assistant clerk, with the consent and approval of the Court, which right cannot be divested by the Legislature, so long as said separate Orphans' Court exists.

Whether a separate Orphans' Court established in accordance with the provisions of Article 5, section 22 of the Constitution of 1874, in a county having more than 150,000 inhabitants may be abolished by the Legislature on the population of the county being reduced below that number, not decided.

When the Constitution creates a public office, but makes no provision as to the salary of the incumbent, the amount of the salary is within the discretion of the Legislature, but the Legislature cannot repeal the Act fixing the amount of the salary, and make no provision therefor, as that would result in expelling him from office.

The Act of April 13, 1887 (P. L. 22), amending § 5 of the Act of May 19, 1874 (P. L. 206), as to the appointment of assistant clerks of the Orphans' Court and fixing their salaries is constitutional, but said Act does not operate to repeal § 5 of the Act of May 19, 1874, in so far as the latter Act provides for the appointment and salary of assistant clerks of the Orphans' Court of Luzerne County.

Error to the Common Pleas of Luzerne County.

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Petition for a mandamus by Henry A. Reid against John Smoulter, Jr., treasurer of Luzerne County, to compel the payment to plaintiff of his salary as assistant clerk of the Orphans' Court of Luzerne County.

The petition set forth, *inter alia*, that said Reid had been duly appointed assistant clerk of said Orphans' Court, that he had duly qualified, and performed the duties of that office, and that there was due him one quarter's salary, to wit, $450; that he had presented a bill therefor duly attested by the register and countersigned by the Judge of the said Orphans' Court to the defendant, who had refused and still refuses to pay the same. The petition prayed a rule to show cause why a mandamus should not be issued commanding defendant, Smoulter, to pay said bill.

A rule having been duly granted, the defendant filed an answer admitting the above allegations of the petition, but denying that in legal contemplation the office of assistant clerk of the Orphans' Court exists in the county of Luzerne, for the reason that said office was repealed by the Act of April 13, 1887 (P. L. 22).

After argument on the above petition and answer, the Court below, RICE, P. J., discharged the rule and dismissed the petition, filing the following opinion:—

"The only question presented for decision is whether the provisions of the Act of May 19, 1874 (P. L. 206), relating to the salary of the assistant clerk of the Orphans' Court are in force in this county. We say that is the only question; for, while it is suggested in the answer that the office was abolished by the Act of April 13, 1887 (P. L. 22), yet, as the Constitution expressly authorizes the register of wills, and *ex-officio* clerk, in all counties where a separate Orphans' Court is established, to appoint such an assistant, the proposition is not insisted upon by the defendant's counsel.

"At the time of the adoption of the Constitution, the only counties having over one hundred and fifty thousand inhabitants were Philadelphia, Allegheny, and Luzerne. In obedience to the mandate of the Constitution the Legislature established a separate Orphans' Court in each of said counties, naming them. (Act May 19, 1874, P. L. 206.) The 5th section of the Act was as follows: 'The register of wills of each of the counties of Philadelphia, Allegheny, and Luzerne shall be clerk of such court, and subject to its decisions in all matters pertaining to his office; he may appoint assistant clerks, but only with the consent and approval of said Court, not exceeding . . . . one in the county of Luzerne, who shall receive annual salaries, payable quarterly by the treasurer of said respective counties, as follows, to wit: . . . . . which salaries shall be paid upon bills attested by said register and countersigned by a Judge of said Court.' Lackawanna County was taken from Luzerne in 1878, and according to the census of 1880, which for present purposes must be taken as the standard, we must assume that the county now has less than one hundred and fifty thousand inhabitants. (Luzerne Co. *v.* Glennon, 109 Penna. 564.)

"The Act of April 13, 1887 (P. L. 22), amends the 5th section of the Act of 1874, reciting the section at length, so as to read: 'Section 5. The register of wills of each and every county containing over one hundred and fifty thousand inhabitants, in which a separate Orphans' Court is or may be hereafter established, shall be clerk of such Orphans' Court and subject to its directions in all matters pertaining to his office; and he may appoint assistant clerks, but only with the consent and approval of said Court, who shall receive annual salaries payable monthly by the treasurer of said respective counties as follows, to wit: The first assistant, $2000; the second assistant, $1800; the third assistant, $1200; and all other assistants $1000; which salaries shall be paid out of the fees of said office paid into the treasury of the county, upon bills attested by said register and countersigned by a Judge of said Court.'

"This form of legislation has been very frequently followed in Pennsylvania since the adoption of the Constitution of 1874, and is in strict compliance, not only in letter but also in spirit, with the section of the article on legislation which provides that 'no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length.'

"It will be well to give a moment's consideration to the purpose of this provision, regulating the mode of amending statutes. In a leading case upon the subject, Judge COOLEY says: 'The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary comparison, failed to become apprised of the changes made in the laws. An amendatory Act which purported only to insert certain words, or to substitute one phrase for another in an Act or section which was only referred to but not published, was well calculated to mislead the careless as to its effect; was, perhaps, sometimes drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation.' (People *v.* Mahoney, 13 Mich. 497.)

"The same eminent jurist, in his work on Constitutional Limitations, says: 'If this is a cor-

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rect view of the purpose of the provision, it does not seem to be at all important to its accomplishment that the old law should be republished if the law as amended is given in full with such reference to the old law as will show for what the new one is substituted.' (p. 151.) Again he says: 'The provision is fully complied with in letter and spirit if the Act or section revised or amended is set forth and published as revised or amended, and anything more than this only tends to render the statute unnecessarily cumbrous.'

"In amending the Act under consideration the Legislature exercised extreme care. The section intended to be amended is not merely designated by its number, but is fully recited. The amendatory Act changes certain clauses and omits others, but in order to make it perfectly clear how the section shall read as amended it is set forth at length. The Legislature well understood the purpose of the constitutional provision, and manifestly intended to conform to its plain requirements. This being so, there can be no doubt of their intention to repeal all portions of the section amended which are omitted from the amendatory Act. This conclusion does not rest on our individual judgment, but is declared to be the settled rule by the text writers, and is sustained without exception by the decisions of all the Courts of last resort in which the question has been raised. Mr. Bishop says: 'An amendment of a statute, declaring that it shall read in a particular way, repeals all provisions not retained in the altered form.' (Bish. Wr. Law, p. 152.)

"Mr. Endlich, in his valuable work recently published, says: 'It is perfectly clear that, as to all matters contained in the original enactment, and not incorporated in the amendment, the latter must be held to have the effect of a repeal.' (Endlich on Interpretation of Statutes, par. 196.) These propositions are fully brought out by the following cases: Blakemore *v.* Dolan (50 Md. 194); People *v.* Young (38 Ill. 490); Kepleey *v.* People (11 West. Rep. 565); Goodall *v.* People (12 Id. 824); Ely *v.* Holton (15 N. Y. 595); Moore *v.* Mansert (49 Id. 333); People *v.* Supervisors (67 Id. 109); Barret *v.* Woodburey (40 Vt. 266); State *v.* Ingersall (17 Wisc. 651); Goodman *v.* Oshkosh (31 Id. 127); Chapin *v.* Crusee (Id. 209). Cases from other States to the same effect may be found in the digests, but we have not been able to examine the reports; therefore we do not cite them.

"We conclude that the provisions of the fifth section of the Act of 1874, relating to the salary of the assistant clerk of the Orphans' Court of Luzerne County and payment of the same by the county, were repealed by the Act of 1887.

"Now, October , 1888, the rule is discharged and the petition is dismissed."

The case was subsequently re-argued, and thereafter the Court filed a further opinion, wherein it was held that the Act of April 13, 1887 (P. L. 22), was not unconstitutional because special or local in its operation or because the subject was not clearly expressed in its title.

Thereupon the plaintiff took this writ, assigning for error the decision that the Act of April 13, 1887, repealed the Act of 1874, and that the said Act of April 13, 1887, was not unconstitutional, and the judgment of the Court.

John McGahren, for plaintiff in error.

William S. McLean, for defendant in error.

October 7, 1889. THE COURT. The general rule laid down by the learned Judge of the Court below as to the effect of an amendatory statute is undoubtedly correct. A statute amendatory of another, declaring that the former shall read in a particular way, must, in general, be held to repeal all provisions not retained in the altered form. All matters not incorporated into an amendment, the latter must be held to have repealed. The authorities referred to in the opinion of the Court are full upon this point, and many more might be cited in support of this general rule of construction.

But assuming this, and that the amendatory section of the Act of 1887, is actually merged in the original statute of 1874, a question arises we think upon the power of the Legislature to repeal the provisions as to the salary of the assistant clerk of any separate Orphans' Court, duly established without any other provisions in that behalf.

The 22d section of the 5th article of the Constitution provides that "in every county wherein the population shall exceed one hundred and fifty thousand, the General Assembly shall, and in any other county may, establish a separate Orphans' Court, to consist of one or more Judges, who shall be learned in the law; which Court shall exercise all the jurisdiction and powers vested in, or which may hereafter be conferred upon the Orphans' Courts; and thereupon the jurisdiction of the Judges of the Courts of Common Pleas, within such county in Orphans' Court proceedings shall cease and determine." It further provides that "in any county in which a separate Orphans' Court shall be established, the register of wills shall be clerk of such Court, and subject to its directions in all matters pertaining to his office," and that "he may appoint assistant clerks, but only with the consent and approval of said Court." By the 31st section of the Schedule, it was made the duty of the General Assembly, at its first session, or as soon as may be after the adoption of the Constitution, to pass such

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laws as might be necessary to carry the same into full force and effect.

At the time of the adoption of the Constitution, the only counties of the Commonwealth containing a population exceeding one hundred and fifty thousand were the counties of Philadelphia, Allegheny, and Luzerne; and in obedience to this mandate of the Constitution, provision was made by the Act of 19th May, 1874, for the establishment of separate Orphans' Courts in each of the three counties named; the salaries of the clerk and of the assistant clerk were adjusted, and separate Orphans' Courts were thereupon duly organized under the Constitution and laws of the Commonwealth in the said several counties. The Legislature in the passage of this Act of 19th May, 1874, simply complied with a command of the Constitution, and thereby caused this provision of the Constitution to come into effect. That Act withdrew from the Judges of the Court of Common Pleas of these respective counties the right to exercise the power of an Orphans' Court, and vested these powers in an independent and exclusive jurisdiction. We think it would not have been competent for the Legislature, by a repeal of this Act, to defeat and set aside the constitutional tribunals thus established; for these Courts, although put into actual operation by the Legislature, were created by and now exist under the authority of the Constitution itself. Having done what the Constitution required, it would not have been in the power of the Legislature wholly to undo it. The Constitution itself set up this system of separate Orphans' Courts, and it is for the Legislature to regulate and maintain, not to destroy it. The Constitution is the paramount law; it is above Legislatures and Courts; what is therein ordained and established cannot be set aside by a simple act of legislation.

James McGreevy, Esq., the clerk of the Orphans' Court of Luzerne County, had an undoubted right, by and with the consent and approval of that Court, to appoint Henry A. Reid the assistant clerk; this right was vested in him by the very terms of the Constitution, and upon receiving the appointment and becoming duly qualified, Henry A. Reid was entitled to perform the duties of that office, and to receive the emoluments thereof. It will not be seriously contended that the Legislature had any power to pass upon the necessity for the appointment, for this discretion is expressly committed to the clerk, who is to act with the consent and approval of the Court. Now will it be pretended that the assistant clerk might be removed from his office by a simple act of legislation; there was no power competent to remove him save the tribunal which conferred the appointment.

If the Legislature may repeal the Act adjusting the salary, without making any further or other provision in that behalf, it may practically abolish the office; if the assistant clerk may thus be deprived of the office, the clerk of the Court and the Judge are both liable to the same fate, and in this way, that might be done by indirection, which could not be done directly. It is true that the salary is a matter which, by the Constitution, is submitted to the discretion of the Legislature; in the exercise of that discretion, by the Act of 1874, the salary was fixed at $1500, and this rule of compensation will continue until, by some other statute, it is changed. The salary first fixed may perhaps be increased or diminished, subject to the restriction of the 13th section of the 3d Article of the Constitution, as the Legislature should from time to time see fit to provide, but to repeal the provision for a salary altogether is to remove the clerk from his office.

It may be said, however, that after the organization of the separate Orphans' Court of Luzerne County, the county of Lackawanna was taken from Luzerne, thereby reducing its population, according to the census of 1880, below 150,000, and that in consequence thereof, although within the power of the Legislature, the Constitution did not require the continuance of a separate Orphans' Court in Luzerne County. It may be that, in view of the reduction of the population, it would have been competent for the Legislature to restore the jurisdiction to the Judges of the Court of Common Pleas, in all matters pertaining to the Orphans' Court, we will decide that question when it arises, but the Legislature did not do so. The Judges of the separate Orphans' Court, as constituted under the Act of 1874, at the time of the passage of the Act of 1887, were and still are the Judges of the only Court having jurisdiction of the estates of decedents and minors, in the county of Luzerne, and it would be clearly incompetent to repeal the Act authorizing the payment of these salaries, or the salaries of the clerks of that Court, without making any other provision for them, or to expel them from office, without cause, and without providing the means for the exercise of these powers by some other lawfully constituted tribunal.

The Constitution creates the office of assistant clerk, and the Legislature fixes the salary; but the latter cannot deprive him of his office by refusing him his salary. In Commonwealth *v.* Gamble (62 Pa. 343) there was an effort to remove a Judge from his office by doing away with his district; and although the apportionment of the districts was clearly within the power and discretion of the Legislature, yet it was held that as the Judge held his office under the Constitution the General Assembly could not, by a mere legislative Act, remove him from the exercise of the duties and jurisdictions attaching to his office. So in this case, the adjustment of the salary is

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given to the Legislature, yet as the clerk derived his office directly from the Constitution, the Legislature cannot expel him from it by repealing the Act fixing the amount of his salary.

We are of opinion that the Act of April 13, 1887 (P. L. 22), already referred to, is not in conflict with the Constitution, because special or local in its operation. The Constitution recognizes a class of counties, in each of which it is the duty of the Legislature to establish a separate Orphans' Court, and the Act plainly applies to all the counties of this class. Nor do we regard the title as defective; it is entitled "An Act to amend the fifth section of an Act relating to the organization and jurisdiction of the Orphans' Court, and to establish a separate Orphans' Court in and for counties having more than 150,000 inhabitants, and to provide for the election of Judges thereof, approved May 19, 1874, as to appointment of assistant clerks of the said Court, and fixing the salaries of the same," etc. Under all the cases this is amply sufficient. We are clearly of opinion, however, that the Act of 1874, so far as it relates to Luzerne County, is not repealed thereby.

The order discharging the rule to show cause is therefore reversed, and judgment entered for the plaintiff below, that an alternative mandamus be issued. Record remitted for further proceedings.

Opinion by CLARK, J. C. K. Z.

Jan. '88, 325. March 20, 1889.

The City of Williamsport v. Beck.

Municipal corporations—Municipal claims—Pavements—Liability of abutting property-owners for repaving streets—Acts of May 1, 1876, *and May* 24, 1887.

The cost of repaving a public street in a city cannot be assessed upon the abutting property owners, even though the expense of the original paving had been paid by the city out of the public funds.

The authority of the Legislature to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties specially benefited thereby, is recognized as a species of taxation imposed upon said properties for the local benefit they receive, but when a street is once opened and paved, all the particular benefits to the locality derived from the improvements have been received and enjoyed, and the repaving being a part of the ordinary duties of the municipality for the general good, must be paid for out of the public funds of the city.

A municipal corporation cannot recover the cost of paving a street from the abutting property owners unless before passing the ordinance the city councils have caused to be made an estimate of the cost and a map of the properties benefited, and a schedule of the amount, each of said properties will be liable to pay as required by the Act of May 1, 1876 (P. L. 94), and when the provisions of said Act have not been complied with, the defect is not cured by section 2 of Article 23 of the Act of May 24, 1887 (P. L. 261).

Error to the Common Pleas of Lycoming County.

Scire facias sur municipal claim wherein the City of Williamsport was plaintiff and John B. Beck defendant.

At the trial the following facts appeared: The city of Williamsport was incorporated by an Act of Assembly in 1866 (P. L. 1231). In the year 1868 the city at its own expense graded and put down a wooden pavement on West Fourth Street, upon which defendant's property abutted. The city subsequently accepted the provisions of the Act of May 23, 1874, thereby becoming a city of the third class.

In 1884 the said wooden pavement having been worn out, a majority of the abutting property owners petitioned the councils of the city asking for a new pavement. Accordingly an ordinance was duly passed and approved June 26, 1884, providing for said repaving at the expense of the abutting property owners. The defendant did not sign the above petition, and when the work was done refused to pay his assessment, amounting to $424.15. The city thereupon filed a lien, and issued this scire facias to enforce payment thereof.

Upon the above facts the plaintiff requested the Court to charge, *inter alia*, as follows:—

(4) That even if the assessment for paving the street in front of the property of defendant was invalid or defective, either by the omission to comply with the requirements of the Act of May 1, 1876, or from want of authority in the city officials to levy it, such invalidity or defect is cured by the Act of May 24, 1887 (P. L. 261), being Article 23, sections 2 and 3. *Answer.* This is answered in the negative.

The defendant requested the Court to charge, *inter alia*, as follows:—

(2) That the plaintiff cannot recover unless prior to the ordinance approved June 26, 1884, under which this lien is filed, the said plaintiff caused the board of viewers or other officers to view the property included in said map, and make a schedule showing the total cash value of the property as nearly as the same could be ascertained, and the amount each property holder would be liable to pay for such improvement. *Answer.* This is affirmed.

(3) That the plaintiff cannot recover unless prior to the passage of the ordinance approved June 26, 1884, under which this lien is filed, the plaintiff caused the map and estimate and schedule required to be made as mentioned in the preceding points to be attached to the said ordi-

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nance before its passage. *Answer.* This is affirmed.

(4) That the plaintiff having failed to comply with all the requirements of the Act of Assembly approved first day of May, 1876, as set forth in the preceding points, cannot recover, and the verdict must be for the defendant. *Answer.* This is affirmed.

(5) That the undisputed evidence in this case shows that West Fourth Street has been a public highway for more than fifty years, and was paved by the city of Williamsport in 1868, and that said pavement had become so worn out and rotten that it was absolutely necessary that it should be repaved, that such repaving is not an original paving within the meaning of the clause 32 of section 20, of the Act of May 23, 1874, and hence the cost thereof cannot be assessed to the property holders abutting upon the said street, and the verdict of the jury must be for the defendant. *Answer.* This is affirmed.

(8) That under all the evidence in this case the verdict must be for the defendant. *Answer.* This is affirmed.

Verdict having been accordingly rendered for the defendant, and judgment having been entered thereupon, the plaintiff took this writ, assigning for error, *inter alia*, the answers to plaintiff's and defendant's points as above set forth.

Henry W. Watson (*Henry C. McCormick* and *S. T. McCormick* with him), for the plaintiff in error.

Henry C. Parsons (*John J. Metzger* and *J. C. Hill* with him), for the defendant in error.

October 7, 1889. THE COURT. The main question in this case is whether the cost of repaving a public street or thoroughfare can be legally charged against the property fronting thereon.

This is neither a new nor an open question. It has long since been definitely settled that, as a general rule, it cannot be done. In several cases, among which is McMasters *v.* Commonwealth (8 Watts, 292), the constitutional authority of the Legislature to confer upon municipal corporations the power of assessing the cost of local improvements, upon the properties specially benefited thereby, was recognized as a species of taxation; but, in Hammett *v.* Philadelphia (65 Pa. 146, 156), the question arose whether, under the authority of those cases, the cost of repaving a public street could be charged against the abutting property. After considering the principle underlying the exceptional species of taxation referred to, and cases in which it is applicable, including original paving of streets, Mr. Justice SHARSWOOD, speaking for this Court, said, "But when a street is once opened and paved, thus assimilated with the rest of the city and made part of it, all the particular benefits to the locality, derived from the improvements, have been received and enjoyed. Repaving streets is as much part of the ordinary duties of the municipality, for the general good, as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments."

The limitation, thus declared to exist, upon the power of taxation for special benefits of a local character, rests upon a clearly defined and impregnable basis; but, notwithstanding this, municipal authorities, charged with the duty of maintaining their streets and highways in proper condition, had become so wedded to the pernicious system of maintaining such improvements at the expense of abutting property owners, that they were loth to abandon it, and various schemes were devised to obviate the difficulty that resulted from the decision in Hammett *v.* Philadelphia, *supra*, but without much success.

Speaking of the Act of 1871, under consideration in Protestant Orphan Asylum's Appeal (111 Pa. 135, 142), Mr. Justice GORDON said it "was evidently devised for the purpose of avoiding the constitutional prohibition against unequal taxation, and, as far as possible, to render ineffectual the blow struck at this kind of taxation in the case of Hammett *v.* Philadelphia."

By that Act a board of viewers was authorized to arbitrarily carve out, from the general municipality, a district that should in whole or in part, as it might determine, bear the burden of repaving or regrading a public street. In declaring the Act unconstitutional, it was further said: "We can readily understand why the cost of constructing and maintaining a sewer, which is designed for the drainage of a particular street or locality, and which is essentially necessary for the health, comfort, and convenience of the inhabitants of such street or locality, should be assessed upon the property of the district or locality thus benefited, for the improvement as well as the use is local and the benefit to the public is but secondary. So with a sidewalk, without which a house in a town or city cannot be said to be finished; and, though the public has a right of way over it, the greater benefit results to the property itself. But, when we come to a street or other highway, which is primarily designed, not for the use or welfare of the inhabitants of any particular locality, but for the public at large, the case is very different. It then becomes utterly unjust to charge the cost of what is purely a public improvement, designed exclusively for the general welfare, upon the property of a few individuals, who, however they may be incidentally benefited, have neither been consulted, nor their profit or convenience regarded. Under such circumstances we cannot agree to proceed a single

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step beyond what is warranted by the case of Hammett v. Philadelphia. There is some show of reason why the original cost of grading and paving a street in a populous municipality should be charged upon the adjacent property, for it receives from the improvement some benefit of a local character; but when this is done it has fully paid for all its local advantages and it cannot thereafter be charged for maintenance and repairs."

The second, third, fourth, fifth, and eighth points submitted by defendant were rightly affirmed by the Court, and were conclusive against the right of the plaintiff to recover. Neither of the assignments of error is sustained.

Judgment affirmed.

Opinion by STERRETT, J. C. K. Z.

July '89, 92. May 29, 1889.

Appeal of W. W. Groff et al.
Groff et al. v. Bird-in-Hand Turnpike Co.

Turnpike companies—Eminent domain—Right to take public road—Practice—Injunction.

A turnpike company, chartered under the General Corporation Act of 1874, the charter specifying the termini on points of a public road, cannot seize and occupy for its entire road-bed the highway already dedicated to public use.

Property devoted to public use cannot be taken by eminent domain for another public purpose, without express legislative authority, or by necessary implication. The "necessity" contemplated by the law is not such as is created by the company itself for its own convenience, or for the sake of economy.

Quære. Whether the General Corporation Act of 1874 would authorize the issue of any charter granting an express power to take other public property or franchise, except incidentally, and to such an extent only as would not destroy or substantially impair the existing public use.

The rule as to enjoining only irreparable injuries, has no application to acts, especially corporate acts, entirely without authority, for which there is no adequate measure of damages at law. Such acts equity always enjoins.

Appeal from a decree of the Common Pleas of Lancaster County, confirming a Master's report and dismissing plaintiff's bill.

Bill in equity, filed by W. W. Groff, Peter Dorsheimer, and Andrew Johe, to restrain the Bird-in-Hand Turnpike Company from constructing a turnpike road over an existing highway.

The bill and answer were referred to George M. Kline, Esq., as Master, who reported as follows:—

"The bill charges:—

"(1) That the complainants are taxpayers and inhabitants of East Lampeter Township, in the county of Lancaster, and State of Pennsylvania, owning real estate adjoining what is known as 'The Old Philadelphia Road,' in the said township, the said road being a public highway laid out by law, and used as such for many years, and kept up and maintained by the supervisors of the townships through which it runs.

"(2) That the Bird-in-Hand Turnpike Company is a corporation organized under the Act of Assembly of April 29, 1874, on letters patent issued to it September 21, 1885, for the purpose of building a turnpike road in said township, commencing at a point at the terminus of the Bridgeport and Horseshoe Turnpike, in said township, and ending at the township line, between East Lampeter and Leacock Township, in Lancaster County, near the village of Bird-in-Hand.

"(3) That the said defendant has, without any authority whatever, entered upon the said 'The Old Philadelphia Road,' and is about to appropriate it, between the said terminal points, for the purpose of building its turnpike road upon it.

"(4) That if the said defendant is permitted to so appropriate the said 'Old Philadelphia Road,' the complainants, and a vast number of other citizens of East Lampeter Township, and county of Lancaster, will not be permitted to travel over the said road free and uninterrupted, as is their right, but will sustain great and irreparable injury, utterly incapable of being compensated at law.

"(5) And pray the said Bird-in-Hand Company and its officers, etc., be enjoined from proceeding in its intended purpose of constructing a turnpike road, under its charter, on and over the said public road, on a portion of which the said defendant has already entered.

"The answer sets forth:—

"(1) Neither admits nor denies the facts in the plaintiffs' bill, first paragraph, and demands exact proofs thereof.

"(2) Admits the facts set forth in the second paragraph.

"(3) Admits that it has entered upon the said 'Old Philadelphia Road,' and has appropriated it between the said terminal points for the purpose of building its turnpike road upon it, but deny that it has done so, or about doing so, unlawfully and without authority. It asserts its right to do so by its charter.

"It alleges, to build a turnpike between the terminal points, it is necessary to lay it over the bed of said 'Old Philadelphia Road,' said road being the shortest and only feasible and practicable route or line for a turnpike between said terminal points.

"That said pike must be laid either on the bed of said 'Old Philadelphia Road,' or by diverging widely from a straight line, in order to prevent destroying many valuable improvements along the line of said 'Old Road.'

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"That, by adopting the line of said 'Old Road,' no injury would be done to any person or property, while the adoption of any other line would result in very serious injury to a large number of people, and be destructive of very valuable property.

"(4) Admits that, after completing said turnpike, travellers over it will be obliged to pay tolls; and denies that the complainants and others will sustain great and irreparable injury, utterly incapable of being compensated at law, or that they will sustain any injury whatever.

"Avers that the construction of said turnpike on the bed of said road will be a benefit to the complainants and all others having occasion to use the road, in that they will not be required to pay any taxes to keep the said 'Old Road' in repair, and will have a smooth, substantial, solid road to travel on at all seasons of the year, instead of the present clay road, which, at some seasons of the year, has been heretofore well nigh impassable on account of the softness and miry character of its bed.

"And concluding with the prayer that the bill may be dismissed with costs.

"The facts are that:—

"The Bird-in-Hand Turnpike Company was chartered under the Act of 29 April, 1874, by letters patent, issued on the 21st of September, 1885.

"At the hearing before the proper authorities at Harrisburg, the applicants for the charter and the objectors were heard by their respective attorneys. The application, with the direction that letters patent issue, appear of record in Lancaster County in Charter Book No. 1, p. 30. The only clause necessary to be quoted is the second, defining the object of the corporation, and is as follows:—

"'Said corporation is formed for the purpose of constructing and maintaining an artificial road or turnpike of stone, gravel, or earth, to commence at a point at the terminus of the Bridgeport and Horseshoe Turnpike, in East Lampeter Township, in the county of Lancaster, and ending at the township line between East Lampeter and Leacock townships, near the village of Bird-in-Hand, a distance of about three and one-half miles; the whole of said proposed road is in Lancaster county.'

"The capital stock was fixed at $20,000, divided into 800 shares of $25.

"Soon after the grant of the letters, the directory located the turnpike, appropriating for that purpose the bed of the old 'Old Philadelphia Road,' all of which lies between the terminal points of the charter, a distance of three miles and 1453 feet, and commenced work immediately thereon.

"That the 'Old Philadelphia Road' has been a public highway since 1733; being laid out by viewers appointed by the Governor and Council of Pennsylvania on a petition presented in 1730–1, a return made in 1733, by courses and distances, from the city of Lancaster to its intersection with the King's Highway, leading from Chester to Philadelphia, was approved by the Governor and Council, and the records certified to the Courts of the respective counties, October, 1733, and by the Court of Lancaster ordered to be opened. (See Rupp's History of Lancaster County, p. 262; Mombert's History of Lancaster County, p. 134; Colonial Records, Vol. III., pp. 521, etc. Road Docket of Lancaster County, No. 1, from 1729 to 1742, p. 104.)

"That the plaintiffs' bill was filed October 5, 1885, seeking to restrain the defendant, and only after nearly $9000 had been expended in building the road, being almost half the cost of the entire superstructure.

"After the bill was filed, defendant proceeded to the completion of the road, and then asked the Court to appoint viewers to examine and report upon the same, who returned that the turnpike was built in a competent and workmanlike manner, and recommended that the Court grant the company the right to erect gates and collect and receive tolls.

"Application was then made to the Court for this authority.

"At this point the Court divided in opinion on the status of the case, and this resulted in sending it to the undersigned Master for examination and report upon the rights of the parties.

"The Master further finds:—

"(1) That the 'Old Philadelphia Road,' in the summer season, when not rainy, was a good road, with easy grade, with but few exceptions.

"(2) That at other seasons, from the late fall until some time in the spring, a period running from four to six months, the road was at times almost impassable, if the period was rainy, by reason of the soft and miry character of its bed, when the road would be badly cut up, and then when the ground would be frozen was hard, rough, and very difficult to travel over.

"(3) The road is located in one of the most thickly populated parts of Lancaster County, has a large amount of travel and hauling over it from all surrounding points. The Pennsylvania Railroad has a prominent station and warehouse at Bird-in-Hand, close to its eastern terminus.

"(4) That the line adopted for the pike is very nearly direct between the termini, is on the bed of the 'Old Philadelphia Road,' and along its entire route interferes with no private property.

"(5) [Draft No. 2 and the evidence show it to be the only feasible, reasonable, and practicable route between the termini. Any other route would have diverged either to the north or the south.] That the character of the surrounding country, on the south, is hilly near the creek, soft, and the hills steep. Near the eastern terminus would meet the railroad where there is a fall of about twelve or fourteen feet. On the

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north the railroad (Pennsylvania) would be met at several places to be crossed above or under grade; at Mill Creek a dam to be crossed, and from that eastward to the terminus low ground, and would have been exceedingly injurious to private property.

"(6) [That the change in the road from a highway to a turnpike will not work great and irreparable injury to the plaintiffs and others using said road.] The pike gives a good and substantial road, ready for all uses, in all seasons of the year. It works no injury or damage to any one. The only change the turnpike makes is the substitution of tolls for taxes, and thus throws the burden of maintenance upon *all* who use it, without regard to residence, while, as a public highway, that burden must be met by the inhabitants of the township through which it passes.

"(7) [That the change in the 'Old Road' from a public highway (passing through a rural district) to a turnpike, makes no change in the use of the road.] The turnpike will be used for the same purposes and by the same modes of intercommunication as the 'Old Philadelphia Road' had been.

"Under these facts, the question arises, has the defendant company, under its charter, a right to appropriate the bed of the 'Old Philadelphia Road,' for the purpose of building an artificial road or turnpike thereon.

"The charter gives explicitly the termini. The road or pike to be built must be between these two points. It is silent as to the intermediate route. It does not grant the right by express words, to take and occupy the bed of the 'Old Road' for the purpose of constructing the new one. Neither does it exclude or prohibit this defendant company from so doing. The question of location is left open to the judgment and sound discretion of the company, acting faithfully upon all the circumstances and necessities of the case, and 'will not be revised by the Court, unless it appears that they have clearly exceeded the limitations of the charter and have acted in bad faith.' (Mills Em. Dom., sec. 62, 2d ed.)

"If, therefore, the power to appropriate, as was done in this instance, exists at all, it is the result of necessary implication of a necessity which arises from a state 'of things over which the corporation has no control.'

"[In selecting the bed of the 'Old Philadelphia Road,' and appropriating it to the uses of the new company, the latter appear to have been guided by the legislative requirements in relation to the laying out of public roads and highways, 'having respect to the shortest distance and the best ground for a road, and in such a manner as shall do the least injury to private property.' (Act of June 13, 1836, § 2; Purd. 1496, pl. 2.)

"There is no change in the use of the road. It is not like the change of a highway into a railroad. The turnpike will be used for the same purposes, and by the same modes of inter-communication as the 'Old Road' had been—transit over on foot, by horse in carriage, by wagons, and other mediums of transportation usually used on public highways. It is still a highway, and the land does not revert to the owner. It is not an additional burden on the old public road. The only change in its operation is the payment of tolls instead of taxes, and this is only a change in sustaining the road, and not a change of use. For such a change the adjoining owners are not entitled to compensation. In the rural districts, such as this is, through which this turnpike passes, they still own the land to the centre of the same, and the corporation, like the public, over the 'Old Road' has but an easement or right of way. (Mills on Eminent Domain, sec. 34.)

"[The appropriation of the 'Old Road' injures no one,] but, on the contrary, furnishes a good, substantial macadamized road that can be used in all seasons of the year, to the great comfort and convenience of the public, in place of one which, in many parts, for an average at least of one-third of a year is almost impassable and extremely burdensome in its use.

"There is no difference in a charter, whether granted specially by the Legislature, or granted under a general law of the State. (Cochran *v.* Arnold, 58 Pa. St. 405.)

"In The Commonwealth *v.* Erie & N. E. R. Co. (27 Pa. St. 354), BLACK, C. J., says: 'Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad by a straight line between two designated points, this implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. So, also, when an act of incorporation directs a road to be made between certain termini by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway, if, in the judgment of the directors, it be necessary or expedient to do so. But, when an Act of incorporation authorizes the making of a railroad, which it is not possible to make without using the streets of a town for part of it, still such streets cannot be so used if the same Act of incorporation forbids it. If the powers given to the corporators cannot be executed without disregarding the restrictions with which they are coupled, they cannot be executed at all.'

"In the charter of this company there is no restriction of any kind.

"'In determining whether a power, generally given, is meant to have operation on lands already

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devoted by a legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which the use would be impaired or diminished by the taking of such part of the land as may be demanded by the subsequent public use.'

"'If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner.' (In the matter, City of Buffalo, 68 N. Y. Rep. 167—FOLGER, J.)

"The Master, on the facts found, and the law governing the case, as he conceives it to be, finds that the corporation defendant, [the Bird-in-Hand Turnpike Company, has not 'unlawfully and without any authority whatever,' entered upon the 'Old Philadelphia Road,' and appropriated it between the terminal points specified in its charter; but, on the contrary, finds that its entry upon and appropriation of that part of the 'Old Philadelphia Road,' for the purpose of building its turnpike road upon it, was lawful, and with authority under its charter.]

"He therefore recommends to the Court a decree dismissing plaintiffs' bill, at their costs, with a further decree, that the defendant have permission to erect toll-gates upon the line of their road, and receive and collect such tolls as the law authorizes."

Plaintiffs filed exceptions to this report (1 to 6) to the Master's findings as inclosed in brackets above, 7, recommendation of a decree dismissing the bill, and 8, his refusal to recommend a decree in accordance with the prayer.

The Court, PATTERSON, J., dismissed the exceptions and entered a decree in accordance with the recommendation of the Master. Plaintiffs took this appeal, specifying for error this action of the Court.

W. U. Hensel (with him *J. Hay Brown*, *Benjamin F. Davis* and *H. M. Houser*), for appellants.

D. McMullen and *H. M. North* (with them *Samuel H. Reynolds*), for appellee.

October 7, 1889. THE COURT. The question presented in this case, whether a turnpike company by virtue of a charter under the general corporation Act of 1874, specifying the termini of its road, can appropriate an existing highway, is one of very considerable importance.

Eminent domain is defined to be the sovereign power vested in the State to take private property for the public use. The contention of the appellee is, that under the law of Pennsylvania, any five persons, only three of whom need be citizens, may constitute themselves a corporation, take possession of any public highway of the Commonwealth, change it to a turnpike road, and thereafter charge tolls for their private profit. A claim which thus in effect completely reverses the definition and fundamental objects of the power under which it is sought to be exercised, may well challenge careful scrutiny into the basis on which it rests.

It has been settled since the cases of Kensington Plan (2 Rawle, 445), and Philadelphia and Trenton R. R. Co. (6 Wharton, 25), that property devoted to public use, including franchises, is subject to eminent domain, and may be taken for other public uses; but it is equally settled that it cannot be so taken without legislative authority expressed in clear terms, or by necessary implication. Whether this rule has been correctly applied to the facts in all the cases, is a question on which judgments may fairly differ, and have differed sometimes in this Court, but in the long line of decisions from Stormfeltz *v.* Manor Turnpike Co. (13 Penna. 555), down to Pittsburgh Junction R. R.'s Appeal (122 Penna. 511), the rule itself has never been questioned.

The appellee derives its power from a charter under the general corporation Act of 1874. It is not claimed that its charter gives it any express authority to take the public road in question. Whether that Act would authorize the issue of any charter granting an express power to take other public property or franchise, except incidentally, and to such extent only as would not destroy or substantially impair the existing public use, is, at least, extremely doubtful. The weight of judicial decision seems to be against such authority. (Barber *v.* Andover, 8 N. H. 398; Springfield *v.* Conn. River R. R. Co., 4 Cush. 71; Com. *v.* R. R. Co., 14 Gray, 93; Housatonic R. R. Co. *v.* L. & H. R. R. Co., 118 Mass. 391; B. & M. R. R. Co. *v.* L. R. R. Co., 124 Id. 368; Re Petition of B. & A. R. R. Co., 53 N. Y. 574; Re Application of City of Buffalo, 68 Id. 167.)

It is not necessary, however, to determine this point, as the present charter does not assume to grant such authority. It gives the termini only, and makes no mention of the intermediate route. "It does not," says the learned Master, "grant the right by express words to take and occupy the old road for the purpose of constructing the new one. Neither does it exclude or prohibit this defendant company from so doing." But this argument overlooks the settled rule that a failure to grant is itself an exclusion. Omission is prohibition. And in this particular case, though further confirmation is unnecessary, the general rule is further confirmed by the fact that the omission was intentional, it appearing that the executive refused to grant a charter with such express power.

We are left, therefore, to the consideration of

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the only other ground on which the claim can rest, that of necessary implication. The imperative and inevitable nature of the implication has been laid down in all our cases, and nowhere more strongly than in some of the most recent and carefully considered. (See Pittsburgh Junction R. R. Co.'s Appeal, 122 Pa. 511; Pa. R. R. Co.'s Appeal, 93 Id. 150; Pa. R. R. Co.'s Appeal, 115 Id. 517; Stormfeltz *v.* Manor Turnpike Co., 18 Id. 555; Cake *v.* P. & E. R. R. Co., 87 Id. 307; Tyrone School District's Appeal, 22 WEEKLY NOTES, 513.)

The appellee's charter gives only the termini of the proposed road, and is silent as to the intermediate route. The charter does not indicate the position of the termini relative to the old road, nor is the Master's report explicit as to this point, but it appears in the evidence that the starting place is on the old road, "at the terminus of the Bridgeport and Horseshoe Turnpike in East Lampeter Township," and the ending point as also on or near it, "and end at the township line between East Lampeter and Leacock townships, near the village of Bird-in-Hand." Assuming even that both termini are on the old road the right to follow the course of that road between the two would not be necessarily implied. As already said, the right of the new corporation to acquire an express authority under the Act of 1874 is doubtful, and the right to create a necessity by its own act in fixing its termini is equally so. But passing that, as the case does not call for its decision, it is entirely clear that the course of the old road is not the only and not even the most direct route between the given points. The Master reports only that the line adopted for the pike, which is the bed of the Old Philadelphia Road, "*is very nearly direct* between the termini," and it appears in the evidence that a straight road between the termini would not have occupied the old highway, though it would not have deviated far from it at any point. The intervening country offered no physical obstacles to a new route, either perfectly straight or deflected to either side, for it was the fertile plain of the Lancaster Valley. Notwithstanding the finding of the Master, therefore, that "draft No. 2, and the evidence show it to be the only feasible, reasonable, and practicable route between the termini," it is entirely clear from the evidence that this conclusion does not rest on any physical difficulties in the way of another route, but on what is the perfectly manifest animus of the appellee's whole case, the saving of the expense of buying a new route through private property. This indeed is not disguised. There is scarcely a suggestion of any other ground on which the right claimed can be supported. How entirely insufficient this ground is has been declared in Pittsburgh Junction R. R. Co.'s Appeal (122 Pa. 531), in terms so forcible and so pertinent to the present case that I could not hope to improve upon them. "The location claimed for defendant," says the present Chief Justice, "is a matter of economy, not of necessity. It can construct its road and reach its terminus by another route. It is true it would be expensive, but it is a mere question of money and engineering skill. It is not entitled to run through plaintiff's yard and cripple its facilities for handling its business, merely to save money. Upon this point the language of our brother GORDON in Pa. R. R. Co.'s Appeal is so clear and forcible that I may well repeat it here. . . . 'It is true that a franchise is property, and as such may be taken by a corporation having the right of eminent domain, but in favor of such right there can be no implication unless it arises from a necessity so absolute that without it the grant itself would be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience, or for the sake of economy.'"

This is decisive of the present case. There is no real ground set up except of economy. The Master indeed finds that the old road is, during part of the year, in bad condition for travel; that the turnpike is really a continuation of the same use in a better form, and that the change will not work irreparable injury which should be enjoined. But these considerations are mere make-weights and of no validity. If the road is in bad condition there is an adequate remedy to compel its repair, but as it has been in use for a century and a half there is a strong presumption that it is not altogether unsuited to the public requirements. But, however, bad it might be, its condition would be no justification for taking it away from its owners; and the proposal to substitute a better article at a moderate price would not help the right claimed. It is the necessity for the new use, not the inadequacy of the old, that is the test of such a change. The rule as to only enjoining irreparable injuries has no application to acts, especially corporate acts, entirely without authority, for which there is no adequate measure of damages at law. Such acts equity always enjoins.

On the whole case it is entirely clear that the appellee's claim rests upon no real necessity, but only upon a convenience of its own making and which has regard only to expense. The right, therefore, arises neither from express grant nor from any necessary implication from the charter privileges, and hence does not exist at all. The injunction prayed for in the bill should be granted and made perpetual.

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Decree reversed, and record remitted for decree in accordance with this opinion.

Opinion by MITCHELL, J.

PAXSON, C. J., and GREEN, J., dissented.

CLARK and McCOLLUM, JJ., absent.

W. M. S., JR.

July '87, 186. February 11, 1889.

Philadelphia, Wilmington, & Baltimore R. R. Co. v. Alvord.

Railroad company—Negligence—Contributory negligence—Erroneous assumption of facts by Court in charge to jury.

A statement by the Court of facts not in evidence, or an answer to a point stating the same, is error, for which judgment will be reversed.

In an action for injuries received, plaintiff testified that as she was attempting to board a train of defendant standing at a station, the brakeman, who was standing upon the station platform, jumped upon the step in front of her, and the start he gave her thereby caused her to lose her balance and fall between the platform and the car, whereby she received the injuries complained of. The brakeman denied this, and attributed her fall to her making a short step or tripping. In charging the jury, the Judge stated that the brakeman "pushed or jostled her so that she lost her foothold:"

Held, (1) that it was not error to submit the question of defendant's negligence to the jury; (2) that the part of the charge of the Court was error.

Error to the Common Pleas of Chester County.

Assumpsit, by Mary A. Alvord against the Philadelphia, Wilmington, and Baltimore Railroad Company, to recover damages for injuries received owing to the alleged negligence of defendant.

Upon the trial, before FUTHEY, P. J., the plaintiff, who was 56 years of age, and engaged in giving instruction in music, testified that intending to travel from Media to West Chester she reached the edge of the station platform at which the train of defendant was standing. Immediately opposite the front steps of the rear car, as she raised her right foot for the purpose of stepping upon the lower step of the car, which at this point was on a level with, or slightly lower than the platform, the brakeman, who had been standing upon the platform, between the rear car and the car ahead, suddenly turned, and sprang between her and the platform of the car to a higher step, which prevented her getting a foothold. The unexpected action of the brakeman, and the start he gave her, caused her to take too short a step, and she fell between the platform and the cars. As she fell she badly wrenched her back, but was assisted from her position by the brakeman, who "got on" and helped her, and went to her destination. Plaintiff did not testify that the brakeman touched her in any way while jumping to the car.

The brakeman of defendant testified that as plaintiff attempted to get on she slipped on the step, and apparently made a short step, or stepped on her dress and fell. He assisted her to her feet, and as she passed up the steps, went up behind her, reached in front, and opened the door for her. She went into the car, and was seated before the train started. He denied that he stepped on the car ahead of plaintiff, or that he touched her.

This was the only evidence as to the cause of the accident. Testimony was offered by the plaintiff as to the extent of her injuries.

The Court charged the jury, *inter alia*, as follows:—

"Miss Alvord says that she was passing from the stairs which led down to the platform, that she walked across the platform to the car, which was the rear car of the train, and was about stepping on to the steps of the car, that the brakeman was there, and just at that instant of time when she was about getting a foothold upon the step of the car, he brushed past her, hastily preceding her up the steps of the car, and that he pushed or jostled her so that she lost her foothold—her foot slipped or did not obtain a firm footing upon the step, and that she thus slipped down between the car and the platform, and was injured as she described; and she attributes this to the conduct of the brakeman in thus passing between her and the steps, so that it prevented her from obtaining the foothold which she would otherwise have obtained." (First assignment of error.)

"Now, if the brakeman did thus interfere with her getting her foothold upon the step, and if in consequence of his passing in this way she failed to get a foothold which she would otherwise have obtained, and if the accident resulted from his thus passing in before her, then that would be negligence upon the part of the employé of the railroad for which the railroad would be responsible, and the plaintiff would be entitled to recover." (Second assignment of error.)

Plaintiff requested the Court to charge, *inter alia*:—

(4) It is the duty of the railroad company to allow the plaintiff access to its train free from any danger of its being suddenly started before she was safely upon it; and if the jury find that by reason of the conduct of the brakeman she was pushed or jostled, and thus prevented from getting a sure footing, and that thereby the injury happened, she is entitled to recover. *Answer.* If the jury find the facts stated in this point—that by reason of the conduct of the brakeman she was pushed or jostled, and prevented from getting a sure foothold, and thereby the injury

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happened, she is entitled to recover. (Third assignment of error.)

Defendant requested the Court to charge:—

(1) There is no such evidence of negligence upon the part of the defendant, in this case, as ought reasonably to satisfy the jury thereof, and upon the whole of the testimony in the cause, the verdict of the jury should be for the defendant. *Refused.*

(2) There is no evidence in this case that would justify the jury in finding that the defendant was guilty of negligence, and their verdict must be for the defendant. *Refused.*

(3) The verdict of the jury in this case must be for the defendant. *Refused.* (Fourth, fifth, and sixth assignments of error.)

Verdict for plaintiff for $10,000. A rule for a new trial having been dismissed, defendant took this writ, and assigned error as above.

John J. Pinkerton, for plaintiff in error.

In a case of this kind the burden of showing that the injuries received resulted wholly from the negligence of defendant is upon the plaintiff.

D. L. & W. R. R. *v.* Napheys, 9 Nor. 142.
Drayton *v.* N. P. R. R., 10 Weekly Notes, 36.
F. & B. Turnpike Co. *v.* Phila. & Trenton R. R., 4 Sm. 347.
Flint *v.* N. & W. R. R., 110 Mass. 222.
Favor *v.* B. & L. R. R. 114 Id. 350.
Miller *v.* P. & R. R. R., 11 Weekly Notes, 369.
Sellars *v.* R. & D. R. R., 25 Am. & Eng. R. R. Cases, 451.
Patterson's Railway Acc. Law, 35, § 35.

Error was committed by the Court in submitting to the jury a case not sustained by the evidence. In both the charge and the answer to plaintiff's fourth point, it is stated "he pushed and jostled her so that she lost her foothold," etc.

Greber *v.* Kleckner, 2 Barr, 292.
D. L. & W. R. R. *v.* Napheys, *supra.*
Penna. R. R. *v.* Zebe, 9 Casey, 325.

William T. Barber and *V. Gilpin Robinson*, for defendant in error, cited, as to the degree of care required from railroad companies—

Patterson's Railway Acc. Law, 231.
2 Redfield on Railways, 188, n.
Meier *v.* P. R. R., 14 Sm. 225.
Sullivan *v.* P. R. R., 6 Cas. 234.
N. Y. L. E. & W. R. R. *v.* Dougherty, 11 Weekly Notes, 437.
Gillis *v.* P. R. R., 9 Sm. 132-3.

It is not fair to select a few sentences from the charge of the Court; the whole must be taken together.

Carothers *v.* Dunning *et al.*, 3 S. & R. 373.
Kerr *v.* Sharp, 14 Id. 399.
Watts *v.* Cummins, 9 Sm. 84.
R. R. *v.* Armstrong, 2 Id. 285.
Reeves *v.* D. L. & W. R. R., 6 Cas. 454.

It is very doubtful whether this Court will ever reverse on the ground of misstatement of testimony in the charge of the Court. See—

Henwood *v.* Cheeseman, 3 S. & R. 500.
Poorman *v.* Smith's Exrs., 2 Id. 464.
Graham *v.* Graham, 1 Id. 330.
Burd *v.* Lessee of Dansdale, 2 Binn. 80.
Dennis *v.* Alexander, 3 Barr, 51.
Riddle *v.* Murphy, 7 S. & R. 230.
Hamett *v.* Dundass *et al.*, 4 Barr, 178.

The verdict of the jury determines that the brakeman's passing between plaintiff and the step caused her to lose her foothold, whereby the accident happened, and for this negligence the company is liable.

Johnson *v.* W. C. & P. R. R., 20 Sm. 360.
Terre Haute R. R. *v.* Jacks, 81 Ind. 19.
Wood on Railway Law, § 315.
Penna. R. R. *v.* Vandiver, 6 Wr. 372.
T. W. & W. R. R. *v.* Harman, 47 Ill. 298.

October 7, 1889. The Court. The defendant's points were properly denied. The testimony of the plaintiff described conduct of the brakeman which was in violation of his duty, and negligent, and which it was alleged caused the injury complained of. While her statement was uncorroborated, and was flatly contradicted, it presented a case for the jury. It was undisputed, that in attempting to pass from the platform of the station into the car she fell between the steps of the car and the platform. We quote her version of the occurrence: "I was accustomed to get on the last car, on the front of it always. . . . . As I looked forward I saw the brakeman, distinctly with his face turned towards me, and his manner indicated that he was waiting and expecting me to get on the train, as usual, when I should reach it; I reached the car, and as I was about to step on, I went to step on the step, he dashed in with a spring between me and the step, on to a higher step, which prevented me from taking my step securely, my getting a foothold; and the start he gave me, and the unexpected thing, caused me to take too short a step, and I went down simply on my toes, and prevented as I said before, my getting my step—his jumping in between prevented me from getting my step, which could not have happened if he had not been there. I slipped down at once of course . . . . and I was wedged in." John Keely, the brakeman, testified on this point as follows: "I was standing at my post of duty, at the rear car, on the platform of the station, by the body of the car, a little to the rear of the front step. I saw this lady approaching down the platform, and waited on her. She being a regular rider I had some idea that her intention was to come down and get in that car for West Chester, as it was a West Chester car. She came down and in attempting to get on she stepped on the step, and apparently made a short step, or stepped on her dress, I could not tell which, as I was right in the rear, or a little to one side of her, and the result was she slipped and fell on the step. I assisted her to her feet, and then as she was passing up the steps I came in the rear, back of her, up

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the steps, reached in front and opened the door for her. She passed in and was seated when the train started." These extracts present the claims and evidence of the contending parties, respecting the cause and manner of the plaintiff's fall.

The statement of the learned Judge in his charge to the jury, that the plaintiff testified that she was pushed or jostled by the brakeman, was unauthorized by her evidence, and was misleading. These words in this connection imply that the plaintiff was forcibly prevented from securing a foothold and ascending the steps of the car in safety. There was nothing in the evidence from which such an inference could be drawn. The plaintiff did not state or hint even that the brakeman ran against or pushed her. But the plaintiff's fourth point and the answer to it, coupled with the misstatement referred to, allowed the jury to find a fact of which there was no evidence, and to rest a verdict upon it. This certainly was error, and because of it the judgment must be reversed. (Greber *v.* Kleckner, 2 Pa. 289; Musselman *v.* Railroad Co., 2 WEEKLY NOTES, 105.

Judgment reversed, and venire facias de novo awarded.

Opinion by McCOLLUM, J. H. C. O.

July '88, 176. January 23, 1889.

Myers v. Tobias.

Contracts—Illegal contracts—Gambling—Evidence.

When an action is brought by a broker against his principal to recover the loss on a transaction carried on by margins, in which the defence is that the contract was a gambling contract, evidence is admissible on behalf of defendant to show that his means were inadequate to carry the contract into effect as a sale, and this is a circumstance which, though not conclusive, the jury may take into account in determining the true intention of defendant.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit, by Theodore W. Myers & Co. against Joseph O. Tobias, to recover the loss on a transaction consisting of a purchase of grain on margin, in which plaintiffs had acted as brokers for defendant.

On the trial the facts of the case appeared to be as follows: The plaintiffs are bankers and brokers in New York City, and in 1886 purchased on account of defendant, at his request, several large lots of corn, deliverable in May, 1887. The defendant deposited margins to cover the transactions, and, finally, as the price of corn fell, ordered his purchases sold. They were sold accordingly at a considerable loss. The purchasers demanded delivery of the grain, and warehouse receipts for the same were delivered to them accordingly. The suit was brought to recover the loss on the transaction appearing on the plaintiffs' books.

The defendant testified that the transaction was on margin, and with intent to sell out in a short time. He was then asked what were his means at the time. Objected to by plaintiffs. Objection overruled. Exception. Defendant then stated that his means were not sufficient to buy and pay for the corn.

The Court charged, *inter alia*, as follows:—

"The question whether it was a wager is for you. It is quite possible for a man who wants to buy corn to go to a broker, and the broker to buy of another person. In all that there is nothing if the purpose is to carry out, but if it is the man's purpose not to get the corn, but to wager on the price of the corn, it is a bet. . . . [There is another circumstance which may have some weight. It has been stated by our Supreme Court, although in a way by no means conclusive, that the means of a party in such a transaction can be considered, whether they were adequate to carry it through in one form and not adequate to carry it through in another. . . . For the defendant says that all he had in the world was not enough to pay for what was to be laid down on the first day of May for this corn. That is a further circumstance for your consideration."]

Verdict for the defendant, and judgment thereon. Plaintiffs thereupon took this writ, assigning for error the admission of defendant's evidence, as above, and the portion of the charge included within brackets.

Rudolph M. Schick, for the plaintiffs in error.
Thomas R. Elcock, for defendant in error.

February 4, 1889. THE COURT. The question whether this was a gambling transaction was fairly submitted to the jury, and they have found that it was. The plaintiffs complain of two things, (*a*) that the defendant was permitted to testify as to his means, or to state it more accurately, his impecuniosity, and (*b*) that the Court instructed the jury that "in considering the nature of such transactions regard may be had to the means of the alleged purchaser, and if they are inadequate to carry the contract into effect as a sale, it is a circumstance, which, though not conclusive, may be taken into view in determining whether his intention was to buy." As both the admission of the testimony and the charge referred to are fully sustained by Kirkpatrick *v.* Bonsall (72 Pa. 155), we see no occasion for a discussion of this case.

Judgment affirmed.

PER CURIAM. L. L., JR.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, OCT. 25, 1889.* [No. 26.

Supreme Court.

Jan. '89, 156. May 2, 1889.

Dixon v. The White Sewing Machine Co.

Execution—Levy by sheriff—When valid—When form may be altered—Levy upon goods of stranger to execution—When trespass—Sheriff's return—When may be altered—Requisites of.

A levy by the sheriff, in sight or within potential control of the goods, is valid only when followed up by actual possession within a reasonable time.

A levy on the goods of a stranger to the execution is an exercise of dominion over them sufficient to constitute a trespass, though there be no actual taking of the goods.

If a debtor have bailed, or demised, goods, his interest may be seized and sold, but the possession of the bailee may not be disturbed. A levy on the thing itself disturbs the possession, and is a trespass.

In order to maintain an action of trespass against the sheriff it is absolutely necessary that the plaintiff must be in actual possession of the goods or have the right of taking possession at the time of the trespass.

The general right of a sheriff to change his levy, or to enlarge, restrict, or abandon it, is unquestionable. Having made a mistake he is not bound to persevere in it. If he withdraws or abandons a levy it is absolutely discharged, even though his action was improper, and he thereby became liable to the plaintiff in the execution.

After having levied upon goods the sheriff may, upon claim by another, either abandon the levy or restrict it to the defendant's interest in them.

The right of the sheriff to change the character of his levy, carries with it the right to alter his return, and this alteration may be made at any time before the return is actually filed in Court.

The sheriff, as the executive officer of the Court, is charged with the duty of making return to the mandates of its writs, but what return he shall make is within his own control. The Court cannot dictate what it shall be; it can only require that it shall be in form appropriate to the writ, and as a matter of law sufficient.

Error to the Common Pleas of Cumberland County.

Trespass, by the White Sewing Machine Company against James R. Dixon, sheriff of Cumberland County, to recover damages which plaintiff claimed to have suffered by reason of the sale of certain organs, under an execution by the New England Organ Company on a judgment recovered against W. H. Dinkle.

Upon the trial it appeared that the New England Organ Co. had two judgments against Dinkle, and in September, 1887, executions were issued on them. No actual levy was made on these writs, but the sheriff went to the residences of two parties in Newville, who held organs on "rental contracts" or "conditional sales," and told them that he went to levy on those organs as Dinkle's property. He made no memorandum at the time, but on his return to his office his deputy entered on the back of the writs the name of the organ and its location. Afterwards a notice was served on the sheriff that the White Sewing Machine Co. claimed those organs, and he added, immediately, to the memorandum already made, the words "The interest of William H. Dinkle in." The organs themselves were never touched by the sheriff. The interest of William H. Dinkle in them was sold at the store-room of Dinkle, in Carlisle, it being announced at the sale by the sheriff that only the interest of Dinkle in the two organs which were in possession of Mrs. Shreffler and Miss Cora Getter was sold. At the time of bringing this suit no return of sale had been made. The sheriff read his return during the trial and then filed it. It set out that only the interest of Dinkle had been sold. The sheriff did not deliver the organs to the purchasers, nor was there any evidence that they ever took possession of them.

The remaining facts in the case appear in the charge of the Court, which was as follows:—

"It appears that Dinkle was a dealer in organs, pianos, and sewing machines on July 29, 1885, and had been for some time previous to that, his place of business being in a building owned by a Mr. Gill on North Hanover Street in the borough of Carlisle. Prior to this date he had made conditional sales of organs to certain parties, three of them being B. F. Shriver, dated the 27th of May, 1885, Luther Plowden, dated the 9th of May, 1885, and A. E. Cornelius, dated the 24th of July, 1885. On July 29, 1885, being indebted to the White Sewing Machine Company, he executed a written paper by which among other things he transferred the contracts and amounts due thereon, which Dinkle had made as aforesaid with the aforenamed parties, as collateral security for the indebtedness owing by him to the said company, and Dinkle agreed to collect the instalments from the parties on these contracts. He did collect some of the instalments and made payment to the company or its agent. Under a provision in these contracts of sale Dinkle had the right to repossess the organs if the payments were not made as

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stipulated. Subsequently, on March 23, 1886, Plowden returned to Dinkle the organ bought by him; on April 1st following that of Miss Cornelius was brought back, and on August 25 of the same year the one bought by B. F. Shriver was returned, and they were placed in the store of Dinkle from whence they had been taken.

"In the winter of 1887 Dinkle removed all his property, including the organs in dispute, to a store-room in the house of William Peffer, situated on West Main Street, Carlisle, and while there, on the 22d or 23d of March, 1887, he was visited by a Mr. Johnson, agent of the White Sewing Machine Company, and after some negotiations between the latter and Messrs. Henderson & Hays, attorneys for the sewing machine company, it was agreed that Dinkle was to keep charge of the organs and act as the agent of the company in the care and disposition of them. They were removed to a store-room owned by Mrs. Noble, about May 1st, 1887, and Dinkle states that on May 23, 1887, he entered into an agreement for the rental of one of them to Mrs. Shreffler, of Newville; on the 25th of the same month he rented one to Mrs. Wetzel, of Carlisle, as agent of the sewing machine company; and that about the same time the other was delivered to Miss Getter, of Newville, on trial, in anticipation of a sale of the same to her.

"The organs in dispute were in the possession of the parties when the levies and sales were made under the executions issued on the judgments of the New England company. These judgments were recovered on the 23d of August, 1887, executions issued the same day, and the sales made November 2, 1887.

"[It was also testified by Dinkle that he informed Mr. Stannard, the agent of the plaintiffs in these executions, that is, the New England Organ Company, in April, 1887, that he held certain organs as the agent of the White Sewing Machine Company, and exhibited his book to him, which contained the entries opposite each of the three organs, the entries being, you will observe, 'White Sewing Machine Company; July 29, 1885.'] The book was also given in evidence by the plaintiff to exhibit these and subsequent entries therein, and also the contracts with Mrs. Shreffler and Mrs. Wetzel, and the receipts to the latter for instalments on the organ purchased by her, for the purpose of establishing the fact that the organs were treated by Dinkle as the property of the White Sewing Machine Company, and not as his own. Sheriff Dixon was called to show what he levied upon, and also the bills prepared by him and posted, under which the property was to be sold, were given in evidence. [There was testimony also offered by the plaintiff to establish the fact that no portion of the debt for which the New England Organ Company recovered judgment and issued execution was owing to it at the time of the transfer by Dinkle to the White Sewing Machine Company, on July 29, 1885. The defendant contends, however, that the books of Dinkle show the reverse to be the fact.]

"[The defendant offered in evidence the return which the sheriff had appended to fi. fa. 25 of August Term, 1887, for the purpose of showing the levy and sale. The correctness of this return was denied, and it is insisted that the testimony clearly establishes that the organs at Newville were levied upon as the property of Dinkle without any qualification. That is, that the organs were levied upon and not merely any interest he might have in them.]

"It is also contended by the defendant that no actual seizure was ever made of the property in dispute, and hence no trespass was committed by the sheriff, and no damages suffered by the plaintiff at his hands.

"[The law, as we understand it to be. is that a wrongful levy without the removal of the property or interfering with it in any way, will make the officer a trespasser, and while an officer may levy upon the interest of a debtor in personal property in which another has an interest, yet if he levies upon and advertises for sale the entire property in the goods, he will become a trespasser.]

"[Now, we are of the opinion that if Dinkle made the conditional sales to Shriver, Plowden, and Miss Cornelius, as evidenced by the contracts presented to you, and in good faith and without any intent to hinder, delay, or defraud creditors, assigned them to the White Sewing Machine Company on the 29th of July, 1885, and they were in the spring and summer of 1886 returned to him at his store in the Gill House on North Hanover Street, without any understanding with the sewing machine company, and he treated them as in his custody for them and to secure their indebtedness, and that the agent of the New England Company was informed in March, 1887, of the arrangement that had been entered into between him and the White Sewing Machine Company, and subsequently he removed them to the store on Main Street, and that while there, in March, 1887, an agent of the White Sewing Machine Company visited him, and the organs were pointed out to him, that is, to Johnson, and an arrangement was then made by which Dinkle was to act as the agent of the company in caring for them and in the disposition of them in good faith, and without any intent to hinder, delay, or defraud creditors, and that he afterwards removed them to the store-room in Noble's property on North Hanover Street without any understanding with the White Sewing Machine Company, and subsequently he rented one to Mrs. Wetzel, one to

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Mrs. Shreffler, and also gave one to Miss Getter on trial, with the option to purchase it, as agent of the aforesaid White Sewing Machine Company, and in pursuance of these contracts the organs had been delivered to and were in the possession of the said parties in Carlisle and Newville, the White Sewing Machine Company had such property in them as mortgagees or pledgees as gave them the right to hold them without disturbance from any one; and if on an execution subsequently issued, the sheriff levied on and advertised for sale the organs in the possession of Miss Getter and Mrs. Shreffler as absolutely belonging to Dinkle, as contended by the plaintiff, and subsequently sold them or their interest in them, the defendant would be liable to the plaintiff for any damages which has been shown by the evidence in the case has been suffered by him.] In answer to points of the plaintiff, we have stated what rules are to control you in estimating these damages, as we regard the organs in dispute, under the testimony in the case, as held by the White Sewing Machine Company in the nature of a pledge or mortgage to secure the indebtedness of Dinkle to them.

"Under the 23d section of the Act of 1836 relating to executions, it is provided that 'Goods or chattels of the defendant in any writ of fieri facias, which shall have been pawned or pledged by him as security for any debt or liability, or which have been demised, or in any manner delivered or bailed for a term, shall be liable to sale, upon execution as aforesaid, subject, nevertheless, to all and singular, the rights and interests of the pawnee, bailee, or lessee to the possession or otherwise of such chattels or goods by reason of such pledge, demise, or bailment.' As it is undisputed that only the interest of Dinkle was levied upon in the organ in the possession of Mrs. Wetzel, there can be no recovery against the defendant for that organ, in our opinion. You will remember, gentlemen, that the contest is between the plaintiff and the sheriff. There has been no evidence given as to whether a bond was given by the New England Organ Company. You will disregard any reference to anything of that kind.

"[The simple question, as we have stated to you, is, was this transfer, this sale of the 29th of July, 1885, made in good faith, without any intent to hinder, delay, or defraud the creditors of Dinkle? Was the property received by Dinkle without any understanding, except other than the law would impute to him, the right to hold it as agent of the sewing machine company? If an attorney of the White Sewing Machine Company came here and gave him the authority to act as agent, and *subsequently the New England Organ Company were notified of this fact, and that the goods were removed* from the store on North Hanover Street to the store on West Main Street, and then removed from the store on West Main Street back to North Hanover Street to the Noble property, and that these organs were put out on conditional sales by him, as agent for the White Sewing Machine Company, to Miss Getter and Mrs. Shreffler, and the sheriff made the levy as claimed, then, we think, whatever damages the plaintiff has shown to have suffered he is entitled to, with interest from the 2d of November, 1887. If you do not find these facts, then he is not entitled to recover."]

Plaintiff and defendant both presented a number of points, among those of the latter were:—

(6) The evidence shows that only the interest of Dinkle in the three organs in dispute was sold, and that at the time of such sale the chattels were in the possession of parties who had a right to the possession, and not in that of the plaintiff; nor does it appear that the right of possession was in plaintiff, and as the sheriff did not touch the chattels, nor authorize nor direct others to do so, there was no injury to plaintiff for which he can recover. *Answer.* Under the testimony in this case we cannot affirm this point as presented. It is therefore refused.

(7) The return of the sheriff is conclusive, and it shows that only the interest of Dinkle was levied on and that nothing more was sold, and this does not amount to a trespass for which the defendant was liable in this action. *Answer.* Under the testimony in the case we cannot affirm this point.

Verdict for plaintiff for $102.50, and judgment thereon. Whereupon defendant took this writ, assigning for error, *inter alia*, the portions of the charge of the Court inclosed in brackets, and the answers to his sixth and seventh points.

Samuel Hepburn, Jr. (*Samuel Hepburn* and *J. W. Wetzel* with him), for plaintiff in error.

John Hays (*Robert M. Henderson* with him), for defendant in error.

October 7, 1889. THE COURT. The common law requirement of a valid levy that the sheriff shall take actual possession of the goods has been relaxed in Pennsylvania to a degree that has been regretted by the Judges of this Court. (Cowden *v.* Brady, 8 S. & R. 510; Schuylkill County's Appeal, 80 Pa. 359.) But none of the cases have gone further than to hold that a levy in sight or within potential control of the goods will be valid only when followed up by actual possession within a reasonable time. (Cowden *v.* Brady, 8 S. & R. 510; Com. *v.* Stremback, 3 Rawle, 345; Com. *v.* Contner, 18 Pa. 445; Schuylkill County's Appeal, 30 Id. 358; Welsh *v.* Bell, 32 Id. 12.) The levy in the present case, therefore, could scarcely be considered a perfected levy, if it had maintained its initial

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character as a levy on the organs themselves in the possession of the contract vendees. But there are cases which hold that it was a sufficient interference with the possession of the owner to support an action of trespass. (Paxton *v.* Steckel, 2 Pa. St. 93; Welsh *v.* Bell, 32 Id. 12.) "A levy on the goods of a stranger to the execution is an exercise of dominion over them sufficient to constitute a trespass, though there be no actual taking of the goods—though they be not touched. . . . If the debtor have bailed or demised the goods, his interest may be seized and sold, . . . but the possession of the bailee may not be disturbed. A levy on the thing itself disturbs the possession, and is a trespass." (Id. 16.)

But it is the person whose possession is disturbed to whom the right of action accrues. "To maintain trespass it is absolutely necessary that plaintiff must be in actual possession, or have the right of taking possession at the time of the trespass." (Ward *v.* Taylor, 1 Pa. St. 238.) Thus in Srodes *v.* Caven (3 Watts, 258) the action was by the bailee for taking from him property which he had hired, and Walsh *v.* Bell, already cited, was supported expressly on the ground that the jury found the plaintiff had not parted with the possession.

Tested by these principles, the original levy, though upon the organs themselves, gave plaintiff no cause of action. Whatever the plaintiff company's title might have been it is clear that it had no right of possession at the time of the levy, or at any time before the sheriff's sale. The organs had been sold by Dinkle, and delivered to the purchasers upon contracts for payment in instalments. There is no evidence, nor is it claimed that any instalments were due and unpaid, or that either Dinkle or the plaintiff had any right of resuming possession in the absence of default in the payments. So far as the evidence shows even the purchasers could not have claimed anything more than nominal damages (Watmough *v.* Francis, 7 Pa. 216), and plaintiff had no ground of complaint at all.

But Dinkle, either for himself or as agent of plaintiff, had still a title in the organs, to which a reversionary and conditional right of possession attached, and a sale of the goods themselves by the sheriff would be such an interference with this title and consequent right of possession as would support an action. Assuming, therefore, for the present, that plaintiff's title through Dinkle was valid, we have to consider the right of the sheriff to change his levy, and the steps he took in doing so.

The general right of the sheriff to change the levy, to enlarge, or restrict, or abandon it, is unquestionable. Having made a mistake he is not bound to persevere in it. If he withdraws or abandons the levy, it is absolutely discharged even though his action was improper and he thereby became liable to the plaintiff in the execution. (Commonwealth *v.* Contner, 18 Pa. 445.) And having levied on goods themselves, he may upon claim by another either abandon it, or restrict it to the defendant's interest. (Patterson *v.* Anderson, 40 Pa. 363.) This is what the sheriff did in the present case. When he made the levy he does not seem to have been aware of plaintiff's interest in the organs, and he accordingly levied on them as the property of Dinkle. On being informed of the plaintiff's claim, he changed his levy by reducing it to Dinkle's interest in the organs. It is true he did not notify the purchasers in possession of this change, but they are not here complaining of omission, and as already seen they are the only ones whose rights were interfered with by the levy itself in either form.

In accordance with his action in changing the character of the levy, the sheriff also changed his return. His right to do so is equally beyond question. The effect of so doing is another matter. The sheriff, as the executive officer of the Court, is charged with the duty of making return to the mandates of its writs, but what return he shall make is within his own control. The Court cannot dictate what it shall be. (Vastine *v.* Fury, 2 S. & R. 426; Maris *v.* Schermerhorn, 3 Whart. 13.) It can only require that it shall be in form appropriate to the writ, and as matter of law sufficient. And this control of the sheriff lasts as long as the writ is in his hands. The right to alter his levy as affirmed in Patterson *v.* Anderson (*supra*), necessarily carries with it the right to make a corresponding alteration in his return, if it should happen to be previously written. In Schuylkill County's Appeal (30 Pa. 358), it is reported that the sheriff "made return," and afterwards, but before return-day, made a new levy, sale, and new return. Whether the expression "made return," means that the writ was actually returned into the court office is doubtful, but until such actual return the right of the sheriff to alter his indorsement on the writ is beyond question. It is the final act of filing it in court that fixes his official return.

In the present case the return was not changed on the back of the writ until long after the return-day, and after the commencement of this action, and was not actually filed in court until the day of trial. This, however, was but an irregularity. In Mentz *v.* Hamman (5 Whart. 154), it is said that "the sheriff is not obliged, unless ruled so to do, to make a return to a writ of fi. fa.," and while this is meant probably as a statement of the practice rather than of the law, it is sufficient to show that the delay does not lessen the sheriff's control over his return, so long as the writ actually remains in his hands. The effect of delaying the return until after *lis mota* is to take away

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the presumption to which it is ordinarily entitled in the sheriff's favor.

The change therefore in the levy and the return being within the sheriff's privilege, and being made under circumstances which gave the plaintiff no right to complain, we have left only the sale, and this it is quite clear was of Dinkle's interest only. The testimony of Dinkle on this point is somewhat confused, but tends rather towards a sale of his interest only, and the same may be said of the testimony of the sheriff himself, for although he says in a general way that the organs were sold, he also says that his return will show precisely what was done, and that the sale was held by the under-sheriff, it not appearing that the sheriff himself was even present at all. But the testimony of Spencer, the deputy-sheriff who made the sale, is conclusive that only the interest of Dinkle was sold.

It being thus clear that plaintiff below had no present right of possession which could be disturbed by the levy, and the sale being only of Dinkle's interest, did not interfere with plaintiff's title, whatever it was, it follows that under the evidence plaintiff had no cause of action, and defendant's sixth point should have been affirmed.

As this is decisive of the whole controversy it is not necessary to consider the other questions raised.

Judgment reversed.

Opinion by MITCHELL, J. H. C. O.

Jan. '89, 408. April 17, 1889.

Sheble et al. v. Strong et al.

Partnership association, limited—Act of June 2, 1874—Requisites of certificate—Personal liability of members.

In the formation of a partnership association, limited, under the Act of June 2, 1874 (P. L. 271), and its supplement, a strict compliance with the statutory requirements is essential. Where there is no record of such a statement as the statute requires, there is no statutory association.

A statement is fatally defective when it does not contain such a detailed description and valuation of the machinery as the supplement of May 1, 1876 (P. L. 89), requires.

The question is not one of good faith on the part of the members of the association or of notice to creditors, but whether, in their attempt to form a limited partnership, they conformed to the law. It is no defence that creditors had actual knowledge of the facts required to be set out in the recorded statement.

It is no defence to an action against the individual members of a partnership association, limited, that a judgment had already been recovered by the plaintiffs against the company. Such actions are not inconsistent. Even if it be conceded that the debt sued for is the same in both cases, yet the question of liability as general partners, was not in any manner involved in the first suit while in the second action it is the main question.

Error to the Common Pleas of Luzerne County.

Assumpsit, by George H. Sheble and Charles M. Hill, trading as Sheble & Hill, against Theodore Strong and twenty-seven others, late doing business under the name of "The Pittston Knitting Company, Limited," to recover for wool sold and delivered to "The Pittston Knitting Company, Limited."

The following facts appear from the statement, affidavit of defence, and the opinion of the Court below (RICE, P. J.) upon the rule for judgment:

In April, 1879, the defendants, with certain others who were sued but not served with the summons, attempted to form a partnership association, limited, to be called "The Pittston Knitting Company, Limited." The certificate provided, *inter alia*, as follows:—

III. The total amount of the capital of the said association is twenty-five thousand dollars, of which amount the sum of fifteen thousand and fifty dollars has been subscribed for and is payable in cash, and the remaining nine thousand nine hundred and fifty dollars has been subscribed for and is payable in machinery suitable for the uses of the association and accepted and to be accepted at a valuation to be approved by all the members subscribing to the capital of the association. The cash capital is payable as follows: twenty-five per cent. thereof on the first day of February, A. D. 1879, and the balance thereof in three equal instalments on the first day of each succeeding month. The subscription of Daniel M. Stimson, four thousand dollars and of Frances C. Stimson two thousand dollars were made and have been paid in machinery valued and accepted for the said amounts in manner as aforesaid. The subscription of Daniel M. Stimson for thirty-nine hundred and fifty dollars was also made and is payable in machinery to be valued and accepted in manner as aforesaid, but upon condition that no certificate for, or other evidence of this share of the capital stock shall be issued to the said D. M. Stimson until the said machinery shall have been fully paid for and the lien of the vendors fully satisfied.

No schedule of such machinery was filed.

Sheble & Hill sold wool to the company, and afterward brought suit against "The Pittston Knitting Company, Limited," to recover payment as of November Term, 1882, No. 177. They recovered judgment, and issued execution, but owing to the embarrassed condition of the company's affairs nothing was realized upon the judgment. This action was then instituted against the individual members of the company as general partners.

In their affidavit of defence defendants set up that they were a limited partnership association and not individually liable: that in addition to the notice contained in the statement, plaintiffs had actual notice of the kind of machinery contributed; that

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plaintiffs were estopped from pursuing this suit because they had already recovered a judgment against "The Pittston Knitting Company, Limited;" and in a supplemental affidavit, that some of the members had died and some become insolvent before the action was brought.

Plaintiffs took a rule for judgment for want of a sufficient affidavit of defence, which was discharged after argument, the Court deciding that the judgment recovered in No. 177, November Term, 1882, was a bar to the present suit; that the two actions were inconsistent, the parties to both actions being the same.

Whereupon plaintiffs took this writ assigning for error the action of the Court in discharging the rule for judgment and in holding as above set forth.

F. C. Sturges and *John Bethell Uhle*, for plaintiffs in error.

The parties to these two actions were not the same. The suit against the company did not bring the members individually into Court.

Lauder *v.* Tillia, 117 Pa. 304.

The defence set up in this case is in the nature of a former recovery. In such a defence it is necessary to show that the exact question at issue was the same in both cases; that the parties were the same; and that the effect of the judgment as an estoppel must be mutual.

Tams *v.* Lewis, 42 Pa. 410.
Com'th *v.* Cheny, 2 New Eng. Rep. (Mass.) 229.
Com'th *v.* Waters, 11 Gray, 83.
Greenleaf on Evidence, §§ 522-524.
Bigelow on Estoppel, 47.
Herman on Estoppel, §§ 148, 149, 216, 313.
Chandler's Appeal, 100 Pa. 265.

George S. Ferris, for defendants in error.

The plaintiffs having elected to treat the association as valid are now estopped by their prior suit against the company from alleging that the organization is invalid and bringing suit against the individual members. The claim is *res adjudicata;* the original demand was merged in the former judgment, and did not exist when the second suit was brought.

Keystone, etc. Co. *v.* Schoelkopf, 11 WEEKLY NOTES, 132.
Bement *v.* Brick Co., 5 Id. 58.
Eliot *v.* Himrod, 108 Pa. 569.
Martin *v.* Ives, 17 S. & R. 364.
Hall *v.* Lacey, 37 Pa. 366.
Smith *v.* Jack, 2 W. & S. 101.
Maloney *v.* Bruce, 94 Pa. 249.

A party may prosecute as many remedies as he legally has, provided they are consistent and concurrent, but he may not pursue inconsistent remedies.

Burke's Estate, 1 Parsons, 470.
McQueen's App., 104 Pa. 596.
Edwards's App., 105 Id. 103.
Appeal of Gas Co., 1 Penny. 100.
Bigelow on Estoppel, 641, 651, 661, 687.
Bowen *v.* Mandeville, 95 N. Y. 237.

October 7, 1889. THE COURT. In 1879, the defendants and others named in the summons attempted to organize a limited partnership association, under the Act of 1874 and supplement, in the name of "The Pittston Knitting Company, Limited." Their articles of Association or statement, as executed and recorded by them, fixed the capital at $25,000, of which $15,050 was payable in money, and the balance, $9950, in machinery contributed by two of the subscribers, residents of New York. In some respects the statement conformed to the requirements of the Act, but no schedule, description, or valuation of the machinery was made. The only reference thereto is in article 3d of the statement, as follows: "The subscriptions of Daniel M. Stimson for $4000, and Frances C. Stimson, $2000, were made and have been paid in machinery valued and accepted for said amounts in manner as aforesaid. The subscription of Daniel M. Stimson, for $8950, was also made and is payable in machinery to be valued and accepted in manner as aforesaid, but upon condition that no certificate for or other evidence of this share of the capital stock shall be issued to the said Daniel M. Stimson until the said machinery shall have been fully paid for and the lien of the vendors fully satisfied."

The plaintiffs, Sheble & Hill, brought suit against the "Pittston Knitting Company, Limited," for material furnished by them to the company, and in due course obtained judgment, on which they were unable to realize anything. They then brought this action against the defendants and others who composed the company, claiming to hold them liable as general partners on the ground that in attempting to organize themselves into a limited partnership association, they had neglected to comply with the provisions of the Act. As disclosed by the affidavits, the grounds of defence are: (1) That defendants were a limited partnership association in which the capital alone was liable for the debts, and they were not individually liable; (2) That in addition to the notice contained in their statement the plaintiffs had actual notice of the character and kind of machinery; (3) That plaintiffs were estopped from proceeding with their action for the reason that they had proceeded against the "Pittston Knitting Company, Limited," and obtained judgment against it; (4) That prior to the bringing of this suit, some of the members of the company had died, and some had moved away, and others had become insolvent.

The last-mentioned ground of defence is so clearly destitute of merit that it may be dismissed without further notice. As has been fully shown by the learned President of the Common Pleas the first and second grounds of defence are also untenable. Assuming that the subscriptions to

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the capital stock are certified according to the facts, it is very clear that the statement is fatally defective in that it does not contain such a detailed description and valuation of the machinery as the supplement of 1876 requires (Maloney *v.* Bruce, 94 Pa. 249). As was said in that case the property contributed was intended as the equivalent of a cash capital, and the plain object of the provision in the supplementary Act, requiring a schedule, was to enable the creditors to ascertain precisely of what the property consisted and to judge of its value. If parties seek to enjoy the advantages of a partnership and yet limit their liability as to creditors, they must comply strictly with the provisions of the Act. The question is not one of good faith on the part of the defendants, or of notice to creditors, but whether, in their attempt to form a limited partnership, they conformed to the law. If they did not, their attempt was abortive, and it is no defence that creditors had actual knowledge of the facts required to be set out in the recorded statement. The averment in the affidavit of defence that plaintiffs had actual knowledge of the extent and nature of the capital of the association, and gave credit to it on the basis of a liability limited to such capital, is therefore insufficient. The immediate context shows that defendants do not mean by that averment to allege that there was any express contract between them and plaintiffs whereby the liability of the former was limited to the capital stock subscribed as set forth in the statement.

All our cases on the subject sustain the position that a strict compliance with the statutory requirements is essential to the formation of a limited partnership. Where there is no record of such a statement as the statute requires there is no statutory association. When immunity from liability is claimed under the provisions of the Act, it is competent for the plaintiff, either to point out a fatal defect on the face of the recorded statement, or to prove that an essential requisite, though formally stated, is falsely asserted. (Eliot *v.* Himrod, 108 Pa. 569; Hill, Keiser & Co. *v.* Stetler *et al.*, 21 WEEKLY NOTES, 255, and 24 Id. 118).

The main ground of defence and the one on which the affidavit was adjudged sufficient is that the plaintiffs having proceeded to judgment and execution against the "Pittston Knitting Company, Limited," in the mode pointed out by the Act of Assembly, are estopped from proceeding against defendants as general partners.

The defendants themselves are not in a position to complain. They attempted as we have seen, to form a limited partnership, but failing to comply with the provisions of the Act, they were not entitled to claim its benefits. Plaintiffs had a right to sue them as a limited partnership association in the mode pointed out by the Act, because they held themselves out as such association, and upon failure to recover their debt by execution against the association, they might have had execution against the non-paying members, if any there were, for the amount of their unpaid subscriptions, or as they did in this suit, they had a right to treat the attempt of defendants to form a limited partnership as a nullity and proceed against them as general partners. The actions are not the same either in form or effect. In the one, the association is made defendant, without naming the individuals who compose it, and service of process is made on one of the officers, who are agents of the members only to the extent of their interest in the association. In the other, the persons who compose the general partnership are joined as defendants, and if liable at all as partners, each is liable for the entire debt, and not merely to the extent of his interest in the partnership, provided all are served with process or voluntarily appear. The measure of liability in each, respectively, is different. In the one it is general; in the other it is limited to the property of the Association, which of course includes unpaid stock due by individual members. For same reasons the actions are not inconsistent.

The defence under consideration is in the nature of a plea of former recovery. Considering it in that light it was incumbent on the defendants to show not only that the parties to both actions are the same, but that the questions to be adjudicated were raised and determined in the former suit. A former judgment is not conclusive of anything that was not directly decided by it, or was not material to the decision. Before such effect can be given to it in another suit, it must appear either from the records or *aliunde* that it must have rested on the same question or questions that are sought to be raised in the second action (Tams *v.* Lewis, 42 Pa. 410; Schriver *v.* Eckenrode, 87 Id. 215).

Conceding for argument sake, that the debt sued for is the same, in both cases, and that the present defendants are of those who constituted the association that held itself out as a limited partnership, it is nevertheless true that the question of liability, as general partners, was not in any manner involved in the first suit, while in the present action that is the main question.

We are therefore of opinion that the learned Judge erred in not holding that the affidavit of defence was insufficient.

Record remitted to the Court below with direction to enter judgment against defendants for the amount claimed by plaintiffs, unless other legal or equitable cause be shown to said Court why such judgment should not be entered.

Opinion by STERRETT, J. H. S. P. N.

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July '89, 19. May 8, 1889.

Nichols's Appeal.

Decedents' estates — Fire insurance — Distribution of proceeds of on destruction of decedent's realty.

The proceeds of a policy of fire insurance, effected in his lifetime by an insolvent decedent, who had died intestate, upon real property, which had been destroyed by fire after his death, are assets of the decedent for the payment of his debts, and are therefore payable to his personal representatives and to be included in their account.

Whether the money paid on a policy of fire insurance is regarded as the proceeds of the contract of indemnity and a personal asset, or as representing the building that was destroyed, in either case the claim of the heirs of the insured owner to said money is subordinate to that of his creditors.

In the present case the policy of insurance was made payable "unto the said assured, his executors or administrators," but *it seems* that that fact was not held material in the decision of the case.

Appeal of J. H. Nichols from a decree of the Orphans' Court of Warren County in the matter of the distribution of the estate of J. F. Bartlett, deceased.

Before the Auditor (Charles A. Peterson, Esq.), appointed to re-state the account and make distribution of the balance in the hands of John A. Day, administrator of J. F. Bartlett, deceased, the following facts appeared: On April 1, 1884, the decedent purchased, under articles of agreement, a house and lot in the village of Youngsville. On March 10, 1885, he insured the house for three years in the sum of $1200 payable "unto the said assured, his executors or administrators."

On March 16, 1886 he died intestate, leaving no widow, but four daughters, two of whom were minors. On July 18, 1886, the house was burned. The administrator procured a power of attorney from the heirs and in this double capacity received the insurance money. He did not charge himself therewith in his account but stated he had received it, and held the balance after payment of expenses, $100, to wit $1100, for the parties entitled thereto. The decedent's debts amounted to $1541.01, and the assets for distribution exclusive of this sum of $1100 to $332.06.

Upon these facts the Auditor found as conclusions of law:—

(1) That immediately upon the death of J. F. Bartlett, his title to said house and lot descended and became fully and completely vested in his heirs, subject to the statutory liens of creditors of the deceased.

(2) The insurance must run with the title to the land, in the name of the owner of the land, although a party having a pecuniary interest in the preservation of the property may make a special contract of insurance to recover his interest. (Grevemeyer *v.* Ins. Co., 62 Pa. St. 340; Ferree *v.* Ins. Annuity and Trust Co., 67 Id. 373; Ins. Co. *v.* Graybill, 74 Id. 17; Ins. Co. *v.* Stewart, 19 Id. 45.)

(3) Upon the death of J. F. Bartlett, his interest in the insurance policy passed to and vested in his heirs who, so far as the right to the indemnity against loss, by said policy, was concerned, stood in the same relation to the insurance company, and to the creditors of the deceased, as did the deceased in his lifetime. (See Wyman, Admx. *v.* Wyman *et al.*, 26 N. Y. 253; Digest of Fire Insurance Decisions, p. 31, § 14, p. 347, § 35; Flanders on Fire Ins., p. 582, § 5; Williams on Executors, pp. 1677, 944.)

(4) Insurance is a contract of indemnity to the party having the policy, or the owner of the property. (Grandin *v.* Ins. Co., 107 Pa. St. 27.)

(5) A judgment-creditor is not entitled to the proceeds of insurance in case of the loss of the building against which the judgment is a lien. (Grevemeyer *v.* Ins. Co., 62 Pa. St. 340; Digest of Fire Ins. Decisions, p. 342, § 16.)

(6) That the $1100, the proceeds of the insurance policy in the hands of the administrator, should be paid to the heirs of the decedent.

He recommended a decree of distribution in accordance with these conclusions of law. To this report exceptions were filed by J. H. Nichols, a creditor of the decedent, which were dismissed by the Court, Brown, P. J., in the following opinion (after stating the facts):—

"Should the fund go to the benefit of Bartlett's creditors or to his heirs? We have not been referred to and have not succeeded in finding any decision of our Supreme Court in which the same question has arisen, and must dispose of the case as the rights of the parties appear to us.

"We attach no importance to the fact that the policy was made payable to the assured, 'his executors or administrators,' for while it may be that his heirs, for want of privity, could not and the administrator could maintain suit against the insurance company, the money, when collected, would be held by the administrator for whoever should be legally entitled to it.

"The contract of insurance was to indemnify the owner of the property. The heirs of Bartlett were the owners at the time of the fire, and neither the creditors of their ancestor, nor his administrator, representing the creditors, had any insurable interest or any right *in* or *to* it. At most they had only a charge or lien on it.

"Had the loss occurred while Bartlett was alive, a judgment-creditor, whose only security was the insured property, could not have claimed the insurance money by virtue of the lien of his judgment. When Bartlett died, his heirs became the owners of the insured property, and were

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entitled to the possession and enjoyment of it, subject to the statutory lien of the debts of their ancestor, enforceable only by the methods prescribed by law. Had the insurance money been paid to the heirs, the creditors of Bartlett could not have claimed it by virtue of their statutory lien. At Bartlett's death he had no present interest in the contract to indemnify him for injury by fire to his real estate that could pass to his personal representative. His right to the insurance money, in case of loss, was based upon his ownership of the property at the time of loss, and by his death the ownership, by operation of law, vested in his heirs.

"We are of the opinion that the claim of the creditors to the insurance money as part of the ordinary personal assets of the deceased, cannot be supported, and thus far the conclusion is in accordance with the case of Wyman *v.* Wyman (26 New York Reports, 253).

"But upon the authority of the case of Wyman *v.* Wyman, the counsel for the creditors ask us to charge the administrator with the amount of the insurance money, by reason of what is claimed to be the superior equities of the creditors; and if the reasoning of the Court of Appeals is correct, and the law of Pennsylvania is the same as that of New York, the case would seem to sustain the contention. The New York Court treated the insurance money as the proceeds of real estate sold and brought into Court for distribution among the creditors having liens against the realty. We are of the opinion that it cannot be so regarded under the law of this State, but that the contract of insurance must be treated as a personal contract to make good the loss to him who was the owner at the time of its occurrence, and not as a guaranty to whoever might sustain loss by the destruction of the insured property.

"The New York Court says that 'a Court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors to pursue them by the dilatory remedy of a new and distinct proceeding.' If the money was in the hands of the heirs, and could be collected from them for the benefit of the creditors under our law, then we could, to avoid circuity of action, award it to the creditors. But we do not understand such to be the law in Pennsylvania. Had the building been injured by a third person after the death of Bartlett, the administrator would have no cause of action; compensation would belong to the heirs, although the injury depreciated or made worthless the claims of the creditors, and we conclude that such must be the case when the destruction is from an accident for which the insurance company agreed to indemnify the owner.

"It is a mistake to say that the $1100 in controversy is in Court. It is not so, unless the administrator, as such, is entitled to it. The fact that the person holding the money is both administrator and trustee for the heirs is of no consequence. If the heirs are by law entitled to it, as we think they are, the Orphans' Court cannot control it. In the hands of their trustee it is, so far as the question before us is concerned, in the hands of the heirs themselves.

"We see very clearly that the loss of the building was a misfortune to the creditors and a benefit to the heirs, but, if our opinion of the law is correct, we are without power to make good the misfortune. Although unfortunate, the creditors are no more so than they would be had the building been burned without any insurance or destroyed by a tornado. The case seems to us to be the accidental depreciation in value of real estate against which the creditors had liens, but in, or to, which they had no right.

"The exceptions are all dismissed. The report of the Auditor is confirmed, and distribution decreed according to it."

Thereupon J. H. Nichols took this appeal, assigning as error the dismissal of his exceptions, and the action of the Court in confirming the Auditor's report.

Samuel T. Neill (*H. J. Muse* with him), for the appellant.

D. I. Ball (*C. C. Thompson* with him), for the appellees.

October 7, 1889. THE COURT. In March 1886, J. F. Bartlett died intestate, seised of an equitable interest in a house and lot, held under articles of agreement, and leaving issue four daughters, two of whom were minors. The house, which was insured by him, for three years from March, 1885, in the Hamburg-Bremen Insurance Company, for $1200, payable "unto the said assured, his executors or administrators," was totally destroyed by fire about four months after his decease. A question having arisen, whether the insurance money should be paid to the administrator or to the children and heirs-at-law of the assured, it was agreed, in writing, by the two adult daughters and the guardian of the minors that it should be paid to the administrator, John A. Day, and if it should thereafter be decided by the Court that the money belonged to the children he would pay the same to them, otherwise he would account for it as administrator. The loss was promptly adjusted by the insurance company, and paid to the administrator. In due time he filed his account, but instead of charging himself with the net amount, $1100, received from the company, he referred to it as having been paid to him in pursuance of the above-stated agreement, and declared his readiness to pay the same to the children of his intestate, or otherwise account therefor as the

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Court might direct. For the purpose of presenting the matter to the Orphans' Court, the omission to charge himself as administrator with the insurance money was excepted to, and an Auditor was appointed to pass upon the question, re-state the account, if necessary, and distribute the balance that might be found in the hands of accountant. The Auditor found as a fact, that even including the insurance money as an asset for distribution among the creditors, the estate was largely insolvent: but, notwithstanding this, he held that the children of the intestate were entitled to the insurance money. The Court was of the same opinion, and accordingly the decree from which this appeal is taken, was entered.

The question thus presented is, whether, the estate being clearly insolvent, the creditors have any claim upon the insurance money? We think they have. The contract under which the money became due and payable to the personal representative of the intestate is one of indemnity against a possible loss which actually happened after his decease but during the life of the policy. If his estate, exclusive of the property insured, had been solvent, his children who succeeded to his interest in said property, would undoubtedly have been entitled to the insurance money; but, inasmuch as his estate, including the realty and the sum realized from the insurance policy, is admittedly insolvent, their right is subordinate to that of the creditors. In this State the lands of a decedent, as well as his goods and chattels, are assets for the payment of his debts. When the personal property is exhausted or clearly insufficient it is the duty of the personal representative, under the direction of the proper Court, to resort to the realty, and thus, if possible, satisfy the claims of creditors. In Horner *et al. v.* Hasbrouck (41 Pa. 169, 179) it is said, it will be seen, from a brief glance at the history of our Orphans' Court, how we enforce the principle, never lost sight of in our jurisprudence, that the lands of a decedent, like his goods, are assets for the payment of his debts, and that the right of succession has respect only to so much of his estate as remains after his debts have been paid. When a man dies in Pennsylvania, his real and personal estate comes within the jurisdiction of the Orphans' Court, to be administered, first of all, for the benefit of creditors, and next for legatees, devisees, and heirs. We usually define the heir to be one on whom the law casts the estate at the death of the ancestor, but with us the estate is cast subject to the jurisdiction of the Orphans' Court. Heirs are thus postponed to creditors. If it be said, as for some purposes it is correct to say, that the estate vests in the heirs directly the ancestor dies, it must be understood to be a contingent interest, defeasible in behalf of creditors. What really vests in the heir, is the title to the residuum, or, in the language of the Act of 1834, the "surplusage" of the estate. This is what the law casts on the heir. It can be nothing else consistently with our system of administration and distribution.

While, strictly speaking, the insurance money in question is not the proceeds of real estate bound by the lien of decedent's debts, it really represents, to that extent, the realty that was insured and destroyed by fire. If the insurance company had elected to restore the lost building, instead of paying the amount of risk in cash, the property would have been immediately subject to sale for the payment of debts. Whether we regard the insurance money as the proceeds of the contract of indemnity and a personal asset in the hands of the administrator, or as representing the building that was destroyed, in either case the claim of the heirs thereto is subordinate to that of the creditors.

While we cannot assent to some of the conclusions reached by the learned Court in Wyman *v.* Wyman, 26 N. Y. 253, the general principle, in relation to the right of heirs as against creditors of an insolvent estate, so ably maintained in that case, harmonizes with the views above expressed.

It follows from what has been said that the Court below erred in not holding that the insurance money was distributable among the creditors of the intestate.

Decree reversed and record remitted with instructions to distribute the fund in accordance with the foregoing opinion. Costs of this appeal and expenses of distribution to be paid out of the fund.

Opinion by STERRETT, J. C. K. Z.

Jan. '89, 450. May 23, 1889.

Kister v. The Lebanon Mut. Ins. Co.

Fire insurance—Mutual insurance companies—Insurance brokers—Agents of company—Fraud or mistake of—Application for insurance—Parol evidence to explain—When admissible—Conditions of insurance policies—Construction of.

The application for a policy of fire insurance, afterwards issued to K., was filled out by S., who signed the application and all the other papers incident to the policy as agent of the company. He also lifted the premium, deducted his commission therefrom, and remitted the balance in a formal report as well as the subsequent assessments to the company:

Held, that S. was the agent of the company, not of the insured, although there was an express provision in the policy that if any broker or other person procured the insurance said broker, etc., should be considered the agent of the insured, and although the company was a mutual fire insurance company. Such

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a provision does not apply to persons appointed or recognized as agents of the company to effect insurance.

In a suit on said policy the insured, K., offered evidence that the statements in the application were not the same as he had made to S., and that he had never seen the application, nor had he read the copy of it indorsed upon the policy, and knew nothing of the mistake until after the fire occurred:

Held, that under the circumstances such evidence was admissible.

One of the conditions of the policy was that no incumbrances other than those stated in the application should be incurred without notice to the company. It was in evidence that judgments were entered against the plaintiff after the policy issued of which no notice was given to the company. The plaintiff offered to prove that the incumbrances, even with these judgments, at no time exceeded the amount stated by him to S. through whom he procured the insurance. This the Court refused to allow him to do:

Held, that if this were true there was no breach of the condition of the policy, for the company was merely held to the risk which it first assumed; the evidence should therefore have been admitted.

Error to the Common Pleas of York County.

Assumpsit, by John Kister against the Lebanon Mutual Insurance Company of Jonestown, on a policy of insurance. Plea, *non assumpsit.*

On the trial, before LATIMER, J., the following facts appeared: The defendant, by a policy dated November 5, 1885, in consideration of ten dollars and the obligation to pay such sum or sums as the board of directors might direct, for the payments of losses by fire and the expenses of the company, insured the plaintiff against loss by fire to the amount of $1000, on a certain building in Goldsboro. The defendant had sent one of its officers to examine plaintiff's properties, and on November 4, 1885, the application for insurance was signed by the plaintiff and filled up by Reuben P. Strominger, a justice of the peace of Goldsboro. The application and papers incident to the policy were signed by Strominger as agent of the company; the policy, when issued, was sent to him to deliver to the insured, and the premium and subsequent assessments he received and remitted to the company.

The application (a copy of which was printed on the back of the policy, as required by the Act of May 11, 1881) expressly stated that the answers to the questions therein set forth were warranties binding the insured; the policy contained a provision against future incumbrances, without notice to the company, and also the following clause:—

If any broker or other person than the assured shall have procured this insurance to be taken by the company, such broker or other person shall be considered the agent of the assured and not of this company.

The property having been destroyed by fire, and the company having refused to pay the insurance, this suit was brought.

The plaintiff offered the policy alone, without the application upon the back. Objected to; objection sustained. (First assignment of error.)

In this copy of the application, interrogatories seven and nine and the answers thereto were as follows:—

7. Have you ever suffered loss of property by fire? If so, were you insured, and in what company?

7. Yes, small loss. Farmers' of York, Dover, Leb. Mutual, of Jonestown.

9. Is it incumbered? To what amount, if so? Is the incumbrance insured?

9. None.

The plaintiff offered to testify in rebuttal, that these were not the answers made by him, but in answer to the first he had mentioned three fires with the loss incurred in each; and to the other he had replied: "That there were liens on all his property of over $4000, but there was some paid on them, but how much he didn't know."

The defendant company objected to this testimony on the ground that the application on the back of the policy was a warranty binding the applicant as expressly set forth therein, that Strominger in drawing it up was the agent of the plaintiff, and that he was estopped, by having received the policy with the application printed on the back, from contradicting its terms. Objection sustained. (Second, third, fifth and sixth assigments of error.)

The defendant having put in evidence certain judgments entered against the plaintiff between the date of the application and the date of the fire, without notice thereof being given to the company, plaintiff offered to show that at the time the application was made the incumbrances due on the property insured were less than $3000, more than $1000 less than he had mentioned to the agent, and that at no time between the date of application, and the date of the fire had the incumbrance exceeded $3000. Objected to. Objection sustained. (Fourth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"In the first place the question was put to him, is there any incumbrance on the property, and to what amount, if so, is it insured, and the answer to that question is "none," that is, that there were no incumbrances on the property insured. By the terms of the application the answers to questions were made warranties, the legal result of which is, that if any of those answers were false, the policy was thereby voided, and there could be no recovery on it from the company, in case of loss.

"Under an Act of Assembly which was passed in 1881, this company, like all other insurance companies, insisting upon the terms and conditions of the application as warranties, was required to indorse upon the back of the policy of

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insurance issued to Mr. Kister a copy of the application, and this policy on which this suit is brought contains indorsed on the back of it a copy of the answer to question No. 9, among the other answers included in the application, 'Is there any incumbrance on the property, and to what amount, if so, is it incumbered?'

"The uncontradicted evidence adduced on behalf of the company defendant in this case shows that at the time of the application for this insurance there was a considerable amount of incumbrances on the property. The judgments have been offered in evidence, and have been read in your hearing and they show that that particular answer to that particular question, which by the terms of the policy is made a warranty on the part of the insured, that that particular answer was not true.

"That being the case, and there being no legal evidence in the case to explain how or why that untruthful answer was made, it is my duty to say to you that the defendant has made out a complete legal defence to the claim made in this suit, notwithstanding the fact that there is evidence that during the pendency of this policy the building was destroyed by fire.

"The company insuring this property had a right to rely upon the truth of the answers contained in the application signed by the insured, and one of those answers having been proved to be untrue it constitutes a legal defence on behalf of the claim that is made by John Kister, plaintiff in this case, to the amount of the insurance, and your verdict therefore will be for the defendant in this case, with costs of suit." (Seventh assignment of error.)

Verdict for defendant and judgment thereon, whereupon the plaintiff took this writ assigning for error, *inter alia*, the refusal of the Court to admit the evidence, and the portion of the charge, given above.

E. W. Spangler (*Henry L. Fisher* with him), for plaintiff in error.

Strominger was the agent of the insurance company, and the fraud or mistake in the application was committed by him, not by the insured.

Columbia Ins. Co. *v.* Cooper, 14 Wright, 331.
Eilenberger *v.* Protective Ins. Co., 8 Norris, 464.
Nassauer *v.* Susquehanna Ins. Co., 13 Out. 507.
Smith *v.* Farmers & Mech. Ins. Co., 8 Norris, 287.

The incumbrances subsequent to the application did not increase the risk, being either revivals of judgments or cases in which the amount paid off was greater than the new incumbrance. At any rate at no time was the amount of the incumbrances greater than that stated by the insured at the time of application.

Penna. Mut. Fire Ins. Co. *v.* Schmidt, 4 Crum. 449.
Somerset Ins. Co. *v.* Usaw, 2 Amer. 80.
Niagara Ins. Co. *v.* Miller, 5 Crum. 504.
Haws *v.* Fire Ass'n, 4 Amer. 431.
Gamwell *v.* Merchants' Ins. Co., 12 Cush. 167.
Ritter *v.* Sun Ins. Co. 40 Mo. 40.
Home Mut. Life Ass'n *v.* Gillespie, 14 Out. 84.

W. F. Bay Stewart (*Geise*, *Ziegler*, *Strawbridge*, and *Niles & Neff* with him), for defendant in error.

Strominger was the agent of the plaintiff not of the insurance company, both by the express terms of the policy and by the rulings of this Court.

Pottsville Ins. Co. *v.* Fromm, 12 WEEKLY NOTES, 69.
Susquehanna Ins. Co. *v.* Perrine, 7 W. & S. 348.
Cooper *v.* Farmers' Fire Ins. Co., 14 Wright, 307.

The plaintiff is bound by the terms of his application.

Weller's Appeal, 7 Out. 594.
Ins. Co. *v.* Cusick, 13 Id. 157.
May on Insurance, p. 161, § 156.

The existence of incumbrances on the property not mentioned in the application, and the entry of judgments subsequently without notice to the company, were alike breaches of the warranty of the application.

Cooper *v.* Farmers' Ins. Co., 14 Wright, 299.
Blooming Grove Ins. Co. *v.* McAnerney, 6 Out. 335.
Schmidt *v.* Ins. Co., 4 Crum. 449.
Seybert's Adm. *v.* Ins. Co., 7 Out. 282.
Hench *v.* Agricultural Ins. Co., 7 Crum. 128.

October 7, 1889. The COURT. That Strominger was the agent of the company in effecting this insurance is too plain to admit of discussion. He subscribed his name to the application as agent; he made a statement of the exposures as agent, and approved the risk as agent, and all this was brought to the immediate notice of the company before the policy issued. The company forwarded the policy to him and he delivered it, lifted the premium, included it in a formal report to the company at the end of the month, deducting his commissions, and sent it to the special agent. He subsequently received all the assessments and gave the receipts which were recognized by the company and were at the trial given in evidence. He was without doubt the agent of the company in this particular transaction, and must be so regarded.

The policy contains a clause as follows: "If any broker, or other person than the assured, shall have procured this insurance to be taken by the company, such broker or other person shall be considered the agent of the assured and not of this company."

It it said that the defendant is a mutual company, of which the plaintiff is a member, and he will be presumed to have known this regulation. But Kister was not yet a member of the company; the application was one of the preliminary negotiations to that end, and certainly he will not be presumed to have known in advance

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of a provision in a policy which had not yet issued. But according to our construction the agents of the company are not embraced in this provision; the reference is to persons operating on their own account or on behalf of the assured and not representing the company in procuring the insurance. The use of the term "broker" indicates the class of persons intended. Where general words follow particular ones the rule is to construe them as applicable to subjects *ejusdem generis*. If it was intended by the policy to provide that the company's agent, when taking an application, was not the company's agent, but the agent of the assured, it would have been an easy matter to say so. Susquehanna Insurance Company *v.* Perrine (7 W. & S. 348) is a case of that kind. There a person preparing the application was styled as surveyor, and it was provided that such applications might be made either by the applicant "or by the surveyor," and in all cases the assured will be bound by the application for the purpose of taking which "such surveyor will be deemed the agent of the applicant."

Assuming the truth of the matters alleged in the offer, this case bears a close analogy to Eilenberger *v.* The Insurance Company (89 Pa. 464); for the policy in that case contained a provision similar to that in the policy in suit; a provision, however, which contained no restrictive words whatever; and it was held that they did not apply to an agent of the company who solicited insurance, made out applications, sent them to the home office, delivered the policies and remitted the premiums. Whilst we have no particular evidence as to the authority of Strominger, these are the acts which he performed and they were approved by the company. The other cases cited by the company on this branch are fully discussed and distinguished in the Eilenberger case, and further reference to them seems unnecessary now. "An examination of the facts in those cases," says Mr. Justice TRUNKEY, "will aid in understanding the scope of the opinions. In each there was no question but that the warranty was made, and it was conceded that if there were a mutual mistake between the contracting parties, parol evidence is admissible to reform the policy. None declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract. The authorities go far, very likely not too far, in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact and hold the principal to the contract, as if he had committed the wrong."

A copy of the application accompanied the policy, and it is argued that Kister could and ought to have read it, and, if he had done so, he would have seen the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. (Howard Insurance Co. *v.* Bruner, 23 Pa. 50; Insurance Co. *v.* Wilkinson, 13 Wall., U. S., 222.) One thing is certain, however: the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination.

We are of opinion also, that if the amount of the incumbrances was not increased during the continuance of the policy and before the date of fire, there was no breach of the condition against incumbrances, within the spirit and meaning of the policy. It may be conceded that in case of a warranty it is a matter of no consequence whether or not the act stipulated for be material to the risk; one of the objects of the warranty, it is said, is to preclude the controversy as to the materiality of the thing in question. Yet it must still be ascertained, under the ordinary rules of construction, what the thing is that is warranted, and this being ascertained, the insured is held to a full and literal performance of it. (Home Life Association *v.* Gillespie, 110 Pa. 88.) But this covenant or condition against future incumbrances does not stand upon the footing of a warranty. The warranty covers the representations contained in the application, whilst the condition referred to is a provision of the policy only, and is not within the terms of the warranty. The incumbering of the premises to be insured was intended to operate as a forfeiture. Now, if it be assumed that the plaintiff's proof would come up to the offer, which we say should have been received, it would appear that the plaintiff, at the time of the application, disclosed the fact that there were liens to the amount of $4000 against the premises insured; that some of these were paid, but that he did not know how much; that at the time the application was made the amount of these incumbrances was less than $3000; that at no time did they exceed that amount, nor equal the amount represented. This provision of the policy is based upon the increased risk resulting from incumbrances; a person is supposed to have less interest in the preservation of his property when it is incumbered beyond its

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value. If the testimony contained in the offer is true, the company was willing to assume the obligation with the incumbrances then existing, and, if these incumbrances were not increased in amount during the continuance of the policy, then the company was merely held to the risk which it at first assumed, and no more. The applicant, in stating the amount of incumbrances on his property, may include not only those actually entered, but such as are liable to be entered; for, if he has given a judgment note or bond, he knows that it may, and probably will be, placed upon record. He may not have knowledge of the amount actually entered, but be able to state the amount in condition to be entered, and may represent the amount of liens accordingly. If the lien of one of the judgments entered should expire, it would certainly not be treated as a breach of the condition to have it revived; or if the assured, in order to raise money to pay a lien pressing for payment, should enter another in its place of equal amount, that would not affect the risk upon the premises insured, yet in either case the assured may be said to "have the same incumbered." The question we have been considering was referred to, but not decided, in Insurance Company *v.* Schmidt (119 Pa. 449).

Indemnity is the real object and purpose of all insurance, and this is to be kept constantly in view, and favored in the construction of policies of insurance. Such contracts are to be construed liberally, and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. (Teutonia Ins. Co. *v.* Mund, 102 Pa. 95.) "Forfeitures are odious in law, and are enforced only where there is clear evidence that that was what was meant by the stipulation of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture. (Helme *v.* Insurance Co., 61 Pa. 107.)

The judgment is reversed, and a venire facias de novo awarded.

Opinion by CLARK, J. S. H. T.

Jan. '88, 344. January 11, 1889.

Kisterbock's Appeal.

Collateral securities—Redemption of—Rights of holder—Pledge of fraudulently issued stock—Liability of corporations on fraudulently issued stock—Basis of.

A stock certificate issued by a corporation having power to issue stock, is a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon, and, although the stock has been fraudulently issued, to claim the benefit of an estoppel against the corporation in his favor when a *bona fide* assignee.

The right of the holder of fraudulently issued stock of a corporation to claim an estoppel against the corporation depends upon his equity. If he has expended money upon the faith of the official certificates of the officers of the corporation, he has a right to be indemnified to the extent of his expenditure against loss from false certificates, but only because of the fact of his expenditure.

When the pledgee of fraudulently issued stock of a corporation has establishd his claim to indemnity against the corporation, and has received in settlement of his claim genuine shares of stock in said corporation, the pledgor of said stock, who never advanced any money thereon, or parted with anything on the faith of the certificate, has no equity to redeem the genuine stock on the re-payment of the advancements made to him with interest.

A., holding certificates of stock, issued in the names of X. and Y., with powers of attorney to transfer the same executed in blank by said X. and Y., delivered the same to B. as collateral security for certain notes for money loaned A. by B. These notes were renewed from time to time, and the certificates were transferred on the books of the corporation to B. It was thereafter discovered that these certificates had been fraudulently issued. In a proceeding in equity against the company by B., a decree was entered in B.'s favor for the same number of genuine shares of stock, or their then value in cash, which did not equal the amount of B.'s advancements to A. with interest. B. accepted the shares of stock. A. subsequently filed a bill in equity to redeem this stock still remaining in B.'s possession on repaying the advancements with interest. It did not appear that A. had advanced any money on these certificates or parted with any value on the faith of them. A decree having been entered in A.'s favor, on appeal by B.:

Held, that what was pledged by A. to B. was not shares of stock, but a right to indemnity on account of the *bona fide* advancements to B. of his own money; that it was the advancement of money by B. and not the giving of the notes by A. which conferred the right to indemnity; that B. alone was entitled to this indemnity; that all the relief that could be given or was given in virtue of that right to indemnity had been actually and properly given to B., and, therefore, A.'s bill should have been dismissed.

Appeal of Josiah Kisterbock from a decree of the Court of Common Pleas No 8, of Philadelphia County.

Bill in equity, wherein William T. Elbert was plaintiff, and Josiah Kisterbock and the West Philadelphia Passenger Railway Co. defendants.

The bill averred: That on March 18, 1876, Elbert gave Kisterbock three notes for $11,000 each, which were renewed on August 9, 1877, and were then increased to $11,500 each, and his pledge as collateral security for the said notes of 300 shares of the capital stock of the West Philadelphia Passenger Railway Co., belonging to the complainant; also, a surrender of the pledged certificates to the railway company, and the issuance to Mr. Kisterbock in lieu thereof of certifi-

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cates for a like amount of shares in his name. These notes were all in this form :—

PHILADELPHIA, 9th August, 1877.

Two months after date I promise to pay to the order of myself $11,500, without defalcation, for value received, having deposited herewith one hundred shares of West Philadelphia Passenger Railway Company's stock, upon which it is agreed to keep a margin of ten per cent. good, which I authorize the holder of this note, upon the non-performance of this promise at maturity, to sell either at the Brokers' Board or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary expenses and charges, holding me responsible for any deficiency.

Payable at W. M. Capp.

WILLIAM T. ELBERT.

Indorsed, "William T. Elbert."
Due October 9–12.

The bill further averred that the complainant, by reason of financial straits, had been unable at or since the maturity of said notes to pay the same, or to redeem his said collateral. That the defendant, Kisterbock, sometimes pretends that in or about the year 1880, without notice to or consent of complainant, he exchanged said stock so pledged to him for other stock of the same company, representing a smaller portion of interest in the said company than the stock originally pledged to him; and that he holds said substituted stock as his own property, without any liability to account therefor; whereas, if said exchange were actually made, the complainant is entitled, on the coming in of the evidence in the cause, to elect to treat such exchange as a wrongful conversion of the original pledge, or to treat the new stock as a substituted pledge, as he may deem most beneficial to himself. That said defendant, Kisterbock, still had in his possession, or under his control, the said notes, and that complainant needed discovery of the form and contents thereof.

The bill further averred that the value of these shares, with the dividends paid thereon, exceeded the debt due defendant by plaintiff with interest, and prayed, *inter alia*, an accounting by defendant, and general relief.

The West Philadelphia Passenger Railway Co. filed a cross-bill, alleging that the above shares of stock were not genuine, but had been fraudulently issued; that the plaintiff never advanced any money therefor, and had no right or interest in the shares; that the railway company had issued genuine shares in place thereof, and was entitled to receive from said Kisterbock the excess in value of said shares, above his advances, with interest, and prayed an account and general relief.

The defendant's answer admitted that the above shares of stock had been fraudulently issued, but averred that the liability of the railway company thereon had been determined by a suit in equity, wherein it was decreed that said defendant was entitled to recover thereon the whole amount advanced by him, amounting, with interest, to over $40,000; that the stock of said company was then worth less than $80 a share, and that in settlement of his debt he accepted and received three hundred genuine shares of stock, and surrendered the fraudulent shares; that plaintiff had never advanced any money on said shares of stock, and was not entitled to the relief prayed for.

The case was referred to Abraham M. Beitler, Esq., as Examiner and Master, whose report is substantially included in the opinion of the Supreme Court, *infra*. He found, *inter alia*, that the genuine stock issued to defendant was not, in fact, at that time worth the amount of his advances to plaintiff.

To this report numerous exceptions were filed, all of which, except one relating to the method of determining the amount to be recovered, were dismissed by the Court, in an opinion, wherein it was said, *inter alia* :—

"The present case differs from the other suits brought by this plaintiff in the one important respect, that to enable himself to recover he has but to make out his title to the subject of the controversy, the shares, namely, of the capital stock of the West Philadelphia Passenger Railway Company. The defendant here has not sold, as did the other defendants, the shares pledged, and thereby incurred a loss of the difference between the proceeds of the sale and the amount of money lent upon the security of the stock.

"On the contrary, he still retains the latter, which, in his hands, has been and still is worth much more than the plaintiff's debt to him.

"The only answer he can make to a demand for an account is, to show that the plaintiff has no title to the thing pledged, or that the plaintiff should have proceeded at law, or that he should have tendered the amount of the debt, etc., before bringing suit. . . .

"In respect to the plaintiff's title, inasmuch as it is settled that the stock pledged by him was his when pledged to the defendant, the pledgee must show how and when the title to it passed out of the plaintiff and became his, the defendant's. This, in our opinion, he has entirely failed to do.

"The re-distribution of the stock, when it became necessary to ascertain the rights of the holders of genuine stock of the West Philadelphia Passenger Railway Company, and those of the holders of the over-issued stock, divested no titles and created none, beyond the change which was involved in compelling the railway company to acknowledge as valid the fraudulent acts of

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certain of its officers. It is true that the counsel for the defendant has cited the Supreme Court in Jeanes's Appeal (20 WEEKLY NOTES, 127) as ruling that Elbert, the plaintiff, had no equity, and has made, in support of his view, a quotation from the opinion of the Court to the effect that Jeanes's Appeal was based substantially upon the same facts as five appeals taken by Elbert, and argues that the feature which these cases had in common, could not have been the distribution made among themselves by the members of the firm of Isaac Jeanes and Company, as in fact there was no such distribution in the other cases, and insists that a want of equity on the plaintiff's part must have been what the Supreme Court had in mind. While the distribution, instead of a sale which took place in Jeanes's case, was certainly thought by this Court to be a violation of the contract of pledge, and was made the ground of ruling in that case different from those which were made in the other cases by it and by Court of Common Pleas No. 2, yet as no allusion was made by the Supreme Court to any want of equity on the plaintiff's part, it is easier to suppose that the Court regarded the appeals as all showing a sale by the pledgee, and the distribution made by the Jeanes, followed by a sale, as being also such a sale, than to put any other interpretation upon their words."

The Court then entered a decree that the plaintiff was entitled to redeem his stock on payment to Kisterbock of the amount of his debt and interest, less the amount of the dividends he had received from the railway company, with interest thereon, and on failure to so redeem, the stock should be sold, and the proceeds distributed in accordance with said decree.

Whereupon the defendant, Kisterbock, took this appeal, assigning for error, *inter alia*, the decree of the Court.

John G. Johnson (*William Henry Lex* with him), for the appellant.

F. Carroll Brewster (*F. H. Cheyney* with him), for the appellee.

October 7, 1889. THE COURT. Undoubtedly, the overshadowing, controlling question in this case is, the character of the plaintiff's title.

Certainly the relation of pledger and pledgee was intended to be created by the original transaction between the parties. We should have no difficulty in enforcing the pledge in this proceeding and in accordance with the decree of the Court below, if the proper conditions existed with relation to the substance of the pledge. The case is quite peculiar, not to say without parallel, in its facts.

The plaintiff had possession of two papers which purported to be certificates of stock of the West Philadelphia Passenger Railway Company, one for two hundred and the other for one hundred shares. The former was issued in the name of John W. Patten & Son, and the latter in the name of Charles Lennig. These certificates the plaintiff pledged to the defendant as collateral security for the payment of three notes, made by himself, payable to his own order, each for the sum of $11,500. The actual transaction was made by one Capp, who borrowed the money from the defendant and delivered to him the notes of Elbert and the certificates. The money was borrowed and the notes and certificates delivered in 1876, and the notes were renewed from time to time. The certificates were transferred early in 1876 on the books of the company into the name of the defendant and continued to be held by him. In September, 1877, it was discovered that these certificates along with a large number of others, had been fraudulently issued by John S. Morton, the president of the company, and that they were altogether false and spurious. The plaintiff being utterly insolvent neither redeemed them nor at any time offered to pay any part of the debt.

Upon proceedings instituted against the company, it was determined that as against persons who had paid for the stock or advanced money upon the faith of it, the company was estopped from denying its legality, and was bound to either issue genuine shares, or pay value, for those which were false. The Court in which those proceedings were conducted specially decreed that Josiah Kisterbock was entitled to receive certificates for 300 genuine shares of the stock; in case of his refusal to take shares he could take $75 per share in money for the spurious shares held by him. He elected to take the 300 shares, and did so, and it is these shares which the plaintiff claims to have decreed to him upon payment of the debt and interest due to Kisterbock. The latter claims they are his absolutely without liability to account to the plaintiff for anything connected with them.

It is entirely undisputed that the plaintiff never bought these shares, and that when they were pledged to Kisterbock he alone advanced all the money that was advanced upon them and on the faith of their genuineness.

It has not been found as a fact by the Master in the present case that the plaintiff was ever the owner of these stocks, or that he ever paid any money for them or advanced any money on them to Morton or to any other person. The plaintiff alleged that there was a large balance of account due to him by the defendant from the year 1870, and that he received these shares, or was entitled to hold them as security for the payment of that indebtedness, and of other and further indebtedness due upon an accounting. But he also alleged and testified that he borrowed money for Morton on the shares of West Philadelphia Railway

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stock, giving his own notes, and pledging the certificates of stock as collateral. The whole subject of these transactions, and of Elbert's claim, both as a creditor of Morton upon an accounting, and as a lender of money to Morton upon faith of these stocks, was thoroughly and most fully considered and decided by the Master in the present case, when acting as Master in another case, in which Elbert claimed to recover for the value of shares of stock in the same company pledged to Isaac Jeanes & Co. (See Jeanes's Appeal, 20 WEEKLY NOTES, 127.) The Master then reported that there was no sufficient evidence before him to prove the alleged indebtedness of Morton to Elbert, and he ruled that if the false stock certificates were delivered to Elbert for security for an antecedent debt he was not a holder of them for value. The Master further held in that case that the true subject of the pledge was, not shares of stock, but a right to be indemnified for the fraudulent acts of the company's officers, and even conceding that the plaintiff had an interest in the stock, to that extent it passed to Jeanes & Co. when they advanced money on the faith of the stock and that it was fully asserted and availed of by them. The Master also held that the new shares issued to Jeanes & Co. were lawfully disposed of by them under powers contained in the pledge, without liability to account to Elbert, and he therefore recommended a decree dismissing the plaintiff's bill. On exceptions filed the Master's report was overruled by the Common Pleas and the plaintiff was held to be entitled to a recovery.

While the record of that case was in that condition the present case came before the same Master, and in obedience to the decree of the Court in the Jeanes case he declined to sustain his own views, but reported that the plaintiff was entitled to a decree because the Court of Common Pleas had so decided in the case of Jeanes. Since then, however, this Court sustained the Master's report in that case and reversed the decree of the Common Pleas. We, however, then considered but the one question of the power of the pledgees to sell the pledge and the lawfulness of its exercise. That question does not arise in this case as the pledgee here still holds the new shares of stock issued to him in exchange for the false shares received from Elbert. Upon a present examination of the report of the Master in the Jeanes case we fully approve the views expressed by him as to the true character of the pledge. It was not a pledge of shares of stock but simply of a right to receive indemnity for the fraudulent acts of the officers of the railway company in issuing the spurious shares. The Master in thus regarding the subject simply followed the ruling of this Court in the case of Mount Holly Paper Co.'s Appeal (99 Pa. 513) [S. C. 12 WEEKLY NOTES, 228], in which SHARSWOOD, C. J., speaking of the right of the pledgees of certain other false shares of the stock of this same West Philadelphia Passenger Railway Company by the same John S. Morton and other officers of the company, said: "Their claim on the company was not, indeed, on the stock. It was a claim to be indemnified for the fraudulent acts of the officers of the company from which they allege that they have suffered damage." In the original proceeding in the suit of Swain *et al. v.* The West Phila. Pass. Railway Co. [Wright's Appeal, 12 WEEKLY NOTES, 225], the Master based his report upon the proposition that, "The liability of the railway company arises on the principle of estoppel which the necessities of trade and commerce require. Stock certificates issued by a corporation having powers to issue, is a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor against the corporation." Citing Holbrook *v.* Zinc Co. (57 N. Y. 616); Willis *v.* Darby Railway Co. (6 WEEKLY NOTES, 461); Bahia and San Francisco Railway Co., *In re*, (L. R. 3 Q. B. 585); Bank of Kentucky *v.* Bank (1 Pars. Eq. Cas. 180). Undoubtedly this is the correct principle upon which to administer relief in all such cases. This being so it will be seen at once that the right to relief depends upon the equity of the person claiming it. If he has expended money upon the faith of the official certificates of the officers of the company he has a right to be indemnified, to the extent of his expenditure, against loss from false certificates, but only because of the fact of his expenditure. The false certificates are no certificates in legal contemplation and give no rights of their own force. But the act of the officers in issuing them, having been accepted and acted upon, by another, the company cannot be heard to deny the truth of the fact represented. It is simply the application of the principle well expressed in Freem *v.* Cooke (2 Ex. Rep., Wels., Hurl. & Gor., 654), and *In re* Bahia & San Francisco Railway Co. (*supra*), that, "If you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact." But if what was pledged by Elbert to Kisterbock was not shares of stock, but a right to indemnity on account of a good faith advancement of Kisterbock's own money, made by Kisterbock himself, it is difficult to understand upon what principle the plaintiff is entitled to any recovery upon any view of the facts of this case. There is no finding on this record that Elbert ever owned or bought or paid a dollar of money for these particular shares of

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stock. They were not even *prima facie* his as they were issued in the names of other parties and were transferred into the name of Kisterbock immediately after he received them. Elbert was himself examined and cross-examined as a witness at great length. But he gave no testimony as to his acquisition of these particular shares which were delivered to Kisterbock nor to any of the facts of the transaction. He said he received very many shares from Morton, that those he received in 1870 were as security for the indebtedness due him by Morton, and that he also received shares upon which to borrow money for Morton. He had no written pledge of any of the shares nor could he state any oral pledge of the same. At the end of a long examination on this subject he was asked: Q. Then all the pledge that ever was made, there being no written pledge, orally, was by giving stock in the way that the stock was given? A. Yes, sir.

In answer to another question he said, "I held all that stock as collateral for indebtedness to me." This was 2567 shares including the 300 of Kisterbock and all designated in a letter of Jan. 11th, 1877, from Morton to him.

There is no finding that Elbert ever advanced any money on the shares delivered to Kisterbock, either to Morton or to any one else. There is not even a finding that they were delivered to Elbert as security for an antecedent indebtedness due by Morton to him, or even that there was such indebtedness. But if there had been such a finding, or if such had been the fact, Elbert would not have been entitled to any relief on that account as against the company, because, in that event Elbert parted with nothing on the faith of the certificate, and he would fail to bring himself within the principle, upon which alone indemnity could be given, or was in fact given, when the decree was made in the case of Swain *et al. v.* The Company. Even granting that because Elbert gave his own notes for the money borrowed from Kisterbock, and therefore had an interest equal in extent to that of the latter, it was the advancement of money and not the giving of notes which conferred the right to indemnity, and all the relief that could be given, or was given for that cause, was actually and properly given to Kisterbock.

There could not be a right to indemnity to Kisterbock and a further right to indemnity to Elbert arising out of the same transaction. Most clearly Kisterbock was entitled to it but when it was given to him equity was satisfied; the subject was exhausted. Elbert could suffer no injury on account of the notes because Kisterbock held them and he having accepted the new shares in full payment of the debt for which the notes were given of course could recover nothing from Elbert. Kisterbock had the alternative of accepting seventy-five dollars per share in money for the false shares, or instead thereof three hundred new and genuine shares. Had he accepted the money it would have been an end of the matter and the present case would never have been heard of. But he chose to accept shares instead of money. Why should there be any difference to him in the result of his accepting one or the other of the alternatives? What he took, and what he had a right to take, was indemnity, such indemnity as the law could give him. But it was his, not Elbert's; his absolutely, not conditionally. It was personal to himself, not because of the certificates which he received from Elbert, but because he, as an individual, had parted with his own money upon the faith of certifications made by the officers of the company, the truth of which certifications the company could not be permitted to deny as against Kisterbock. This was something which never belonged to Elbert and which he never passed to Kisterbock. If Kisterbock had never advanced the money he would never have held this right to indemnity even though he might have held the false certificates.

It follows that the trust which is a quality of pledge, and goes with it ordinarily, did not go with, and never attached to, this right to indemnity. It was a right which only came into existence in favor of Kisterbock, not by force of the pledge, but by force of his good-faith advancement of his own money. It was never clogged with any trust in favor of Elbert because the fact upon which alone it was founded had no existence with Elbert or in his favor, or in consequence of any money or property parted with by him. It was the money which Kisterbock parted with, which *created* the right to indemnity and that money was his alone—and its advancement was the sole basis upon which the decree was made in the original case. These views are radical and reach to the very foundations of the plaintiff's claim of title to equitable relief. They are in hostility with such claim and require a reversal of the case upon its ultimate merits.

The decree of the Court below is reversed at the cost of the appellee, and the bill is dismissed with direction that all the costs of the case be paid by the plaintiff.

Opinion by GREEN, J. C. K. Z.

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Jan. '89, 472. May 1, 1889.

City of Meadville v. Dickson.

Constitutional law—Municipal liens—Classification of cities—Acts of May 23, 1874, § 57; *April* 11, 1876, § 16, *and May* 17, 1887.

The 57th section of the Act of May 23, 1874 (P. L. 269), providing that any city of the third class may become subject to the provisions of said Act, and that the mayor and councils of said city may effect the same by an ordinance thereof duly passed, is valid and constitutional, and is not obnoxious to the charge of being special or local legislation.

City of Reading *v.* Savage (23 WEEKLY NOTES, 332) followed.

The 16th section of the Act of April 11, 1876 (P. L. 20), which amends the Act of May 23, 1874), by providing that any city of the third, fourth, or fifth class may become subject to the provisions of the Act of 1874, or to any portion or portions of said provisions by ordinance of councils, etc., is unconstitutional.

Ayars's Appeal (122 Pa. 266) followed.

The city of Meadville by ordinance of councils duly passed, under the authority of the Act of April 11, 1876, § 16, adopted the provisions of sections 47, 48, and 49, of the Act of May 23, 1874, and filed liens against properties upon a certain street for their proportionate share of the cost of a sewer laid thereon. There was no other law authorizing the city of Meadville to charge the cost of sewers constructed against adjoining property:

Held, that the lien was properly stricken off.

A lien is strictly the creature of statute, and without such authority it cannot be lawfully entered.

The Act of May 17, 1887 (P. L. 117), legislating for cities of the third, fourth, and fifth classes, of which the latter two classes do not exist, is so interwoven with illegal classification that no portion of it can be saved.

Error to the Common Pleas of Crawford County.

Scire facias sur municipal lien, filed by the city of Meadville against property owned by Mary Dickson and Jane Dickson, for proportionate cost of a sewer laid along North Street, in said city.

A rule to show cause why the scire facias should not be quashed and the lien stricken off was made absolute, the Court delivering the following opinion, wherein the facts are set forth:—

"The claim in this case was filed to charge the real estate of the defendants, fronting on North Street, in the city of Meadville, with the proportionate cost of a sewer constructed along said street of said city.

"The sewer was constructed under the provisions of sections 47, 48, 49 of the Act of May 23, 1874; and of the supplement of April 11, 1876, which sections had been adopted by the city of Meadville by ordinance No. 168, approved June 8, 1878, in accordance with the provisions of the Acts referred to, relating to the construction of sewers. There was no law applicable to the city of Meadville which authorised the charging of the costs of sewers constructed against adjoining property.

"The defendants now ask that the lien filed be stricken off, for the reason that section 16 of the Act of April 11, 1876, authorizing the adoption by ordinance of a whole or part of the Act of May 23, 1874, and its supplements, is unconstitutional; in that it is special legislation, and therefore in violation of section 7, Article III. of the Constitution.

"The question raised was decided in Appeal of City of Scranton School District (113 Pa. St. 176), and in City of Reading *v.* Savage (22 WEEKLY NOTES, 3).

"These cases hold that the provisions of the Acts of 1874 and 1876, authorising cities to adopt by ordinance the whole or a part of the provisions of said Acts, are unconstitutional. It follows, therefore, that claims filed under provisions of these Acts so adopted cannot stand. The case of the City of Reading *v.* Savage (*supra*) also decides that taxes charged under said Acts are not validated by the provisions of section 2 of the Act of May 24, 1887.

"It is therefore ordered that the lien filed in this case be stricken from the record, and that all proceedings thereon be quashed."

Whereupon this writ was taken, and the action of the Court assigned for error.

Arthur L. Bates, for plaintiff in error.

Thomas Reddy (*Haskins & McClintock* with him), for defendants in error.

October 14, 1889. THE COURT. In City of Reading *v.* Savage (23 WEEKLY NOTES, 332), we decided that the fifty-seventh section of the Act of May 23, 1874 (P. L. 269), providing that any city of the third class may become subject to the provisions of said Act, and that the mayor and councils of said city may effect the same by an ordinance thereof duly passed, is valid and constitutional, and is not obnoxious to the charge of being special or local legislation. We need not repeat the reasons there given for this ruling. The decision was made after mature consideration and a re-argument of the case.

We are now required to pass upon the sixteenth section of the Act of April 11, 1876 (P. L. 20), which amends the fifty-seventh section of the Act of May 23, 1874, by providing that any city of the third, fourth or fifth class may become subject to the provisions of the Act of 1874, or to any portion or portions of said provision; "And the mayor and councils of such city may effect the same by an ordinance thereof, duly passed by a majority of the members elected to each branch

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thereof voting in favor of the same, which ordinance shall recite fully such provisions, or such portion or portions of such provisions, to which it is proposed to make such city subject," etc.

This claim was filed by the city of Meadville to charge the real estate of the defendants below with the proportional cost of a sewer constructed along North Street in said city. The sewer was constructed under the provisions of sections 47, 48, and 49 of the Act of May 23, 1874, which sections were adopted by the city by ordinance of councils, in pursuance of the 16th section of the Act of April 11, 1876. If the latter Act is constitutional the city has a valid lien for the construction of this sewer.

It was competent for the city, acting through its councils, to have become subject to all the provisions of the Act of 1874 by an ordinance duly passed. This much is settled by City of Reading *v.* Savage, *supra.* Relying, however, upon the validity of the Act of 1876, councils accepted only a portion of the provisions of the Act of 1874, and proceded to construct its sewer and to file liens for the cost thereof against the owners of abutting property.

We need not stop to discuss the question whether the acceptance of a portion only of the provisions of the Act of 1874 would be sufficient to bring the case within the reasoning in City of Reading *v.* Savage, had such power been conferred by a valid Act of the Legislature. The Act of 1876 was carefully considered in Ayars's Appeal (122 Pa. 266), and held to be unconstitutional. In speaking of this Act, as well as the later Act of May 24, 1887 (P. L. 204), it was said by our brother STERRETT, in delivering the opinion of the Court: "It has been suggested that such provisions of the classification Acts, as are not in harmony with the Constitution, may be eliminated without destroying other provisions thereof; but that is no answer to the crowning vice of unnecessary and excessive classification which stands out in bold relief on the face of both Acts, and of which nearly all their provisions are predicated. Those Acts doubtless contain many wise and wholesome provisions, but they are so interwoven with and dependent on others that are unconstitutional and void, that neither of the Acts of 1876 or 1887 can be sustained even in part."

An examination of the sixteenth section of the Act of April 11, 1876, shows that it comes directly within the above remark of Justice STERRETT. If it stood alone as an independent section of the Act of 1876, and unaffected by the vice of that Act, it might be supported. In such case it would be our duty to consider the further question above suggested, whether an acceptance of a portion only of the Act of 1874 would come within the ruling in City of Reading *v.* Savage. As the matter stands that question is not reached. Adhere to the ruling in Ayars's Appeal and under that decision this lien falls.

It was urged however, that the lien may be sustained without the aid of the Act of 1874, and Borough of Greensburg *v.* Young (53 Pa. 280), was cited to show that a borough ordinance requiring a lot owner to pay for paving and curbing opposite his lot was valid and reasonable without special legislative authority. That case does not go to the extent of deciding that a lien may be filed without such authority. A lien is strictly the creature of statute, and without such authority it cannot be lawfully entered. Nor do we think the lien is helped by the Act of May 17, 1887, the second section of which provides, *inter alia*, that "All taxes heretofore levied in any of the cities of the third, fourth, and fifth classes, in any one year, in amount not exceeding twenty mills on the dollar, and all assessments made in pursuance of the ordinances of such cities, are hereby made valid. Such taxes and assessments may be collected by action of debt, or proceeding by scire facias may be had to collect any liens filed therefor, in a manner similar to proceedings upon mechanics' claims."

It will be seen that this Act legislates for cities of the third, fourth, and fifth classes. Under the decision in Ayars's Appeal there are no cities of the fourth and fifth classes. Hence we cannot say that the Legislature would have passed the Act with the cities of the fourth and fifth classes eliminated. It shows upon its face that it was intended to apply to three classes. It is so interwoven with illegal classification that we cannot save any portion of it. This view renders it unnecessary to consider any further objections to this Act.

Judgment affirmed.

Opinion by PAXSON, C. J. H. C. O.

May '89, 12. June 4, 1889.

Small v. Small.

Married Persons' Property Act of June 3, 1887 — Wife's right to sue husband in her own name — Interpretation of statutes.

Section 4 of the Act of June 3, 1887 (P. L. 332), which provides: "Husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, for the protection and recovery of their separate property, as unmarried persons," does not authorize a wife to bring suit against her husband in her own name.

While this language is broad enough to include suits by the husband and wife against each other, yet it must be construed with the other sections of the Act. No single sentence, even though it form a separate section of a statute, must be construed apart from the

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context, or without regard to the subject-matter and the general purpose sought to be accomplished.

A radical change in the policy of the law should not rest on inference or implication from general words, but should appear by the explicit and unquestionable mandate of the Legislature. The change, if made, should be made in such form as to guard against the possibilities of injustice in regard to past transactions.

Error to the Common Pleas of Franklin County.

Assumpsit, by Lavina Small against David W. Small her husband, to recover certain moneys received by said David W. Small to her use.

The plaintiff set forth in her statement that her husband, David W. Small, had received certain moneys, about $2200, coming to plaintiff from her father's estate; that he had often been requested to pay the same to plaintiff, but refused so to do, whereupon she brought suit, claiming interest from September, 1882. Defendant pleaded that the plaintiff was the lawful wife of defendant, and, therefore, not entitled thus to bring suit. To this plea plaintiff demurred, and the demurrer was sustained by the Court.

At the trial it appeared that plaintiff was married to defendant in the year 1844, and had lived with him as his wife up to the time of bringing suit. That her husband had received the money sued for, as her portion of her father's estate, about the year 1856, and had never paid the same to her.

Defendant presented the following points:—

(1) The Court is respectfully requested to instruct the jury that it being admitted in evidence that this plaintiff and defendant are husband and wife, that they were married many years ago, and lievd together as man and wife from the date of their marriage until the bringing of this action, then this action cannot be maintained, and the verdict must be for the defendant. *Refused.* (Second assignment of error.)

(2) There being no evidence in this case of any promise by the defendant to repay the moneys of the plaintiff received by him, there can be no recovery. *Refused.* (Third assignment of error.)

Verdict for plaintiff for $2200, and judgment thereon, whereupon defendant took this writ, assigning for error the action of the Court in sustaining plaintiff's demurrer to defendant's plea, and the answers to the above points.

F. M. Kimmell and *W. Rush Gillan*, for plaintiff in error.

Alexander Stewart and *O. C. Bowers*, for defendant in error.

October 7, 1889. THE COURT. The single question presented is whether the Act of June 3, 1887 (P. L. 332), known as the Married Persons' Property Act, authorizes a wife to sue her husband directly and in her own name for money received by him from her separate estate.

Section 4 of the Act reads: "Husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, for the protection and recovery of their separate property, as unmarried persons."

This language is general and unlimited. It makes no exception of actions against each other, and, taken by itself, its natural meaning is, perhaps, broad enough to include them without straining. But no rule of judicial interpretation is wiser or better settled than that which prohibits the taking of a single sentence, even though it form a separate section of a statute, and construing it apart from the context or without regard to the subject-matter and the general purpose sought to be accomplished. The present Act gives notable warning of the danger of such a course. Though not long, it is extremely intricate and confused if not contradictory. The first two sections make the same general grant at least four times, and each time with such variation that though the general purpose is clear, very difficult questions may be raised as to the exact limits of the powers conferred. Section 3 then proceeds to grant certain specific powers, all of which, except for the doubt raised by this section itself, are clearly conferred by parts of the language of the preceding sections. It is a striking example of what is not infrequent in legislation, and the avoidance of which I may say in passing is by no means the least difficult of judicial accomplishments, the desire to enforce and emphasize the intention leading to a second expression which tends to becloud the first. Next is the 4th section, with which we are immediately concerned. Like the preceding section, it seems to be the product of a desire to emphasize a grant already abundantly implied in the control over property, "with all the rights and liabilities incident thereto" of the first section, and expressly given in the capacity to sue and be sued provided by the second. Can it be fairly construed to mean more than this? The general purpose of the Act is clear enough. It is to give married women the same freedom of ownership, control, and disposition of their property and earnings, and the rights and remedies incident thereto, that men have over theirs. It accordingly confers upon them the absolute power of disposition of their personal property, but requires the joining of the husband in the mortgage or conveyance of real estate. The rights of action conferred by implication in section one, as already said, or expressly in the later sections, are given as means of maintaining the rights of property conferred by the sections themselves, and there is nowhere any indication of a purpose

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to extend them beyond their character as a necessary incident for that purpose. Still less is there any indication of a purpose to extend the rights or powers of the husband, which a right to sue the wife under the construction of section 4 contended for would certainly do.

If we look not only at the general intent of the Act, but more closely at the language used, we are led to the same result. The purpose is not only expressed broadly in apt language once, but is repeated and reiterated with superabundant caution. In this varied and detailed consideration it is impossible to suppose that so important a branch of the subject as the right of action between husband and wife should not have been thought of, or being thought of should not have been granted in unequivocal terms if intended to be granted at all. To legislators, versed in the principles of the common law, it would immediately suggest itself as a distinct and momentous departure from the legal policy of centuries, which ordinary phraseology, however general, would not commonly be understood to intend, and it is inconceivable that under such circumstances it should be granted obscurely and by implication. As said by WOODWARD, J., in Ritter *v.* Ritter, (31 Penna. 398), "if the Legislature meant that such actions as the present should be sustained, they had command of a very copious language in which to express their will." The Acts of April 11, 1856 (P. L. 315), and June 11, 1879 (P. L. 126), make provisions for actions by the wife against the husband in cases of desertion, or neglect or refusal to support, and we conclude that the Legislature thought this remedy ample without extending it to suits between parties living amicably together in the marital relation.

This view is confirmed almost to a demonstration by the legislative history of the Act of 1887. The fourth section follows closely the English Married Women's Property Act of 1882 (45 and 46 Vict., c. 75, Law Rep. Statutes, 1882, p. 458), and, as originally introduced into the Senate, it provided, as that Act does, that "husband and wife shall have the same civil remedies upon contracts in their own name and right against all persons, *including each other*," etc. (Legislative Record, 1887, p. 896.) This specific provision which put the change in the previous law into that precise, definite, and unquestionable form which its importance demanded, was struck out, and the section passed without it. The inference from this action is irresistible, that the Legislature did not intend that actions between husband and wife while living together should be authorized.

It is argued that as the language is the same with respect to both husband and wife, it must authorize both or neither to sue the other, and, therefore, if it does not authorize the husband to sue the wife, we shall have the absurd result that the Legislature has solemnly conferred upon a married man the same right to sue strangers that an unmarried man possesses. This is not without plausibility and, if the section stood alone, would be of much force. But taken in its connection, it is an additional link in the argument that the husband's rights, except as involved in the regulation of his wife's, were not intended to be affected at all. The same may be said of the phrase "their separate property" in the same section. What is a husband's separate property? In the language of the law, such a phrase is as absurd as the result pictured in the argument referred to. In truth the real explanation of both phrases, entirely unsuitable as they stand, is the failure to notice the effect of striking out the words "including each other" contained in the Act as originally introduced. With these words left in, the absurdity as to suits by the husband disappears, and the phrase "separate property," though not elegant as to legal style, is clear and definite in its meaning.

There are several other changes from the first draft to the Act as finally passed, such as the striking out of sect. 3 of the power to convey real estate without the husband joining, and the attaching of a proviso to the contrary to section one, etc., which indicate that the Act as originally introduced was much more radical in its changes than the Legislature was willing to pass, and we think it clear that the authority to sue each other was one of the proposed changes which were refused a sanction.

One further consideration which may be adverted to is the hardship and injustice which might arise as to past matters by the grant of a universal and unrestricted right to sue upon a claim which the defendant may have had no reason to expect or foresee. The present case affords a striking example of these dangers. Of course, I do not speak of the moral merits of the case, for of these I know nothing, but of the legal possibilities. The husband received this money about 1856. There is no claim that he received it against the wife's will, nor any evidence that it was not used for their mutual benefit in the support of the family. Thirty years after it has been thus spent, presumably with her entire approval, a difference or quarrel occurs, and the wife sues to recover the money. No promise to pay is proved or pretended. The plaintiff rests on the presumption that her husband received it as trustee for her, and as her counsel truly say, "the burden is upon him to prove the contrary." Yet the very same Legislature that is claimed to have put this action and its consequent burden upon him, in a most ably drafted and elaborately considered statute on the competency of witnesses,

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expressly denied him the right of testifying that the money was given to him by her, or that he spent it at her direction. This, of course, is a legislative rather than a judicial argument, but it adds force to the considerations which induce the Court to say now, as it has said with marked emphasis heretofore, that so great a change in the policy of the law, upon a subject that may come home to every householder in the Commonwealth, should not rest on inference, or implication from general words, but should appear by the explicit and unquestionable mandate of the Legislature, and when the change is made, if at all, it should be done in such form as to guard against the possibilities of injustice in regard to past transactions such as are suggested in the present case.

Judgment reversed.

Opinion by MITCHELL, J. H. S. P. N.

Jan. '89, 233. April 9, 1889.

Schuylkill River East Side Railroad Company v. Stocker et al.

Railroad companies—Land damages—Measure of—Evidence as to value—Experts and expert testimony—Jury—Rights of to books and papers.

In a proceeding to recover damages for land taken by a railroad company under the right of eminent domain, the measure of damages is the difference between the market value of the whole property before and after the building of the railroad, and therefore a witness, who has proved his acquaintance with the property, and that he is qualified to testify as an expert as to its value, must testify as to the value of the whole property before and after the building of the railroad, and not as to the value of a part thereof, though he states as his opinion that that part of the property omitted in his valuation would not be affected by the railroad in question.

While in a proceeding to recover damages for land taken by a railroad company under the right of eminent domain, a witness as to the value of the land may consider and estimate in forming his opinion the possible uses of the ground, and the jury may do the same, yet in determining the damage to city real estate, containing about eighty-four acres, evidence as to improvements upon a square of ground, eight squares away from the land in question, is too remote to base any proper and legitimate inference as to improvements on the land in question, and is therefore inadmissible.

Penna. Schuylkill Valley R. R. Co. v. Cleary (23 WEEKLY NOTES, 529) followed.

In a proceeding to recover damages for land taken by a railroad company under the right of eminent domain, a sewing-machine agent who has charge of neighboring real estate, but does not testify to any other basis for his knowledge of the value of the land in that neighborhood, is incompetent to testify as to the general market value of the land in dispute.

When in a proceeding to recover damages for land taken by a railroad company under the right of eminent domain, the assessments for taxation of the owner's land have been admitted in evidence, it is not error for the Court, having charged the jury to consider these assessments for what they were worth, to further charge them that there is no principle of law which makes these assessments evidence to determine the value of the ground between the owners thereof and the railroad company.

When in the above proceeding it appears that streets have been plotted over the land in question, but not opened, the jury should not consider the streets as opened streets, but may consider the value of the land as affected by the consideration that city streets were plotted upon it, and might some day be opened.

While in the above proceeding an affidavit made by the owner of the land to secure a reduction in the assessed value of his property, is admissible in evidence and may be read to the jury, the jury may not, on retiring to determine their verdict, take said affidavit out with them to the jury-room.

Error to the Common Pleas No. 4, of Philadelphia County.

Appeal of Anthony E. Stocker, for himself, Mary K. Stocker, L. Caroline Elbert, Anthony E. Stocker, Mary K. Stocker, Emily H. Stocker, executors of Anna Maria Stocker; Anthony E. Stocker, Laurette T. Coxe, and Alfred T. Coxe, in right of said Laurette T. Coxe; Martine D. French and Louis E. French, in right of said Martine; Emily H. Stocker, the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees of Louis T. Stocker, from an award made by a jury of viewers, appointed on the petition of the Schuylkill River East Side Railroad Company, to assess damages for the petitioner's entry upon and occupation of the land of Anthony E. Stocker *et al.*, in the Twenty-sixth Ward of the city of Philadelphia.

At the trial, before WILLSON, J., the following facts appeared: The defendant having taken certain land of said Anthony E. Stocker *et al.* in the construction of its railroad, the viewers appointed to assess the damages therefor awarded the owners the sum of $7098. From this award the plaintiffs took this appeal, the sole question at issue being the amount of these damages. The plaintiffs' property contained about eighty-four acres.

To prove their damages the plaintiffs offered Nathaniel E. Janney to testify as an expert thereupon. His qualifications and testimony are set forth at length in the opinion of the Supreme Court, *infra*. His testimony was objected to. Objection overruled and evidence admitted. Exception. (First, second, and third assignments of error.)

The plaintiffs also offered one Andrew Miller as a witness who testified as follows:—

By *Mr. Hart*: *Q.* Where do you live? *A.* 1322 Tasker Street. *Q.* What is your business?

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A. I have been engaged until the last week in the flour and feed business, and building; but I have retired from the flour business. *Q.* Have you built and purchased property in the vicinity of the Stocker property? *A.* No, sir. *Q.* Where have you purchased property in the southern portion of the city? *A.* I bought a square of ground running from Tasker to Morris, and from Sixteenth to Seventeenth. *Q.* That is the square that Mr. Janney spoke of as having cost $50,000. *A.* Yes, sir. *Q.* When you bought that property what was its character? *A.* It was all a lot. Only Sixteenth Street was opened through it. The balance was a flat lot—no streets. *Q.* How far was Sixteenth Street opened at that time? *A.* Down to Passyunk Avenue. *Q.* How did you develop that lot? *A.* I opened Chadwick Street first and built. (Objected to.)

Mr. Hart: I desire to show exactly what the character of improvement is in that vicinity, what has been done there, the time that it has taken to do it; and from that to show exactly what the development will be towards this property.

Mr. Addicks: This is eight squares north of this property.

THE COURT: I do not understand the exact purpose of the offer.

Mr. Hart: There has been in evidence here a purchase of property to the north of the Stocker lot. We desire to show what the development of that particular section of the city is, so that it may go to the jury for what it is worth for them to consider in saying whether this property is coming into the market or not. If, for instance, we can show that on this lot there was a character of buildings erected which was an improving characteristic of the neighborhood, that would go to the jury with one force. If, on the contrary, we show that on that particular lot there was a character of buildings going up detrimental to it, from that they might draw other conclusions; and as this man has testified to this purchase and this development, and Mr. Janney has testified to it and given that as part of the basis upon which he formed his opinion, I now want to know from the man who actually did the thing whether or not Mr. Janney is right in using that as a basis of fixing his value.

THE COURT: What is the fact that you propose to prove?

Mr. Hart: I want to show what he did there—what character of houses he built, and what the character of improvement is in that particular neighborhood, and their extent, and that it is going down further now below him.

Objected to. Objection overruled. Exception.

The witness then testified as to improvements made there as stated in the opinion of the Supreme Court, *infra.* (Fourth assignment of error.)

The defendant offered in evidence the assessments of the plaintiffs' lands for the years 1884, 1887, and 1888. Objected to. Objection sustained, and evidence rejected. Exception. (Fifth, sixth, and seventh assignments of error.)

The defendant then offered Robert E. Peterson as a witness, who, having testified that he was a sewing-machine agent, and had charge of the Bouvier estate, containing about one hundred acres, and situated near the Stocker property, was then asked: Q. Can you state from your knowledge, from having charge of that property and negotiating for its sale, what the general market value of such land was in that neighborhood, including the Stocker property, in 1885, before the Schuylkill River East Side Railroad Company constructed its line? Objected to. Objection sustained, and evidence rejected. Exception. (Eighth assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(5) The jury in this case should not treat the plotted streets on the Stocker farm as opened streets or as city streets in determining the value of the property, as such streets might at any time be changed as to their direction, width or grades, by the municipal authorities, and would require the making of extensive municipal improvements before they could be made available. But the jury are to consider the value of the Stocker farm before the taking by the railroad company, with reference to the streets or roads actually opened through, to, or along the Stocker farm, as well as the physical characteristics of said farm, in determining its value in 1885.

Answer. I do not affirm that point as it is stated. I have already instructed you upon that subject, as I believe, correctly. You are to take the ground just as it was at the time when this road went through it. So far as the streets were actually plotted at that time, if the grades then laid affected the market value of that ground, then you are entitled to consider them. Whether or not there will be any changes such as the city might make, you have no knowledge. These matters could only affect the opinions of persons who were called to testify as to the value of the ground, as they existed, as they were apparent to anybody familiar with the ground, and to that extent they might have had something to do with determining what a proper estimate should be. (Eleventh assignment of error.)

(6) The fact that the entire property of eighty-four acres was assessed in 1885 at $40,000 should be considered by the jury in fixing its fair market value. The law requires that the assessment

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shall as nearly as possible represent the price that a property would bring at a fair public sale after due notice. *Answer.* I have already said to you what I have to say on the subject of assessments. Subject to what I have said, I affirm that point. (Twelfth assignment of error.)

(7) In considering the assessed value of $40,000 of 1885, and its relation to the real or market value of the property, the jury are entitled to consider that the assessment of 1884 was also $40,000, and that it was made after an application for abatement, supported by an affidavit of Anthony E. Stocker, as executor of the estate of Caroline Stocker, deceased. *Answer.* Subject to the instructions which I have already given you upon the effect of the assessed valuation, I affirm that. (Thirteenth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"There is property, if I remember rightly, which Mr. Sylvester said he represented, which is still nearer than that I had in mind, in the neighborhood of Moore Street, property belonging to the Freeman estate, upon which he put a large value. If he has correctly represented the value of that property, then you may think that the value of this property would be larger than that put upon it by some of the defendant's witnesses." (Ninth assignment of error.)

"There has been evidence introduced into the case on the subject of assessed value of this property. I do not propose to deal with this subject at any length. The evidence was produced without objection and therefore it is evidence proper for you to consider. Personally, I do not consider that the estimate put upon the ground by the assessors of the city, confirmed by the board of revision of taxes, is evidence as between the different owners of the ground, or as between the owner of the ground and the railroad company, to determine the value of that ground. The assessor might be called for the purpose of expressing his opinion, but I do not know any principle of law which makes the opinion when put in the form of an assessment upon the records of the city, calling them records perhaps somewhat loosely, evidence between third parties in a controversy of this character. The evidence has come into the case and it is matter for you to consider in connection with all the other evidence in the case, in arriving at your own independent judgment as to what the value of the ground taken was, and as to the effect of that taking upon the entire tract from which it was taken." (Tenth assignment of error.)

At the conclusion of the charge the defendant proposed to hand to the jury, *inter alia*, the original affidavit of Anthony E. Stocker, for abatement of assessed value of the Stocker property, or a copy of it. This affidavit had been put in evidence and read to the jury, but the Court refused to allow the jury to take either out with them. (Fourteenth assignment of error.)

Verdict for the plaintiffs for $14,512.50, and judgment thereon. Whereupon the defendant took this writ assigning for error the admission and rejection of testimony, the answers to points, the charge of the Court, and the refusal to allow the paper to be taken out by the jury, as above set forth.

William H. Addicks (*Lewis C. Cassidy* with him), for the plaintiff in error.

John G. Johnson (*Gavin W. Hart* with him), for the defendants in error.

October 7, 1889. THE COURT. The witness, Nathaniel E. Janney, was examined on behalf of the plaintiffs to prove the amount of damage done to the land of the plaintiffs, by reason of the location and construction of the defendant's railroad upon and through it. The entire property is a tract of unimproved land, containing about eighty-four acres, lying in the southern part of Philadelphia. Oregon Avenue and Moyamensing Avenue are streets plotted, but the former not opened, traversing the tract east and west and paralleled to each other. The whole tract is continuous and extends north of Oregon Avenue and south of Moyamensing Avenue. The railroad is laid upon Oregon Avenue, running across the tract, and takes about one and seven-tenths acres. No streets are opened on the tract except Moyamensing Avenue, which was an old country road recognized on the public plans. The property extended about five or six squares north and south of Oregon Avenue. Mr. Janney being interrogated as to his acquaintance with the property said that he had visited it for the purpose of ascertaining its value in the early part of 1887. He said he looked over the property fully except the portion south of Moyamensing Avenue, he did not go into that; he had been familiar with it from passing along the avenue but not at this time. He made inquiry as to the selling price of several properties at a distance of one to two miles from the Stocker farm. He was then asked to state at what figure he valued the ground along Oregon Avenue, along the line upon which the railroad was built. To this objection was made, but the question was admitted under exception, and the witness proceeded to testify that he valued the ground on Oregon Avenue at $5000 per acre. He was then asked to value the part of the tract north of Oregon Avenue, when, after replying that he had just fixed in his mind the value of that general piece, he was asked to state its value in December, 1885, to which he replied that in his judgment there was no material difference in value between 1885 and the time he examined it, which was in 1887. This evidence was objected

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to and admitted under exception. The further examination of the witness developed the fact that the land along Oregon Avenue consisted of two pieces, one north of the avenue containing a little over thirteen acres, and the other south, about eighteen acres, and these two pieces the witness valued at $5000 per acre. He was then asked to describe the effect of building the road upon these two pieces, which being objected to on the ground that the witness must testify as to the effect upon the whole property, the objection was overruled, it being stated by counsel that the question would be followed by asking the witness as to his judgment of the effect upon the entire property—exception was taken by the defendant and the witness then testified that the effect was to depreciate the whole of the property immediately north and south of Oregon Avenue, containing together. thirty-one and eight-tenths acres, twenty per cent. of its value, which with the ground taken amounted to $40,270. He next answered that he thought the railroad would not affect the value of the part below Moyamensing Avenue one way or the other. On cross-examination he was asked: "*Q.* Give the value of the entire Stocker farm prior to December, 1885? *A.* I have never made any calculation of the value of that portion of the farm south of Moyamensing Avenue for the reason that I gave a moment ago. I did not consider looking at it that that piece of ground was affected materially one way or the other by the presence of the road. I took the ground that I supposed to be affected, which, according to the plan submitted to me, contained about thirty-two acres, thirty-one and eight-tenths acres. *Q.* What are these thirty-one acres worth? *A.* I supposed they were worth $5000 an acre. *Q.* Down to the line of Pennsylvania railroad or beyond it? *A.* To Moyamensing Avenue is my line. *Q.* No; I mean the property to the south. *A.* As I say, I made no estimate of value upon it at all. Looking over it I considered that the only parts of the estate that were affected by that, either injuriously or beneficially, were the pieces running from the northern limit to Moyamensing Avenue. The other I made no estimate of. *Q.* Can you not give me the value of the Stocker farm below Moyamensing Avenue in 1885? *A.* No, sir; I am not prepared at once to give you any figure upon that. *Q.* Have you never looked at it? *A.* Oh, yes; I have seen it frequently. *Q.* There is part of it where the Pennsylvania Railroad runs through for four or five squares? *A.* Yes, sir. *Q.* That part of it that lies along Broad Street? *A.* Yes, sir. *Q.* What is your valuation for that? *A.* I have never fixed any valuation on that at all. *Q.* You have never valued the entire property of the Stocker estate before this Schuylkill River East Side Railroad was located over it? *A.* No, sir; not the entire tract, for the reason that I gave." He further said that he valued the two pieces on Oregon Avenue in December, 1885, at $5000 an acre, and after the road was built at $4000 an acre, and that he did not take into account in any way the piece south of Moyamensing Avenue, except that he satisfied himself the railroad did not affect it one way or the other

It will be seen that this witness, having testified that he did not visit the farm for the purpose of judging its value until in the spring of 1887, and had only seen, in passing, the part of it south of Moyamensing Avenue, was permitted to, and did testify, that he had valued a part of the farm only, containing about thirty-two acres, that he had not valued the remainder of it which contained about fifty-two acres, had taken no account of it, and had determined in his own mind that the part he did value was worth $5000 an acre in December, 1885, though he had not visited it nor investigated its value at that time at all, and that this part of the entire property, less than half of the whole, was depreciated in consequence of the railroad to the extent of 20 per cent. of its value, which would leave a resulting value of $4000 an acre in 1887. The value in 1885 was reached by an inference that there was no material difference in the value of the land between 1885 and 1887, and then being of opinion that the other part of the farm, fifty-two acres, was not affected by the railroad, he values the depreciation of the thirty-two acres at $31,800, and the ground taken at $8470. He does not give the depreciation of the whole, or even a view of the whole property, as affected by the road, but considers that one part has been depreciated by itself and the other part has not been affected, and therefore his testimony might be used with the jury to show that the depreciation of the part is the representation of the effect of the building of the road upon the market value of the whole. This is certainly not in accord with the letter or spirit of the rule which has so long been the law in this State, that the difference between the market value of the whole property, before and after the building of the railroad, is the measure of the damage to the owner. In the case of Pittsburgh, Va. & C. R. W. Co. *v.* Vance (115 Pa. 325), we held a witness to be incompetent to testify to the damages occasioned by the location and building of a railroad in circumstances somewhat similar to those developed in this case. He was only acquainted with a part of the farm; he knew nothing of the other part, and his estimate was made only as to the part he did know. In view of all the testimony of Mr. Janney, we cannot say he was entirely incompetent as a witness, because he had seen the lower part of the farm in passing along the road, and he had visited the remaining part and had estimated its value. But,

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in point of fact, he made no valuation of the larger part of the property, with which he was comparatively unacquainted, and he gave no estimate of its value as it was, either before or after the building of the road. It was never taken into his calculation; on the contrary, he excluded it from his consideration. It is true he said he thought it would not be affected by the railroad, but that consideration does not relieve either the witness or the jury from the necessity of complying with the rule of law which requires that the whole, not a part, of the property shall be valued as it was before the road was built, and again as it was after it was built. It is the difference between these two valuations which constitutes the measure of damages. But if a witness may select a portion of the whole property affected by the building of a railroad, and determine the extent to which that alone is damaged, without valuing or even examining the remainder of the property, it is evident that both the letter and the spirit of the rule will be violated. We are, therefore, of opinion that when the witness was allowed to testify to the value of a part only of the property in question, and the consequent damage sustained by that part alone, without having valued or examined the remaining part, error was committed which requires us to sustain the first three assignments. Without a careful examination of the remaining part, and having in mind the whole scope of the inquiry, the witness could not tell with any certainty whether his own views might not change as to it after a thorough inspection of the land, and a consideration of the effect of opening the railroad in such close proximity. It is not enough that he should say, in a general way, that he thought the railroad would not affect it one way or the other, when he at the same time says he did not visit it, never had been over it, and had only seen it in passing along the road. He is testifying as an expert, and should qualify himself as such by at least investigating the subject-matter of his testimony.

We think, also, the fourth assignment must be sustained. The evidence admitted under this exception took entirely too wide a range, insomuch that the learned Court below felt obliged to interfere, and say that it exceeded the limits of the admission.

The witness had bought a square of ground between Tasker and Morris streets and Sixteenth and Seventeenth, at a considerable distance from the Stocker farm, and much nearer to the built-up portion of the city. Under objection and exception he testified that he opened and built on the west side of Chadwick Street twenty-eight houses; on Seventeenth Street, twenty-five; on Sixteenth Street, twenty-five, and Bancroft, fifty-six, and that these building operations were conducted up to the time of the trial of this case. The effect of such testimony might easily be to give the jury an exaggerated idea of the value of the ground as the scene of future building operations.

While expectations in this regard might be realized in the future, a speculative element is thus introduced into the inquiry which is not legitimate. No one could possibly know whether similar results would follow upon a property so much greater in extent and so much farther removed from the closely built-up portions of the city. Sanguine anticipations might just as easily be disappointed as fulfilled by the actual course of events upon this property, and then the whole basis of the computation would disappear. The proper and legitimate inquiry in all these cases is, What was the actual market or selling value of the property, just as it was, immediately before the land was taken for the railroad, and what was its same value after the completion of the road?

Of course, the possible uses of the ground may be considered and estimated by the witness in forming his opinion, but it would be highly dangerous to permit verdicts to be founded upon a consideration of future speculative operations which may never transpire, and whose results whether profitable or otherwise cannot possibly be known in advance. We passed upon this subject in the case of Pennsylvania Schuylkill Valley R. R Co. *v.* Cleary (23 WEEKLY NOTES, 529). We there held that "the jury are to value the tract of land and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. . . . They are not to inquire what a speculator might be able to realize out of a re-sale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in." If all this is true of the very land over which the railroad is laid, how much more true must it be when the evidence relates to another and different tract, differently situated, and at a considerable distance from the tract under consideration? We think this testimony was inadmissible, and therefore sustain the fourth assignment.

We do not sustain the eighth assignment as we do not think the witness, Robert E. Peterson, was sufficiently qualified to testify.

We think the remark of the learned Judge complained of in the ninth assignment, cannot be regarded as either a direction, or even expression of an opinion, that the value of the Freeman estate as testified to by Sylvester, should affect the estimate by the jury of the value of the Stocker farm. It was a mere passing observation as to

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what the jury might think, not a suggestion that they should think in any particular way on the subject referred to.

This assignment is dismissed.

We do not think there was error in the answer to the defendant's fifth point. While it is true the jury should not consider the streets as opened streets, they might with propriety consider the value of the land as affected by the consideration that city streets were plotted upon it and might some day be opened and this was all the Court said in replying to the point. The eleventh assignment is not sustained.

We think the fifth, sixth, seventh, tenth, twelfth, thirteenth, and fourteenth assignments are not sustained. The assessed valuations were in reality admitted in evidence and might be considered by the jury for what they were worth. This the charge allowed. What the Court said about the value of an assessor's opinion as expressed in the assessment we do not regard as error. These assignments are dismissed.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J. C. K. Z.

Jan. '89, 338. April 8, 1889.

In re Ruan Street.

Constitutional law—Constitution of Pennsylvania, Art. III., § 7; Art. V., § 26—Local and special legislation—Road law—Act of May 6, 1887—§§ 1 and 2 are constitutional; §§ 3 and 4 unconstitutional—In Philadelphia the jury appointed to decide on the expediency of opening a street must also pass on the question of damages and benefits—Magnolia Avenue (117 Pa. 56), overruled.

Sections 1 and 2 of the Act of May 6, 1887 (P. L. 87), providing, *inter alia*, that viewers deciding in favor of opening or widening any public plotted street in any city of the first class, may pass on the question of benefits and damages, is not unconstitutional as local or special legislation. These sections change what was local or special in road cases in the city of Philadelphia to harmonize with the general system prevailing throughout the rest of the State.

Sections 3 and 4 of said Act of 1887, providing for the appointment of a Master and prescribing his duties in road cases in cities of the first class, are unconstitutional, violating Art. III., § 7, of the Constitution, prohibiting local or special laws "regulating the practice or jurisdiction of any judicial proceeding or inquiry."

The failure of §§ 3 and 4 of the Act of 1887 does not impair the validity of the whole Act, as enough remains forming a perfectly valid Act, containing a system complete in itself, capable of easy carrying out in practice, and not dependent on the unconstitutional portions.

Certiorari to the Quarter Sessions of Philadelphia County.

On October 19, 1887, a jury was appointed by the Court of Quarter Sessions to decide upon the question whether public necessity required the opening of Ruan Street. The Court, under the provisions of the Act of May 6, 1887, appointed a Master and a stenographer. The jury, having decided that the street should be opened, proceeded under the provisions of the first section of the said Act to assess damages and benefits. The report was filed on June 22, 1888. Exceptions were filed thereto, one of which was that the Act of 1887 was unconstitutional. Upon argument the Court dismissed the exceptions; whereupon this writ of certiorari was taken, assigning as error the decision of the Court that the Act of 1887 was constitutional.

J. Howard Gendell, for appellant.

The Act of May 6, 1887, violates Art. III., § 7, of the Constitution, which prohibits local and special legislation: "Authorizing the creation . . . of liens;" "authorizing the laying out, opening, altering, or maintaining roads, highways, streets, or alleys;" "vacating roads, town plots, streets, or alleys;" "regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding or inquiry . . . or providing or changing methods for the collection of debts or the enforcing of judgments."

Wheeler *v.* Phila., 77 Pa. 348.
Kilgore *v.* Magee, 85 Id. 401.
Phila. *v.* Haddington M. E. Church, 115 Id. 293.
Weinman *v.* P. R. W. Co., 118 Id. 192.
Davis *v.* Clark, 106 Id. 377.
Betz *v.* Phila., 21 WEEKLY NOTES, 155.
City of Scranton *v.* Silkman, 113 Pa. 191.
Commonwealth *v.* Patton, 88 Id. 258.
Scowden's Appeal, 96 Id. 422.
McCarthy *v.* Commonwealth, 110 Id. 243.
Scranton School District's Appeal, 113 Id. 176.
Strine *v.* Foltz, Id. 349.
Evans *v.* Phillippi, 117 Id. 226.

E. Spencer Miller and *Abraham M. Beitler*, assistant city solicitors (*Charles F. Warwick*, city solicitor, with them), for appellee.

Sections 1 and 2 of the Act of May 6, 1887, are constitutional. The city's contention, in fact, is that the entire Act is constitutional excepting sections 7, 9, and 15, which in Washington Avenue, just argued, the city contends are unconstitutional. If these sections are unconstitutional, the rest of the Act can stand.

Cooley's Consti. Lim., p. 178.

The only provisions of the Act of May 6, 1887, which must be constitutional in order that the de-

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cision of the Court below shall stand, are sections 1 and 2 and possibly 3. These sections are quite independent of the remainder of the statute. The proceedings in Ruan Street derive authority from no other part of the Act. The participation of the Master in the proceeding was not a factor in the result injurious to the appellant. Sections 1 and 2 do not form a law "relating to Courts" nor regulating the "organization, jurisdiction, or powers" of Courts, nor governing the "force or effect of the process or judgment of said Courts."

There is urgent and apparent reason why in Philadelphia the jury to decide upon the expediency of the opening shall in the first place know the cost of the opening to the city, and, having decided it expedient to open the street, proceed to assess the damages and benefits. The Act of 1887 extends to Philadelphia and to the plotted streets upon the public plans of that city the beneficial provisions of the Act of May 14, 1874, which this Court, in Magnolia Avenue (117 Pa. 56), decided did not extend to Philadelphia.

In Philadelphia real estate values are in places exceedingly high, the determination of the question of the opening of a street involves the expenditure of large sums of public money, and may injuriously affect the entire finances of the city. It is of manifest importance that the jury of view should proceed with knowledge of the cost, and, having decided on the opening, fix the amount to be paid by the city.

A classification, therefore, being indespensable to the making of a suitable law to answer the grave needs which its large growth had brought upon Philadelphia, sections 1, 2, and 3 of the Act, it is submitted, were necessary and are constitutional.

October 21, 1889. THE COURT. This is a proceeding for the opening of Ruan Street under and in conformity with the provisions of the Act of May 6, 1887 (P. L. 87), and is assailed on the ground of the unconstitutionality of that Act. It is said that the Act violates—

First. Art. 3, sect. 7, of the Constitution which prohibits the General Assembly from passing any local or special law—

a. "Authorising the creation, extension, or impairing of liens" . . . .

b. "Authorizing the laying out, opening, altering, or maintaining roads, highways, streets, or alleys" . . . .

c. "Regulating the practice or jurisdiction of any judicial proceeding or inquiry," etc.

Secondly. Art. 5, sect. 26, that "all laws relating to Courts shall be general and of uniform operation, and the organization, jurisdiction, and powers of all Courts of the same class or grade . . . . shall be uniform."

The regulation of the opening of new streets is essentially a municipal function. It concerns immediately the entire public, for it changes private property in land into public property in a highway of the Commonwealth. It concerns the municipality itself directly, for its treasury is called upon to pay a part at least of the cost of the land necessary to be taken, and subsequently to pay for parts of the paving, etc., and for the future maintenance of the highway in repair with the consequent liability for injuries from defects. These expenses should in all good government be carefully weighed in comparison with the demands of the public convenience in regard to the new street. These are legislative considerations, and no other body than the municipality can adequately weigh all these factors at the same time. Accordingly we find that the councils of the city of Philadelphia have long been vested with ample powers on this subject as a regular part of their municipal jurisdiction, and by the Municipal Corporation Act of May 23, 1874, sect. 20, P. L. 238 (as amended by the Act of April 11, 1876, P. L. 22), all cities incorporated under it have among their corporate powers the enactment of ordinances "to open and improve streets, avenues, and alleys," etc.

It does not change the legislative and municipal character of the subject that the Court of Quarter Sessions of Philadelphia County has concurrent jurisdiction. Such jurisdiction, as was learnedly shown by Judge THAYER, *In re* Twenty-eighth Street (102 Pa. 142), has been exercised from the earliest days of the colony, when judicial and legislative functions were not separated by the clear lines of principle that now enter into the constitutional framework of our government, and when the Quarter Sessions exercised a miscellaneous jurisdiction, some of the surviving portions of which rest to-day on precedent and long-continued exercise, rather than on principles which would support them now as new grants.

Such being the character of the subject it comes directly within the scope of classification of cities by the Act of 1874, which has been sustained by this Court as founded upon grounds of substantial necessity. That some differences may be necessary in the mode of proceeding in regard to streets in cities and boroughs needs no elaboration; indeed, it is so obvious that the present Chief Justice, in his opinion in Wheeler *v.* Philadelphia (77 Pa. 351), used it for an illustration in showing that the classification of the Act of 1874 did not offend against any constitutional provision. "This construction," he says, "does not open the door to special legislation. It permits legislation for classes but not for persons or things of a class. As an illustration,

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it could not be held to authorize the Legislature to open or vacate a particular street in a city of either of the classes named."

The difference in value relative to quantity taken, and the time of taking, in the case of land in the growing outskirts of a large city and in a comparatively stationary rural county, is of such practical importance as to be of itself a fair basis for a difference in classification. A close analogy is found in assessments for municipal improvements. These are a species of taxation, and nothing in the Constitution is more mandatory than that all taxation shall be uniform upon the same class of subjects. Yet the assessment of improvements upon the adjacent owners by what is called the foot-frontage rule has been sustained in regard to urban, and declared illegal in regard to rural property, upon the very basis that the circumstances of the two are so different that what is a fairly uniform mode of assessment as to one is entirely unequal and inadmissible as to the other.

Government is a practical matter, and the Constitution aims at practical results. It must be administered on this view or it would be impossible to enforce it at all. Its general theory of uniformity as to rights, duties, and burdens among all its citizens is not infringed by classification founded on the practical nature of things, and applied impartially to all individuals of such classes. The subject of laying out, opening, widening, and subsequent regulation of streets is entirely germane to the basis of proper classification of cities, and, unless complicated by provisions extraneous to this basis, an Act relative to streets is not local or special though it be limited to cities of one class only.

With these principles in mind let us look at the Act of 1887. Section one provides that it shall be the duty of viewers, if they shall decide in favor of opening or widening any public plotted street in any city of the first class, to endeavor to procure releases from claims for damages, and failing in that, to assess the damages and benefits now authorized by law, etc., and report the whole matter to the Court at the same time. The first point of observation upon this section is that it is an almost literal re-enactment of the first section of the Act of May 14, 1874 (P. L. 174), with the express insertion of the words "public plotted street," so as to cure the unfortunate construction of that Act, as excluding such streets inadvertently sanctioned by this Court in Magnolia Avenue (117 Penna. 56). So far as concerns this and the next section, which does no more than reiterate and emphasize the intent to apply to plotted streets, they are not only sound on the general principles as to streets in classes of cities already expressed, but in addition if it were necessary, they could be amply vindicated as in no proper sense local or special laws within the general intent of the Constitution. On the contrary, their effect is to do away with an exception and produce uniformity. The general road law of 1836 provided for a jury of view, as it was commonly called, who reported upon the necessity of a new road, and if favorable to it, laid out the route, but left the question of the cost in the matter of damages for land taken, entirely to the consideration of a subsequent jury. Such a system was so wanting in the commonest principles of business prudence, that it could only be tolerable while land was so cheap, and the expense, compared with the benefit, so small, as to be of no practical importance. But the system soon grew burdensome, and had been repealed as to more than half the counties of the State prior to 1874, when it was changed for the whole Commonwealth. To the uniform system thus intended to be established by the Act of 1874, an exception in regard to the plotted streets of the city of Philadelphia was permitted to be set up by the decision in Magnolia Avenue. It is not necessary to go into a discussion of that decision. I have characterized it as inadvertent because it was based on the assumed authority of two previous cases in which the present point of the application of the Act of 1874 to plotted streets was so overlaid by other questions to which the parties concerned gave more prominence and urgency, that this Court passed it *obiter* and without separate consideration. If it were necessary that decision would now be unanimously overruled. Its effect was, as said already, to permit an exception to creep into the uniform system meant to be established. This exception the Act of 1887 rectifies, and in so doing it is in harmony with the general spirit of the Constitution, and especially with the very section of Article III., which it is now claimed to violate. The principles by which the Act, when regarded as to its real intent, and its practical operation, is to be tested are closely analogous to those by which the Act of May 23, 1874, section 57 (P. L. 269), which, taken in its literal terms, was claimed to be local and special because the choice of coming under its authority or not was given to the individual cities of the classes named, was, nevertheless, held to be general, because the cities included were already exceptions, and the choice allowed to individuals was only as to when each should come under the general rule. (Reading *v.* Savage, 124 Penna, 328.) "There is no possibility," says our brother GREEN (p. 336), "of any exercise of the powers or privileges conferred by this section which can work affirmatively a local or special result. Whatever is done by virtue of this section simply converts that which was local or special into that which is general." In the same manner the first two

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sections of the present Act simply change what was local and special to road cases in the city of Philadelphia to harmony with the general system which prevails everwhere else in the State. So regarded these two sections are free from constitutional objection.

The third and fourth sections present a different question. In requiring the appointment of a Master and prescribing his duties in road cases in cities of the first class, these sections might be treated as fairly within the line of practical differences already shown to be allowable as the basis of classification, and therefore not repugnant to the provision of the Constitution against local and special laws relating to streets, etc. But they clearly offend against the subsequent clause of the same section which prohibits local or special laws "regulating the practice or jurisdiction of any judicial proceeding or inquiry," etc. Courts are not in any sense parts of the municipality in which they may chance to sit. They are integral branches of the judicial department of the government, and they exercise their powers directly under the Commonwealth, alike upon cities and towns and individuals who come before them under the law. It is the plain intention of the Constitution to do away as far as possible with the differences in organization, jurisdiction, and procedure of Courts throughout the State, and to bring the whole judicial system into uniformity. It may be doubted if any classification can be made of Courts which will not offend, not only against this spirit of the Constitution, but also against the letter of one or more of its provisions. But whether any such classification be permissible or not, it is quite clear that the sections of the present Act now under discussion make a variation of practice based upon the classification of cities to which the organization and procedure of Courts is in no wise germane, and, therefore, that they cannot stand the constitutional test of validity.

The failure of sections three and four does not, however, involve the entire failure of the Act. The rule that has always been accepted is that if the unconstitutional portions can be taken out and still leave a complete legislative Act, capable of being executed in accordance with its plain intent and not in any wise depending on the rejected parts, the Act will still be valid. (Cooley on Constitutional Limitations, 178.) Tested by this rule, sections one and two form a perfectly valid Act, containing a system complete in itself, capable of easy carrying out in practice, and not depending at all on the unconstitutional portions. And in thus expressing our judgment as to these sections we are not to be understood as limiting the valid parts of the Act to these sections. There may be others which are in entire harmony with the principles of this opinion, but as their consideration is not directly involved in the present case, we do not now express any opinion upon them.

It remains, however, to be considered whether the presence of the Master has vitiated these proceedings. This result does not necessarily follow from the invalidity of the law under which he was appointed. All the Courts of law of this State are also Courts of equity, and their powers to appoint Assessors, Examiners, and Masters is not and cannot well be limited by fixed rules. Such officers are part of the regular machinery of Courts of equity, and each case of such appointment must be determined upon its own circumstances and exigencies. An examination of the record shows that the Master here did not in any essential matter interfere with the jury in the discharge of their proper functions, and he may fairly be regarded in the light of an assistant, such as a draughtsman to make a plan, a reporter to take notes, or any other special though unauthorized aid to the jury. So regarded his presence was at most an irregularity which cannot affect the validity of the proceedings as subsequently reviewed and approved by the Court.

The order is affirmed.

Opinion by MITCHELL, J.

Orphans' Court.

May 20, 1889.

Mifflin's Estate.

Decedent's estate — Will — Construction of — Power of appointment — When properly exercised.

Sur exceptions to adjudication.

All the material facts as they appeared at the audit of the account of J. Sergeant Price, trustee under the will of James Mifflin, the decedent, are sufficiently stated in the adjudication of ASHMAN, J., which was as follows:—

"The testator by his will and the codicil thereto, after reciting a certain power of appointment, gave his estate in trust to pay the net income to his wife Theresa, for life, or during widowhood, and thereafter to pay the same to such of his children as should be living at the happening of either event, and to the issue of

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deceased children *per stirpes* during their respective lives, free from their debts, and the principal to their appointees by will.

"The power was created by the will of Sarah Mifflin, deceased, the mother of testator. She gave her residuary estate in trust to pay to each of her seven children one-seventh of the net income for life, free from the debts of the child, and on the death of any leaving issue surviving, to convey his share to such issue equally; but if any of testatrix's children should die without leaving a child surviving them, in trust, to pay over the income of such share to the testatrix's surviving children, or their issue, 'provided that each of my (her) children shall have power to limit and appoint by will, in writing, to take effect after death, the rents and income of his or her share to any surviving widow or husband he or she may leave to receive and enjoy the same until the death or marriage of such widow or husband whichever may first happen; and provided that, as respects any of my children, who may leave issue at his or her death, upon the further trust to assign, transfer, and convey his or her share of said property and estate to and among his or her child, children, or issue, as he or she may limit and appoint by writing in the nature of a last will and testament, whether in fee simple or for any other estate upon trusts or otherwise.'

"On behalf of Thomas Mifflin, one of the children of present decedent, it was urged that the testator by limiting his estate to his wife for life had exceeded the power of appointment conferred upon him by his mother's will, and that the son was now entitled under the will of the donor of the power to one-third of the income of the estate.

"The ground upon which the proposition was placed appeared to be that the clause giving a power of appointment in favor of a husband or wife of the donee followed immediately the clause providing for the death of a donee, without leaving issue, and was consequently intended to benefit a wife or husband, only where there were no issue to be cared for. To reach this result we must seek to ascertain the meaning of the clause, not from its actual words, but from its accidental place in the will. The words are clear and give the disputed power to 'each of my children,' of whom she had named all; and if the rule laid down by the late Judge TRUNKEY, that we are not to ask what does the testator mean, but rather what do his words mean, is to prevail, the question is ended. We depart from this rule when we argue as to the relative merits of the claim of a wife as contrasted with that of a child upon a testator's bounty. If such a discussion were proper, the suggestion might be made that a provision for a wife or a husband might often be as commendable as a provision for children; and in this instance both have been provided for. No other objection having been made, and the donee having appointed to all of his children, whereby the question whether the power was exclusive or non-exclusive is eliminated, the Auditing Judge holds that the power was well exercised. The claim of the son is refused."

To this finding exceptions were filed in behalf of Thomas Mifflin.

Frank S. Elliott and *William W. Wiltbank*, for the exceptant.

George W. Biddle, for the accountant.

June 1, 1889. THE COURT. There is no room for interpretation in this case. The testatrix has said, in explicit and most unequivocal terms, that "each" of her children should have the power to appoint a life estate to a surviving husband or wife. This is the extent of the power as to children who leave no issue (except in the case of the last survivor, where the others have all died without leaving issue), while as to those who leave issue, there is the additional power to limit the shares and declare the character of the estate which such issue shall take.

The present inquiry relates only to the appointment to the son's wife, and has nothing to do with the validity of the limitation over.

Nothing can be added to what has been said by the Auditing Judge, and for the reasons given by him the adjudication is confirmed.

The exceptions are dismissed.

Opinion by PENROSE, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, NOV. 1, 1889.* [NO. 27.

Supreme Court.

Jan. '89, 87. January 31, 1889.

Laughman's Appeal.

Trade-marks—What are proper subjects of—Geographical names—Trade-names—Assignment of trade-marks—Coal mines—Trade-name applied to coal mined—"Sonman coal."

While every one is entitled to affix to the product of his own manufacture any symbol or device not previously appropriated, and to use the same as a trade-mark, and to have his property in said trade-mark protected from infringement by other parties, yet no property can be thus acquired in a word, mark, or device, used as a trade-mark, which denotes merely the nature, kind, or quality of an article, or, as against other persons carrying on trade therein, in the name of a country or a section of country.

While a geographical name may perhaps in some cases, or under some circumstances, be used as a trade-mark, yet when the article to which it is applied is the product of the place named, the term cannot be used as a trade-mark by one to the exclusion of others, owners of like products of the same place.

The trade-name of any natural product or other article of manufacture upon which a trade-mark cannot conveniently be affixed, though not strictly a trade-mark, is nevertheless a species of property in the use of which the owner is entitled to protection, and which may be the proper subject of assignment in the same manner as trade-marks.

Trade-marks are the proper subject of assignment, to the extent at least, that unless reserved they pass with an assignment of business, and the assignment by one partner of all his interest in a firm to his co-partners will carry with it the exclusive use of the trade-mark of the firm.

Although a tract of coal land containing over 6000 acres of land may not clearly present the features, or be so extensive or so sharply defined in its natural boundaries as what is ordinarily termed an independent region, and although it may be doubtful whether it may be considered as a separate coal basin, or even as a sub-basin, yet if it is proved that it has received a distinct geographical recognition from the public, the name of the tract, when applied to its own natural products, must be taken in its geographical sense, and cannot be used as a trade-name by one coal operator to the exclusion of others mining coal in the same tract.

A. and B. having leased a coal mine associated C. with them in the operation of the mine, trading as A. & Co., and adopting as a trade-name for the coal mined by them "Sonman Coal." Subsequently A. & Co. dissolved, A. and B. transferring their interest in the lease and firm to C. who associated D. with him, and these two continued to operate this mine, trading as C. & Co., and calling their coal "Sonman Coal." A. and B. secured a lease of another mine which they operated calling the product of their mine also "Sonman Coal." A bill in equity having been filed by C. & Co. to restrain A. & Co. from using that name, it appeared that both mines were included in a large tract of over 6000 acres of land originally conveyed to one Aaron Sonman, and hence called the Sonman survey. In this survey there are different veins of coal having various local names. The coal in the different veins and at different places in the same vein varied in quality. There was some evidence that heretofore the coal taken from all these mines had been called "Sonman Coal." The word "Sonman" was commonly used as a word of geographical signification. A village had been built on the Sonman survey and called "Sonman," which had a railroad station, post-office, and telegraph office. Upon these facts, the Court below having granted an injunction restraining A. & Co. from designating their coal as "Sonman coal," on appeal:

Held, (1) that C. as the assignee of A. and B., possessed the rights of the firm of A. & Co., in any trade-mark or trade-name which that firm may, at the time of its dissolution, have acquired, and with C.'s approval the new firm of C. & Co. were entitled to exercise that right.

(2) But, however, that neither A. & Co. nor C. & Co., nor any other parties operating the mines in the Sonman survey had the right to appropriate the name of "Sonman" to the exclusion of others similarly engaged; and therefore C. & Co. were not entitled to the injunction prayed for, and their bill should have been dismissed.

Appeal of Daniel Laughman and J. Chester Wilson, trading as D. Laughman & Co., from a decree of the Common Pleas No. 3, of Philadelphia County, restraining them from the use of a trade-name.

Bill in equity, wherein William H. Piper and John H. Lewars, trading as W. H. Piper & Co., were complainants, and Daniel Laughman and J. Chester Wilson, trading as D. Laughman & Co., were defendants.

The case was referred to Charles F. Corson, Esq., as Examiner and Master, who found the facts as set forth at length in the opinion of the Supreme Court, *infra*. Upon the facts as found by him, and having quoted the rule laid down in Bispham's Equity (p. 511, § 457), that "the name of a country or section of a country cannot be appropriated as a trade-mark by the owner of a particular product (*e. g.*, coal) of that country, so as to exclude owners of other similar products coming from the same country or section of country from using the name;" and referred to the cases of Canal Co. *v.* Clark (13 Wallace, 311); Wotherspoon *v.* Currie (L. R. 5 Engl. & Ir. App. 512; S. C. 18 Weekly Reporter, 564); Lochgelly Iron Co. *v.* L. Iron Co. (6 Ct. of Sessions Cases, 4th Series, p. 482); Day *v.* Brownrigg (L. R. 10 Ch. Div. 294); De Boulay *v.* De Boulay (L. R. 2 Privy C. App. 441); Glendon Iron Co. *v.* Uhler (25 P. F. Smith, 467), the Master continued:—

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"From these cases may be deduced the reason why a geographical name cannot be adopted as a trade-name; and it is because the name has, so to speak, been already dedicated to the public, and therefore is not susceptible of exclusive appropriation by any one carrying on trade within the limits of the borough, town, region, or country described by the name, and because others may, with equal truth, use the same name; but these cases also show that it must be a section of country, a town or borough which is essentially of a public character and well known to the public at large, not merely known to a few persons in the neighborhood, and that it is not every small section of country, every trifling collection of houses which may locally be known by a certain name, or even a large tract of land which is merely a private estate, which will bring the party using the name within the rule forbidding the use of a geographical name. Such names are not geographical in the sense referred to.

"'The Lackawanna Valley,' 'The Lehigh Valley,' 'The Cumberland Valley,' are instances of geographical names which are within the rule; they are names descriptive of well-known regions of Pennsylvania, known to the public at large.

"Tested, then, by these rules, is Sonman a geographical name? If so, the defendants cannot be enjoined. (The Master then referred to the testimony in detail, the more material portions of which are recited in the opinion of the Supreme Court.)

"Nor does the Sonman tract itself present the features of an independent region. It is not a well-defined region like the Lackawanna Valley, referred to in Canal Co. *v.* Clark, with well-defined natural boundaries separating it from adjoining regions. These essentials are wanting; it is irregular and ill-defined, the lines crossing the Conemaugh five or six times. Ben's Creek flows through and Trout Run crosses it. Nor can it be said to form an independent coal basin. In the geological divisions of the State, complainants' mine is in what is termed the Allegheny Mountain District, and in the Wilmore sub-basin or the First Bituminous sub-basin.

"Nor does the coal at Sonman or Ben's Creek present the features of a sub-basin. This clearly appears from the testimony of Mr. Martin, who says, 'there are no inclinations of the measures towards Ben's Creek; they are perfectly flat.' And Mr. Brittain testified: 'I don't consider that the plaintiffs' mine exhibited any of the features of a coal basin.' And Mr. Sanders, an experienced mining engineer, testified that it would be practicable to open a drift from Trout Run to Ben's Creek, which would drain itself; and Mr. Westbrook, a witness for defendants, substantially says the same thing. Speaking of the Miller vein (being the vein worked by complainants), he says: 'If projected from the Sonman or south side to the north side, in which the defendants' mine is situated, they would meet one another.' . . . .

"The evidence of the defendants is wholly insufficient to sustain their contention of a prior use of the word as a trade-name, even if it could be found from the evidence that it had been used as a trade-name by the Whites from 1854 to 1859, or by Westbrook at a later period. The complainants might well have treated it as abandoned. A trade-mark, whether it consist of symbols or a descriptive name, may be abandoned, and, if it is, it may then be appropriated by any one who, by doing so, adopts it as his own. (Hegeman *v.* Hegeman, 8 Daly, 7; Brown on Trade-marks, title 'Abandonment,' sections 674 to 691.) In Blackwell *v.* Dibrell (3 Hughes, C. C. 151), the name used for eight years was held to work a forfeiture which could not be resumed in prejudice of one who used it exclusively during the period of abandonment."

The Master further found that the rights of Dysart & Co. to use the word "Sonman" as a trade-mark had passed to Piper under their assignment.

The Master recommended, substantially, the following decree: (2) That the defendants, Daniel Laughman and J. Chester Wilson, trading as D. Laughman & Co., and each of them, and the servants, agents, and attorneys of them, and each of them, be perpetually enjoined from advertising, or selling, or offering to sell, the said coal mined by the said defendants, or any other coal under the name of "Sonman Coal."

Exceptions filed to this report by the defendants were dismissed by the Court, and the above decree entered, whereupon the defendants took this appeal, assigning for error the dismissal of their exceptions and the decree of the Court.

Joseph J. Knox and *Wayne Mac Veagh* (with them *George Tucker Bispham*), for the appellants.

Rudolph M. Schick, for the appellees.

October 7, 1889. THE COURT. The plaintiffs, W. H. Piper & Co., are miners and shippers of bituminous coal in Cambria County. They are engaged in mining what is known on the geological maps of the State as the Miller vein, at Ben's Creek, on the western slope of the Allegheny Mountains; their mines are located upon what was sometimes called the Big Survey, containing an area of about ten square miles, or over six thousand acres. This large body of land, it is said, was conveyed by William Penn directly to one Aaron Sonman, and hence has been generally known as the Sonman survey. From the testimony of Mr. Westbrook, it ap-

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pears that in the Sonman tract there are several seams or veins of coal, one above another. Mr. Westbrook says: "The bottom vein is known as vein 'A;' a short distance above this is a small vein known as 'A primal;' the next higher vein is known as vein 'B,' and a few feet above this is a smaller vein known as 'B primal;' the next is known as 'C,' and so on to 'E;' 'E' being the highest upper workable vein. These are the designations given in geological surveys. These several veins have other several local designations; they are known by miners in the neighborhood by the name of the person who owned them. The Lemon vein was so named because it was opened by John A. Lemon or his father. The Lemon vein is vein 'E,' and the Miller vein, said to have been first opened by a man of that name, is vein 'B.' The coal mined from the same vein in different localities is not always of the same quality. The Miller vein, or vein 'B,' at Gallitzin, ten miles east of Sonman, is very much softer; while at South Fork, which is eight or ten miles from Sonman west, it is very much harder. In some cases, two or three miles makes a difference in the quality of the coal from the same vein."

In December, 1872, the Cambria Mining and Manufacturing Company, the owner of the Sonman survey, by an instrument of writing in the form of a lease, granted to Dysart and Laughman, for a term of ten years, the right to mine, transport, and sell coal out of the Miller vein from a certain drift opened "nearly opposite a point on Ben's Creek known as Ben's Hole." On the 1st of January, 1874, Piper became a partner, the business was conducted under the name of Dysart & Co.; and the firm commenced to mine and ship coal in considerable quantities therefrom to market. On the 26th of July, 1879, the firm of Dysart & Co., dissolved, Dysart and Laughman transferring their interest to Piper; the lease was afterwards extended, and Lewars became associated with Piper as a partner under the name of W. H. Piper & Co., the complainants in the bill. Upon the dissolution of the firm of Dysart & Co., Dysart and Laughman began operations upon another portion of the Sonman tract, and were, and are now, engaged somewhat extensively in the mining and shipping of coal therefrom.

The complainants in the bill allege that soon after the formation of the firm of Dysart & Co., which was on the 1st of January, 1874, the firm sought to select and establish a trade-name for their coal; that "Ben's Creek" and "Eureka" were at first suggested, and, upon due consideration, the latter name was adopted; but when it was afterwards discovered that this was an infringement upon the trade-name of Berwind, White & Co., also miners and shippers of coal from the Clearfield region, the name "Sonman" was adopted as a trade-name, and that name has ever since been used and applied as the trade-name of all the coal shipped from their mines; that their coal is known and recognized in the trade as "Sonman coal," and is thus distinguished from other kinds and qualities of bituminous coal in the market. The plaintiffs complain that the defendants are infringing their right, by wrongfully and fraudulently shipping an inferior coal under the same trade-name, and offering it for sale as "Sonman coal," thus inducing dealers and consumers to suppose that the coal which they buy from the defendants is the Sonman coal of the plaintiffs; whereby the public is deceived and the reputation of the plaintiffs' coal is injured, etc.

It is clear from the evidence, and the fact is found by the Master, that the coal taken from these mines has heretofore been spoken of and sold as "Sonman coal." Prior to 1874, however, the term "Sonman" would seem to have been applied, not as a trade-name, but merely as descriptive of the location of the mines. Mr. Alexander M. White, who mined the Lemon vein in 1852 or 1853, says: "We called it the Sonman coal in contradistinction to the Lily Mill coal, which was mined east of it, between planes 3 and 4; this was a common appellation for it; we called the coal from that survey Sonman coal." Hon. John Dean testifies, that there were about five thousand acres known to him as the Sonman lands; that the coal is called the Sonman coal, and that he always heard it called by that name; and that it was a very common name as far back as 1854. Mr. Westbrook, who opened the Miller vein and sold coal to the Altoona Manufacturing Company, to the Logan Iron and Steel Works, to the Phœnix Iron Company, and to dealers, says: "I always called all coal mined and shipped Sonman coal, as designating the locality or region in which it was mined; sometimes, however, designating the coal by the name of the vein by which it is known."

But the plaintiffs have introduced evidence to show that a short time after the 1st of January, 1874, they formally adopted the term "Sonman" as a trade-mark or name for their coal, and they now seek an injunction to restrain the use of that term by the defendants to any of their coal, even though the same be mined from the Sonman lands.

The ownership of a trade-mark has, in general, been considered as a right of property, and equity will protect that right from infringement; proof of fraud is not required; the mere violation of the right is sufficient to induce the exercise of the equity powers of the courts. The trade-name of any natural product or other article of manufacture, upon which a trade-mark cannot conveniently be affixed, though not strictly a trade-

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mark, is, nevertheless, a species of property and will, as a general rule, be protected in like manner. Trade-marks are the proper subject of assignment, to the extent, at least, that unless reserved they pass with an assignment of business (Sebastian on Trade-marks, 286); and the assignment by one partner of all his interest in a firm to his co-partners will carry with it the exclusive use of the trade-mark of the firm. (Menendez *v.* Holt, 128 U. S. 514.) "As a distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale; but when the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred, is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character as those to which the mark was attached by the original designer." Such is the appropriate language of Lord CRANSWORTH, in the case of Leathercloth Company *v.* The American Leathercloth Company, in 11 Jur., N. S. 513; Kidd *v.* Johnson (100 U. S. 617). We assume, therefore, that W. H. Piper, as the assignee of Dysart and Laughman, possessed the rights of the firm of Dysart & Co. in any trade-mark which that firm, at the time of its dissolution, may have acquired, and, with his approval, the new firm of W. H. Piper & Co. were certainly entitled to exercise that right.

But we are not clear that either Dysart & Co., or W. H. Piper & Co., or any other parties operating the Sonman mines, had a right to appropriate the term "Sonman" to the exclusion of others similarly engaged. The object of a trade-mark is that the article, to which it is attached or belongs, may be distinguished from articles of a similar kind, and thus be known and identified in the market; its purpose is to indicate the personal origin of the article to which it is applied, or the source from which it comes. The office of a trade-mark is thus defined by Mr. Justice FIELD, in Manufacturing Co. *v.* Trainor (101 U. S. 53): "Every one is at liberty to affix to the product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature, manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellencies he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and the assurance that they are the genuine article of the original producer."

But in the exercise of the right to establish a trade-mark, there are certain limitations which must be observed. No property can be acquired in any word, mark, or device, which denotes merely the nature, kind, or quality of an article. Thus, in Raggett *v.* Findlater (L. R. 17 Eq. 29), an injunction to restrain the use of the words "Nourishing Stout," which the plaintiff had previously used, was refused upon the ground that "nourishing" was a mere English word denoting quality. "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that are appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify others may employ with equal truth, and therefore have an equal right to employ, for the same purpose." (The Amoskeag Manufacturing Company *v.* Spear, 2 Sandf. S. C. 599.)

And whilst the office of a trade-mark is to indicate the personal origin or ownership of an article, yet a merely geographical name cannot be so used (Bispham's Eq. sec. 457; Canal Company *v.* Clark, 13 Wallace, 311). In the case last cited, it was held that the word "Lackawanna," which is the name of a region of country in Pennsylvania, could not, by combination with the word coal, constitute a trade-mark, because every one who mined coal in the valley of the Lackawanna had a right to represent his coal as Lackawanna coal. "The word 'Lackawanna,' says Mr. Justice STRONG, "was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of a region and, of course, all the earths and minerals in the region." . . . . . "It must then be considered as sound doctrine," says the learned Justice, "that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the appellation as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, expressed or implied, designed or incidental, that there is any title to relief against it."

In the case of Newman *v.* Alvord (49 Barb. 588), the plaintiffs manufactured a cement at Akron, N. Y., and sold it under the name of

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"Akron Cement." The defendants made the same sort of cement at Syracuse, and labelled it "Onondaga Akron Cement." The Court held that: "Though all the world had a right to manufacture cement at Akron and call it Akron Cement, yet the action of the defendants, in calling their cement made at Syracuse, Akron Cement, was a fraud on the plaintiffs and on the public, and should accordingly be restrained." To the same effect is our own case of Glendon Iron Co. *v.* Uhler (75 Pa. 467), where a corporation adopted the trade-mark "Glendon" upon their iron; the place where their furnaces were located was afterwards erected into a borough by the name of Glendon. Another company, engaged in business in the same place, afterwards used the word "Glendon" on their iron, and it was held that the second company was justified in so doing. "The appellees," said this Court in the case cited, "put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town, prevents any other manufacturer of pig iron within its limits from using the same word. If it be so now, it may continue through all coming time. The boundaries of the town may be enlarged; the borough may grow into a city; the manufacturers of pig iron may be multiplied, and the word most expressive to indicate their location must be denied to all save one. So far as the authorities go to restrain a manufacturer from the adoption of a truthful trade-mark, we will endeavor to enforce them; when asked to go further we must decline. If the effect of the incorporation of the appellants' district of country into a town by the name of Glendon, has been to deprive them of some of their former rights, they must submit to the consequences." It is upon the same principle that every person may put his own name upon his own goods, notwithstanding another person of the same name may, in that name, manufacture and sell the same or a similar article. (Burgees *v.* Burgees 17 Eng. L. & E. 257.)

Applying these principles to the case now under consideration, it seems clear that the plaintiffs are not entitled to the exclusive use of the word "Sonman" as a trade-mark. It is clear, from the evidence, that Sonman is a word of geographical signification; it denotes a specific territory or region of country of considerable extent, which is and for many years both before and since the trade-name was adopted has been devoted to the production of a somewhat peculiar quality of coal by different operators. In the year 1854 the village of Sonman was built upon this tract. Mr. Alexander M. White testifies: "That the village consisted of a steam saw-mill, a store, a dwelling which he constructed for himself, one for his superintendent, and six tenement houses. The village was on the main line of the Pennsylvania Railroad, and although at first there was no station, a siding was constructed to facilitate the shipping of coal and lumber." Mr. Richard P. Westbrook testifies: "That in 1867 there was a settlement or village, consisting of two large mansion houses, one 40 by 60, the other 30 by 40, a steam saw-mill, a store-house in which was kept a company store, two barns, one of which was very large, a blacksmith shop, several tenements for workmen, and an iron siding connecting the lumber yard with the Pennsylvania Railroad. There were several other houses or tenements in different parts of the Sonman property. This village was known by the name of Sonman. There was a post-office there at that time, kept in the store-house. James A. Shoemaker was the postmaster." He further testifies: "That a station was established at Sonman by the Pennsylvania R. R. in 1871; the building was destroyed by fire. In the latter part of 1872 or the early part of 1873, the Pennsylvania R. R. Co. erected a permanent building there for ticket and freight purposes and appointed an agent. About the same time, a telegraph station was established there by the Western Union Company; both the railroad station and the telegraph station were called Sonman. There was a post-office called Sonman located there previous to 1857. A. F. Cantwell was postmaster in 1857. The office was continued by that name for more than ten years; and when Shoemaker removed from Sonman, a man residing at Portage, one mile west, was appointed, and he removed the office from Sonman to Portage." Mr. Martin says, in 1869 the saw-mill was gone; the post-office had been removed to Portage, and some houses were vacant, but the mines were still in operation, and continued to be in operation until the railroad and telegraph stations were established in 1872 or 1873 and ever since that time.

It may be that the Sonman tract does not present the features of what the appellees call an independent region; that it is not so extensive or so sharply defined in its natural boundaries as the Lackawanna Valley; it may be, also, that Sonman cannot be considered as a separate coal basin, or even as a sub-basin, yet it is plain that it had received a distinct geographical recognition from the public. These lands, for many years prior to the time that the plaintiffs adopted their trade-name, were, as we have seen, known as the Sonman survey. Its boundaries were marked and defined upon the map of Cambria County; the village erected thereon was Sonman; the post-office was Sonman; the railroad station was Sonman; the telegraph office was Sonman; the coal taken from the mines was shipped as Sonman coal, and,

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by this description, was known in the market. Can it be doubted that the term Sonman, in the year 1874, was a name descriptive of a locality? If it was, the name, when applied to its own natural products, must be taken in its geographical sense. We do not say that a geographical name may not, in some cases or under some circumstances, be applied as a trade-name; but we do say, that when the article to which it is applied is the product of the place named, the term cannot be used as a trade-name by one to the exclusion of others, owners of like products of the same place. This is the doctrine of all the cases. The case of Wotherspoon *v.* Currie (L. R. 5, E. & I., A. W. P. 512), relied upon by the appellees, when properly considered and understood, will be found, we think, to be consistent with this statement of the law. In that case, as we understand it, the trade-name "Glenfield" was applied to a starch which, at the time of the infringement, was not made at Glenfield, but elsewhere. The name was then used and for some time before that, had been used in an entirely fictitious sense, as denoting the personal origin of the article known as "Glenfield Starch," and not in connection with the place of its manufacture. The word Glenfield, assuming that it may have a geographical import at first, at the time of the infringement, was used in an entirely different sense and for a wholly different purpose; and the remarks of the Lord Chancellor are intended to emphasize the fact that the defendant, who was then the owner of Glenfield, had nothing to lose in being denied the privilege of affixing the name of his private estate to his products, as the place was of little consequence, and he could hope for no advantage therefrom, only from the fact of considerable importance that the plaintiff had manufactured a superior article of starch known by that name, which had a great reputation in the market, and of which he had made large sales.

It is doubtless true, as a general proposition, that the name of a private estate may be used by the owner as a trade-name. The case just cited is an illustration in point; for the plaintiff, in that case, at first manufactured starch on the private estate of Glenfield, and called his starch Glenfield. He removed from his private estate, but retained for his starch manufactured elsewhere the same trade-mark, and his right to do so was sustained by the judgment. But Sonman is not the name of a private estate in this sense; it is the name of a large boundary of land containing a number of separate private estates, owned by a number of different persons, all of whom are engaged in the same business of mining and shipping coal, and we hold that no one of these can assume and adopt, as a trade-name, the name by which the place is generally known in the geography of the country to the exclusion of others.

The decree is reversed, and the bill is dismissed at the cost of the appellees.

Opinion by CLARK, J. C. K. Z.

Jan. '89, 202. March 21, 1889.

Warriner v. Mitchell.

Partnership and individual debts — Whether property held in name of individuals who constitute a partnership, is firm or individual property, is a question of fact for a jury, as between the partners—But otherwise as to purchasers, or lien creditors—Parol evidence, when admissible in such cases.

Purchasers of land and lien creditors, dealing with the owners upon the faith of an individual title appearing upon the record, may not be deprived of their rights against the individual interests in the land by parol proof that they were really partnership interests, and therefore mere personalty.

Between partners themselves, land which is treated as partnership property, especially if it be purchased and paid for with partnership money, is regarded as partnership property only, although the title be taken in the name of the partners individually.

Whether land conveyed to persons who are partners, in their individual names is partnership property or not, is largely a question of intention, which may be shown by parol; it may be manifested in the acts and declarations of the parties.

J., having purchased the interest of W. in the firm of J. and W., gave with M. a bond to W. to indemnify him from the payment of all indebtedness outstanding against the firm. J. subsequently became insolvent, after having paid all the firm debts, except a balance upon a judgment confessed by himself and W. in favor of F. to secure the payment of part of the purchase-money of a foundry property, used by the firm of J. & W. in their business, title being taken in the name of J. and W. as individuals. W. having paid the balance due, brought suit against M. upon the bond. All the evidence having been admitted upon the question whether the debt in question was a firm, or an individual debt, the Court directed a verdict for the defendant, upon the ground that it was incompetent to change, by parol proof, a debt which on its face was an individual debt, into a partnership debt: *Held*, to be error. Whether a debt is a firm debt or not, is a question of fact for the determination of a jury.

Error to the Common Pleas of Bradford County.

Feigned issue, in which F. H. Warriner was plaintiff, and J. M. Mitchell and Austin Mitchell were defendants.

Plaintiff entered up a bond dated May 27, 1882, for $5000, given by defendants, conditioned that they should pay all the debts of the late firm of Mitchell & Warriner, and indemnify and save harmless said F. H. Warriner from all said debts, liabilities, and costs arising from or on account

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of all indebtedness then outstanding against said firm.

Execution having been issued upon the judgment, and the personal property of Austin Mitchell, one of the defendants, having been levied upon, he filed an affidavit, and supplemental affidavit, alleging that the debts mentioned in the bond were all paid and satisfied; whereupon the Court ordered this issue to be framed to try the facts as to whether said partnership debts had been paid, and, if not, how much said Warriner had been obliged to pay, etc.

The material facts, as they appeared upon the trial, before WILSON, P. J., of Tioga County, are fully set forth in the opinion of the Supreme Court.

The Court charged the jury, *inter alia*, as follows:—

"This is an issue to ascertain whether that debt of five hundred and forty-four dollars and eighty-nine cents, which was for part of the purchase-money of that real estate, was a partnership debt. And I have permitted the plaintiff, Warriner, to give parol evidence to show that the deed ought to have been in the name of the firm, that the purchase was really for the use of the firm, that the judgment-note and the judgment founded upon it were for a firm debt—and I have admitted all this evidence for the purpose of coming to a conclusion whether such a thing ought to be permitted; for the purpose of getting this case in a shape where it may be properly reviewed, upon being taken up, if I am mistaken now.

"Upon full reflection I am satisfied that that parol evidence cannot be admitted to change the character of that deed, that it cannot change the character of that note nor of the judgment which is in evidence entered upon that note; that the plaintiff cannot be permitted to change the record by parol, and to show that a judgment which is an individual judgment, which stands in this Court as an individual judgment is, in fact, a firm judgment; that to do that is contrary to the law of Pennsylvania, and that this action cannot be maintained upon the evidence offered and admitted, and, therefore, we say to you that you are to return a verdict in favor of the defendants, and the prothonotary will take your verdict."

Verdict accordingly.

A rule for a new trial having been discharged, plaintiff took this writ, and assigned for error that the Court erred, *inter alia*:—

(1) In instructing the jury that the plaintiff was estopped by the record from showing that the debt in dispute was a firm or partnership debt.

(2) In directing a verdict in favor of the defendants.

(3) In not submitting to the jury the question whether or not the bond in this case was executed by J. M. Mitchell and Austin Mitchell, his surety, upon the agreement and understanding that it was to indemnify F. H. Warriner against this particular debt, and if the jury so found, and Warriner acted upon the good faith of the transaction, the plaintiff is entitled to recover, notwithstanding the form of the record.

William Maxwell, for plaintiff in error.

The law as laid down in—

McDermot *v.* Laurence, 7 S. & R. 437;
Shafer's Appeal, 10 Out. 49,

that "a deed to persons as tenants in common, who are partners, must as to *purchasers of the title* and *lien creditors*, stand as the foundation of their rights, and govern in distributing the proceeds of the sale of real estate," is not disputed. The objection is to its application to the facts of this case.

Overholt's Appeal, 2 Jones, 222.
Erwin's Appeal, 3 Wright, 535.
Shafer's Appeal, *supra*.
Lammers *v.* Alden, 28 Pitts. L. J. 43.
Abbott's Appeal, 14 Wr. 234.
Black *v.* Seipt, 12 Phila. 360.
West Hickory Mining Assn. *v.* Leed, 30 Sm. 38.
Meason *v.* Kaine, 13 Id. 335.
Crow *v.* Com., 23 Pitts. L. J. 95.
Williams's Estate, Id. 118.
Fay *v.* Finley *et al.*, 14 Phila. 206.
Palmer *v.* Taggart & Co., 1 Chester Co. Rep. 107.
1 Parsons on Contracts, *153.

E. B. Parsons (*J. T. McCollom*, *A. C. Fanning*, and *A. Morgan* with him), for defendants in error.

We do not question the principle that the equities of the partnership may be shown by parol on distribution of money arising from judicial sales of real estate, brought into the firm as stock, when there are no intervening equities. This is not our case. There is no question of distribution here. This principle can only apply between the partners themselves.

It is settled that where lands are owned by two persons, on the face of the deed of conveyance to them as tenants in common, it is incompetent whenever the rights of third persons are involved, to show by parol that they were held as partnership property.

Appeal of Geddes and Wife, 3 Nor. 482.
Lefevre's Appeal, 19 P. F. Sm. 122.
Ebbert's Appeal, 20 Id. 79.
Ridgway, Budd & Co.'s Appeal, 3 Har. 177.
Erb & Matter's Estate, 1 Pearson, 98.
Hale *v.* Henrie, 2 W. 143.
Holt's Appeal, 2 Out. 271.
Appeal of Second Nat. Bank, 2 Norris, 206.

October 7, 1889. THE COURT. In this case the material facts were that Warriner, the plaintiff, and J. M. Mitchell, one of the defendants, had formed and conducted a partnership manufacturing business from 1877 to 1882, at which latter date the partnership was dissolved by mutual agreement. The dissolution was effected by

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Mitchell purchasing the interest of Warriner and agreeing to pay all the firm debts. To secure performance of this agreement, so far as the payment of debts was concerned, Mitchell gave Warriner a bond of himself and Austin Mitchell, the other defendant, in the penal sum of $5000, which, reciting the dissolution and that James M. Mitchell had agreed to indemnify Warriner "from the payment of any and all firm debts against said partnership," stipulated that James M. Mitchell and Austin Mitchell should at all times "indemnify and save harmless the said F. H. Warriner, his executors, administrators, or assigns from the payment of any and all indebtedness now outstanding against the said firm of Mitchell & Warriner, and of any and all cost and damage that may arise by reason of the same."

James M. Mitchell subsequently became insolvent after having paid all the firm debts but a balance of $544.89, due upon a certain judgment confessed by James M. Mitchell and F. H. Warriner in favor of Thomson & Kucher for $4250. This balance of $544.89 Warriner was obliged to pay and now seeks to recover it of Austin Mitchell, surety for James. The question is whether this debt was a partnership debt of Mitchell & Warriner. If it was not Austin Mitchell was not bound for its payment, and there could be no recovery in this case. If, on the other hand, it was a partnership debt, Austin Mitchell was bound for its payment, and the plaintiff would be entitled to recover. Whether the debt was a firm debt or not was a question of fact, and was for the determination of a jury if there was proper testimony in the case to support a verdict to that effect. The learned Court below, however, after admitting all the testimony offered upon that question, was of opinion that the plaintiff could not recover, and withdrew the case from the jury and directed them to find a verdict for the defendants, which was done.

We are of opinion that this action of the Court below was erroneous, and for that reason the judgment must be reversed. The reason given by the learned Judge for his instruction to the jury, was not that there was no evidence to prove that the debt paid in part by Warriner was a partnership debt, but that it was incompetent to change by parol proof a debt, which apparently on its face was an individual debt, into a partnership debt. The debt in question was evidenced by a judgment-note for $4250, given in 1879 by J. M. Mitchell and F. H. Warriner, to Thomson & Kucher, upon which judgment was entered. It was in evidence that this judgment-note was given to secure the payment of $4250, part of the consideration money of a deed for a foundry property which was made by Thomson & Kucher to J. M. Mitchell and F. H. Warriner. Being named as individuals in the deed, *prima facie* they would be regarded as tenants in common and so far as the rights of purchasers and lien creditors were or might be concerned, this state of the title could not be controverted and changed by parol proof. Purchasers and lien creditors dealing with the owners upon the faith of an individual title appearing upon the record, could not be deprived of their rights against the individual interests in the land by parol proof that they were really partnership interests, and therefore mere personalty. This doctrine is exceedingly well settled, and is not at all open to question. (Lefevre's Appeal, 69 Pa. 122; Ebbert's Appeal, 70 Id. 79; Gedde's Appeal, 84 Id. 482; Holt's Appeal, 98 Id. 257.)

But it is just as true that as between the partners themselves land which is treated as partnership property, especially if it be purchased, and paid for with partnership money, is regarded as partnership property only, although the title be taken in the name of the partners individually. It is largely a question of intention, "that intention may be shown by parol; it may be manifested in the acts and declarations of the parties." (Shafer's Appeal, 106 Pa. 49; Erwin's Appeal, 39 Id. 535; Abbett's Appeal, 50 Id. 294; West Hickory Mining Association *v.* Reed, 80 Id. 38.)

The error of the learned Court below consisted in the wrong application of an undoubtedly correct legal principle. If Austin Mitchell occupied the position of a purchaser of the individual title of either of the owners of the land, or if he were a lien creditor of either of them, and had no notice of any other title than that which appeared of record, his rights could not have been affected by any parol proof, the purpose of which was to show that the title was vested in the partners, and not in the individuals. But he is not in any such position. He is simply an obligor in a bond indemnifying the plaintiff against liability for firm debts. He neither purchased any titles nor loaned money upon the faith of any title in this property. He made himself liable generally for the payment of the debts of the firm. The question then, and the only question, is, was this a firm debt. That depends upon various considerations. Primarily it depends upon the question whether it was a debt owing for a partnership transaction. It happens that this particular transaction is one which may have two aspects, one of them depending not so much upon the actual facts of the case as upon the character of the persons whose rights or interests may be affected, such as purchasers and creditors, and the other depending upon the real, as distinguished from the apparent state of the title. If the rights of purchasers or lien creditors are concerned the apparent state of the title prevails as to all others, and even as to purchasers and creditors

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who have notice the real state of the title prevails. In this case therefore if the debt due for the conveyance of the property made by Thomas & Kucher to J. M. Mitchell and F. H. Warriner was a debt due by the firm of Mitchell & Warriner, the defendant Austin Mitchell was liable to the plaintiff for its payment, if it was not such a debt he was not liable. On this question there were facts which looked in both directions. The fact of the conveyance to the two individuals without naming them as partners, and without any statement in the deed that the property was to be held as partnership property was some evidence that the consideration of the conveyance was individual, and not partnership. The judgment bond being given by individuals would afford some evidence also, though slight, to the same effect. On the other hand there was evidence showing that the property was obtained and used for partnership purposes, that the down payment of $250 was partnership money, that two further payments of $500 each were made with partnership funds, and also that all the interest money that was paid came from the same source, that repairs were made and paid for with firm money, that the buildings were insured and the premiums were paid with the money of the firm. It was also testified by Warriner that Austin Mitchell was present at the time before the execution of the bond of indemnity in suit, when the parties were calculating the amount due on the bond given for the property, and participated in the calculation, and at another time that it was said in Austin Mitchell's presence that the bond in suit was to be given to secure him, Warriner, against this debt, and that all of them understood it was a partnership debt. There was other evidence tending in the same direction. We are clearly of opinion that it was competent to prove by the foregoing and any other testimony that the property was treated by the members of the firm as partnership property, and the consideration money for it as a partnership debt. If it was a partnership debt as between the partners, it could be recovered as such against them, and such liability would bring it directly within the term of the bond of indemnity.

In the first affidavit of defence the defendant, Austin Mitchell, alleged upon oath, that the firm of Warriner & Mitchell had purchased real estate for the purpose of carrying on their business for about $4200, and that there was unpaid on said real estate at the time Warriner's interest was sold about $2700, and that the indemnity bond was given to secure the judgment which was revived by amicable scire facias. The effect of all this was for the jury, and it would be at least evidence tending to show knowledge on the part of Austin Mitchell that the debt was regarded by all the parties, including himself, as a firm debt.

We sustain the first, second, and third assignments of error, and on them the judgment is reversed. The other assignments are not sustained.

Judgment reversed, and new venire awarded.

Opinion by GREEN, J. H. C. O.

July '88, 11. May 27, 1889.

Commonwealth's Appeal.

Collateral inheritance tax—Penalty for non-payment of—When due—Acts of May 4, 1855, and May 6, 1887—Not inconsistent—Payment of tax—How far estoppel to Commonwealth of further recovery.

The provisions of the Act of May 4, 1855, substituting a six per cent. annual charge for the twelve per cent. penalty are not inconsistent with the similar provisions of the Act of May 6, 1887. This latter Act is simply a re-enactment of the substance of the previous laws, relating to the collateral inheritance tax, into one harmonious whole.

Upon an appeal from an appraisement made for the purposes of the collateral inheritance tax, the Orphans' Court found that there had been an "unavoidable cause of delay" in settling the estate, and therefore refused to apply the twelve per cent. penalty for delay in the payment:

Held, not to be error, though a refusal to impose a six per cent. annual charge was error.

Pending an appeal to the Supreme Court, the parties liable to pay the tax under the decree of the Orphans' Court, made payment of it to the register of wills:

Held, that this did not estop the Commonwealth from prosecuting the appeal, and recovering the interest upon the tax up to the day of payment.

Appeal from the Orphans' Court of Northumberland County.

In the Court below this was an appeal by Curtis Q. McWilliams, administrator c. t. a. of William Fagely, deceased, and Catherine Martz, devisee and legatee, under the last will and testament of said William Fagely, from the appraisement for collateral inheritance tax purposes.

William Fagely died at Shamokin, Pa., testate, on the 17th of February, 1874 He was unmarried, and left to survive him neither father, mother, children, nor lineal descendants. By his last will he devised his whole estate to trustees in trust, to pay the one-half of the net income to his brother, Reuben Fagely, during his life, and the other half to his sisters, Hannah Fagely and Elizabeth Martz, and his niece Catherine Martz, or the survivor of them,

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during their lives or the life of the survivor, and from and after the death of Reuben Fagely to pay the whole of said income to Hannah Fagely, Elizabeth Martz, and Catherine Martz, or the survivor of them, during their lives or the life of the survivor, with remainder over, under the intestate laws.

Reuben Fagely qualified as executor of his brother on March 2, 1874, and died February 21, 1880. On March 2, 1880, letters of administration d. b. n. c. t. a. on the estate of William Fagely were granted to Curtis Q. McWilliams.

On May 1, 1878, Samuel Heckert was appointed by the register of Northumberland County collateral inheritance appraiser of the estate of William Fagely, and on April 2, 1880, Charles M. Clement was appointed appraiser of the estate of Reuben Fagely. No appraisement of any kind of the estate of William Fagely was made during the lifetime of Reuben. After his death the two appraisers acted together, in all matters relating to their appointment, although separate appraisements were made by them for each estate.

The appraisers first met on March 27, 1882, and on August 6, 1883, filed an inventory and appraisement, and fixed the *corpus* of the estate of William Fagely for the purposes of the collateral inheritance tax, as well as the estates of the several life-tenants and remaindermen therein. This appraisement was largely a joint one of the two estates of William and Reuben Fagely, and failed to so separate them that an assessment of the tax due by each estate could be made. An appeal from this appraisement was taken by the legatees and devisees of both estates, and the Orphans' Court (ROCKEFELLER, P.J.) appointed the aforesaid two appraisers as commissioners to take testimony and report a valuation of both estates, as well as of the life-estates and expectancies in question. The commissioners so appointed made their report, to which both sides filed exceptions. Pending these exceptions, it was agreed between counsel that, waiving all irregularities, the report of the commissioners should be taken as fixing the values of the estates, as well as of the life-estates and expectancies, and the principal of the tax due, and that the case should be argued on the question of interest only. Thereupon all exceptions were treated as withdrawn, except the Commonwealth's sixth exception, which was as follows:—

"Because the said appraisers did not specifically find and report that the said estates were liable to a penalty of 12 per cent. interest per annum from the death of the respective decedents, and did not specifically find and report the time when the same should begin to run."

After argument the Court entered a decree refusing to allow any interest whatever upon any portion of the tax as fixed by the commissioners (subsequently amended as to this on motion of the Commonwealth so as to allow interest at the rate of six per cent. upon the tax chargeable against the remainder), and further reducing the tax chargeable upon the remainder from $5380.68 to $2870.54, without any election having been made by the remaindermen to take advantage of the provisions of the Act of May 14, 1855. In entering this decree, the Court filed, *inter alia*, the following opinion:—

"In the case of the Commonwealth's Appeal, Avery's Estate (10 Casey, 204), it was held that 'it is the duty of executors, where a part of the estate cannot be settled up within the year, to estimate the amount thus suspended, and pay the collateral inheritance tax on the balance, otherwise they are chargeable with interest thereon at the rate of 12 per cent. per annum.'

"In the present case, however, the evidence shows that the estate was very much complicated; most of it consisted of partnership property, and the settlements of the affairs of William and Reuben Fagely and of John Haas & Co. were involved, which occupied several years, and it seems it was impossible to ascertain the amount of the principal, or make an estimate until such settlements could be made. In the supplemental report of the appraisers, filed January 4, 1886, they say, 'they have been requested and respectfully do call the attention of the Court to the testimony taken by the appellants for the purpose of showing that it was not possible to have had the estate of William Fagely appraised for collateral inheritance tax purposes at an earlier date than was done without manifest injury thereto. And to the evidence taken by appellants to show that neither Reuben Fagely, Catherine Fagely, nor Hannah Martz, during the life of Reuben Fagely, received from John Haas & Co. any revenue or income upon the interest of William Fagely therein, but that the same remained in and swelled the *corpus* of said estate.' Under such facts and circumstances I have come to the conclusion that it would be wrong to compel payment of any penalty. It would seem that it was almost impossible, and perhaps unsafe, for the executors to undertake to make an estimate. They allege, and from their known integrity and honesty, I have no doubt of it, that they have all along had the money in bank ready to be paid over at any time when the amount could be ascertained. The fact that when the appraisers re-examined the matter and came to make their last report, they reduced the value of the estate nearly thirty thousand dollars, is evidence of the difficulty in ascertaining the amount of the estate at an earlier period. The sixth exception is, therefore, dismissed."

The Commonwealth thereupon took this appeal

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assigning for error the action of the Court in dismissing the sixth exception (first assignment of error); in refusing to allow any interest whatever upon the collateral inheritance tax (second, third, and fifth assignments of error); and in reducing the amount of the tax itself (fourth assignment of error).

In the Supreme Court the devisees and legatees under the will of Wm. Fagely, deceased, moved to quash the certiorari taken upon this appeal, and also filed certain special pleas to the effect that they had paid the amounts of the collateral inheritance tax ordered by the decree of the Orphans' Court and held the receipts of the register of wills of Northumberland County and of the auditor-general of the Commonwealth of Pennsylvania therefor, and averred therefore that the Commonwealth was estopped from making any further claim against them.

The appeal and motion to quash were heard together.

Robert Snodgrass, for the Commonwealth, appellant.

Estoppel does not operate against the Commonwealth. The receipt given by the register is simply for payment of money under the provisions of the third section of the Act of May 6, 1844 (P. L. 565), as a proper voucher in the settlement of the estate. It does not bind the Commonwealth.

The collateral inheritance tax became due and payable within one year after the death of decedent, and under the fourteenth section of the Act of April 10, 1849 (P. L. 572), if not paid within that time the devisees became liable to a penalty at the rate of twelve per cent., unless from some "unavoidable cause of delay" the estate could not be settled up; in which case under the provisions of the Act of May 4, 1855 (P. L. 425), interest at the rate of six per cent. only may be charged.

In any event therefore interest should have been charged, and in this case the testimony showed no such "unavoidable cause of delay" but rather the unusual and unprecedented delay of thirteen years in the settlement of the estate.

The executors could readily have made an approximate estimate. If they do not they are chargeable at the higher rate.

Commonwealth's Appeal, 10 Casey, 204.
Com. *v.* Smith, 8 Harris, 100.
Reish *v.* Com., 10 Out. 521.

The tax upon estates in remainder accrues immediately upon the death of the persons from whom the remaindermen derive title, and unless paid within one year draws interest at the rate of 12 per cent.

Mellon's Appeal, 114 Pa. St. 570.

In this case no election was made to pay the tax in anticipation of the time of actual possession and enjoyment under the provisions of the Act of May 4, 1855 (P. L. 425), but even if that had been done, the amount would have been "immediately payable to the register" and liable to interest at six per cent.

Com. *v.* Porter, 9 Harris, 389.
Bank of U. S. *v.* Com., 5 Id. 407.
Com. *v.* Am. Kaolin Co., 2 Pearson, 364.
Com. *v.* Easton Bank, 10 Barr, 442.
Com. *v.* Alliance Coal Co., 13 Weekly Notes, 324.

John B. Packer (*S. P. Wolverton* with him), for appellees.

Where there are facts *dehors* the record which bar the appellant from further proceedings upon the certiorari, the proper practice is to bring them to the view of the Court by a plea or a motion to quash the writ.

Showers *v.* Showers, 3 Casey, 485.
Martin *v.* Ives, 17 S. & R. 364.
Baily *v.* Baily, 8 Wright, 274.
Herman on Estoppel, 552, § 599.
Laughlin *v.* Peebles, 1 P. & W. 114.
Smith *v.* Jack, 2 W. & S. 101.
Ullery *v.* Clark, 6 Harris, 148.
Sutton's Appeal, 112 Pa. S. 598.
Martin's Appeal, 13 Weekly Notes, 147.
Bigelow on Estoppel, 588, 584.
Smith *v.* Hood, 1 Casey, 218.
Hall *v.* Lacy, 1 Wright, 366.
Scranton Building Assoc. *v.* Rauck, 13 Atl. Rep. 840.

This doctrine of estoppel applies to the Commonwealth.

Com. *v.* Freedley's Ex., 9 Harris, 37.
Com. *v.* Smith, 2 Clark, 335.
State *v.* Ober, 14 Reporter, 330.
State *v.* Milk, 13 Id. 709.
Com. *v.* Heirs of Andre & Billou, 3 Pick. 224.
Herman on Estoppel, 295, § 276.
Com. *v.* Proprietors, 10 Mass. 155.
Carver *v.* Jackson, 4 Peters, 86.
United States *v.* Bank, 15 Peters, 377.
Cooke *v.* United States, 1 Otto, 398.

The action of the Court in reducing the amount payable by the remaindermen was proper, otherwise the Commonwealth would receive more than five per cent. on the whole estate.

King's Estate, 11 Phila. 26.

The right to charge interest upon the tax is abolished by the third section of the Act of May 6, 1887 (P. L. 89), by which Act, in its twenty-first section, all prior laws inconsistent therewith are repealed.

Com. *v.* Standard Oil Co., 5 Out. 119.

October 7, 1889. The Court. An examination of the testimony in this case satisfies us that the learned Court below was right in holding that there was unavoidable cause of delay in the settlement of the estate of the decedent.

The reasons for this finding are sufficiently set forth in the opinion of the Court, and need not be repeated here. It follows that there was no error in refusing to apply the twelve per cent. penalty for delay in the payment. But the law which relieves from the payment of this penalty

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also requires that six per cent. per annum shall be charged upon the collateral inheritance tax from the end of one year after the death of the decedent, in case the estate is not subject to the twelve per cent. penalty. That being so, it follows that the learned Court below was in error in not directing the six per cent. annual charge to be imposed, and to that extent, but to that extent only, the decree of the Orphans' Court must be reversed. The provisions of the Act of 1887 are scarcely more than a re-enactment of the substance of the previous laws relating to the collateral inheritance tax into one harmonious and consolidated law. So far as the substitution of the six per cent. annual charge for the twelve per cent. penalty is concerned, there is no inconsistency between the Act of 1855, in which this provision was originally contained, and the Act of 1887, which merely repeats it. Hence it does not follow that the Act of 1855, which was in force when this proceeding was commenced, was repealed by the Act of 1887.

We do not think that the Commonwealth's right to the present appeal was taken away by the fact of the payment to the register of wills of the amount of tax as fixed by the decree of the Court. When the other exceptions filed by the Commonwealth were withdrawn, the sixth exception, which raised the question of interest, was reserved, and there was no agreement by either party that the decision of the Court on that exception should be final. When the money was paid to the register, there was no agreement by any one that there should be no appeal by the Commonwealth, nor was such a condition annexed to the payment by the parties who paid the money. While they, having voluntarily paid the money, could scarcely have been heard on appeal, we can see no good reason for holding the Commonwealth estopped, simply because the parties indebted in any event to the extent of their actual payment, chose to make that payment. It was a payment in their own case, because it stopped the further running of a burdensome charge; and as it was unaccompanied by any condition, and not induced by any promise on the part of the Commonwealth, there are no circumstances of estoppel present. The register's receipt is simply for the amount of money fixed by the Court, and does not express the idea that the money was received in satisfaction, discharge, or payment of the decree, or of the amount of tax claimed by the Commonwealth. The second, third, and fifth assignments of error are sustained, and the remaining assignments are dismissed.

The decree of the Court below is reversed and record remitted, with direction to amend the decree in accordance with this opinion, the costs of this appeal to be paid by the appellees.

Opinion by GREEN, J. S. H. T.

July '87, 150. January 10, 1889.

Reichenbach et al. v. Ruddach.

Decedent's estate—Will—Issue devisavit vel non—Undue influence—What constitutes—Testamentary incapacity—Evidence of—In what it consists—Charge of Court to jury—Requisites of.

In an issue *devisavit vel non* on the ground of the alleged mental incapacity of testator, evidence that testator's father was admitted to a hospital because of intemperance continued for six months, and was affected by melancholia resulting from intemperance, is not admissible in the absence of proof that such species of melancholia is hereditary.

In such an issue there was much testimony as to testator's insanity shortly before the execution of the will. The Court affirmed a point that "there is no sufficient evidence of insanity on the part of testator, and therefore the burden of proof is on defendants to show that at the very time he executed the will, he was not of sound disposing mind, memory, and understanding, or at that very time his free agency was destroyed:"

Held, to be error. An unqualified affirmance of the whole point was a positive direction to the jury that the evidence was insufficient to show general insanity; and the answer should have been qualified so as to submit the testimony to the action of the jury, and that if it failed to satisfy them that there was a condition of general insanity at any time before the will was made, then the burden of proof as to the testator's condition at the time of the execution was on the defendants.

In order to avoid a will upon the ground of mental incapacity, or undue influence, the evidence must show that the incapacity or undue influence existed at the very time of executing the will.

A disposing mind and memory, in view of the law, is one in which the testator is shown to have had, at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the Act he was engaged in; a full knowledge of the property he possessed; an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty.

It is not necessary that there must be an ability to remember, and call to mind, all the items of his property, and to know and appreciate, as well as to remember, the value of each item.

It requires less undue influence and less fraud to procure a will unlawfully from a person of weak and impaired intellect than from a person in full mental vigor, and in determining the question of fraud and undue influence, the jury may take into consideration the state and condition of mind of the testator at the time of making and executing the alleged will, the condition and relative situation of the testator and the plaintiff, the situations, surroundings, and condition of the testator himself, the nature and extent of his property, all the circumstances under which the will was made, and the provisions of the will itself: and, if in the opinion of the jury, the alleged will was procured by fraud or undue influence, which the alleged testator, in the condition which the jury may find he was, from all the evidence, at the time of making and

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executing said will was too weak to resist, their verdict must be against the will.

The mere fact of the unlawful relation of mistress to a testator, is enough to justify an inference of undue influence where a will is made in favor of the mistress, and even in the case of the marriage of the parties prior to the execution of the will, it does not relieve the testamentary act from the imputation of a continuance, and present exertion of an undue influence, if the jury, in view of all the facts of the case, incline to such a belief.

It is not legally true, that one who has merely "given indications of mental unsoundness" is not at liberty to do what he likes with his own; or that in such case, every sign of partiality or injustice must be viewed with strong suspicion.

Unsoundness of mind, evinced by a revolution in character, may co-exist with an apparent use of the faculties in many respects.

In an issue *devisavit vel non*, the Court read to the jury at length the testimony of two witnesses of the proponent, and entirely omitted to read any on the part of the contestants. In the charge, there was much statement, and considerable argument of the testimony favorable to the proponent, and of the theories on which her side of the case was submitted, but there was no allusion to the great bulk of the contestants' testimony. There was much testimony on behalf of the contestants that testator was subject to delusions of an extraordinary and absurd character, but no reference to it in the charge. There was also much testimony as to testator's excessive use and abuse of intoxicating liquors, and venery, and the effect produced by them upon both mind and body. The only reference to this was, "That Dr. Ruddach was for years a man addicted to drink and lust is undoubted; but that fact alone would not necessarily incapacitate him from making a will. If all the people who drink liquor, and are fond of women, are held to be incapable of making a will, I am afraid a great many people would die intestate." A large amount of expert testimony given by physicians of experience, character, and ability, on behalf of contestants was disposed of in the charge by repeating a remark of the medical witness of proponent, that he had no doubt the contestants' medical witnesses were competent to give an opinion, if they had seen testator, but given as it was, he did not think it "worth a fig:"

Held, that the charge was unfair, incomplete, and misleading, and was ground for a reversal.

When there is sufficient evidence upon a given point to go to the jury, it is the duty of the Judge to submit it calmly and impartially, and, if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party, as that which makes against him.

It is error to confine the jury to one view of the case, where there is more than one which they should consider.

In the charge, the Court referred to the law in regard to lunatics and habitual drunkards, commented on the fact that no proceedings had ever been taken by contestants in the lifetime of the testator, and ended with the remark, "Their anxiety about the safety of his (testator's) property, and their concern as to the state of his mind, seem to have commenced after his death:"

Held, to be error. The remark would produce prejudice in the minds of the jury, and for that reason it is out of place in the charge.

The Court charged generally, and in answer to a point, "The presumption, where a will is duly executed by a person of full age, is, that the testator is competent to make a will, and that he was not unduly influenced in the making of it. This must be overcome, not by doubtful testimony, but by positive evidence:"

Held, that the latter part of the instruction was error.

Error to the Common Pleas No. 1, of Philadelphia County.

Issue, *devisavit vel non*, directed by the register of wills to try the validity of a paper dated November 15, 1884, offered for probate as the last will and testament of Dr. William H. Ruddach by Mary G. Ruddach, claiming to be the widow, devisee, and executrix of decedent, in which said Mary G. Ruddach was plaintiff, and William C. F. Reichenbach, claiming as devisee under a paper of earlier date, also offered for probate as Dr. Ruddach's last will, and George J. Ruddach, Mary Robinson, Edmund Ruddach, Mary Elizabeth Burns, Margaret Buchwalter, William R. Frazier, Louisa Frazier, Elizabeth Irwin, Thomas Webster, William H. Armitage, James Armitage, Abigail L. Mittinacht, James Sloan, Jr., and Abigail, his wife, in right of said Abigail; Elizabeth M. Huppman, Ella R. Huppman, and Eliza J. Frazier, claiming as next of kin, were defendants.

The issue was in the ordinary form to determine, (1) whether Dr. Ruddach, at the time of the making of said alleged writing, was of sound, disposing mind, memory, and understanding; and (2) whether said alleged will was made by reason of undue influence exercised over his mind.

Upon the trial, before BIDDLE, J., plaintiff offered testimony tending to show that William H. Ruddach was born October 15, 1825. From his youth he was a man caring nothing for society, but was rather moody and silent in his ways, and not talkative, except when in his cups. He was eccentric in these respects, and so continued until his death.

He became acquainted with the plaintiff when she was only a girl, and wanted to marry her twenty odd years before the marriage actually took place, and before she married any other person. He was well-to-do at that time, and she was poor; for some reason she refused to marry him, and married a Mr. Dixon.

Because of this he took to drinking, and from time to time went upon sprees more or less protracted. He always, when sober, spoke of her in

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the highest terms, and frequently said that if she had married him he would never have become dissipated. He also said repeatedly that he never would marry any other person.

Plaintiff lived with Mr. Dixon but a short time, when she left him, because of personal abuse, and returned to her mother's home. From that time until now she has supported herself by her labor.

Decedent, shortly after her return home, learned of that fact, and endeavored to renew his attention to her. He urged upon her to get a divorce from Mr. Dixon, and to marry him. This she refused to do. During this time, which was almost continuously for ten or fifteen years before he died, he was boarding with her mother, and would meet her at the store where she worked, and would escort her home. He frequently told others of his wish in this regard, particularly her warm, personal friends, whose active assistance he tried to enlist in his behalf. During all this period he was thoroughly competent in every respect to attend to business.

On January 26, 1884, he made the will under which W. C. F. Reichenbach, claims. The principal devisee under that will was a relative, Nicholas Huppman. Huppman died March 21, 1884, and on March 24, 1884, decedent executed a codicil reciting that fact, and substituting Mr. Reichenbach as the principal legatee. The two witnesses to this will both testified to his entire competency at the making of both will and codicil, and both testified to meeting decedent subsequently, after he was alleged to have become totally incompetent, one as late as about a month before his death, and that he was then as competent as he was when he made the first will, or at any time they had known him, which was for a period of twenty-two years. The only change they noted was that he complained of his health and his sight.

Decedent was on the grand jury of this county during April Sessions of 1884, attended every day of its session, nineteen in all, and was thoroughly careful, competent, and intelligent in all that he did.

In May, 1884, he was arrested on the charge of procuring an abortion, and bound over to answer at Court. This matter was the cause of much annoyance to him, and he went on a spree. On July 8, 1884, the grand jury ignored the bill.

On the same day he voluntarily went to St. Joseph's Hospital to recover, as he said, from the long spree he had been on. He did not go to his boarding-house, because he did not wish Mrs. Dixon to see him in the condition he then was. At the hospital he refused to have much to say to the attendants or to Dr. Cruice, the attending physician, who saw him about five minutes a day during his stay. Whenever, however, his friends called he recognized them, conversed with them intelligently about past and present events, about business, his investments, and other matters of interest to him. When he thought he had sufficiently recovered from his debauch, he voluntarily left the hospital and returned to his boarding-house. This was on July 17, 1884. At the hospital he received liquor and opiates, the direct tendency of which was to stupefy him.

Dr. Price, the attending physician, visited him first on that day. He found decedent perfectly intelligent and was told by decedent what medicine he could and what he could not take.

Between that time and August 26, 1884, he remained boarding with defendant; and went about his business, consulting with Messrs. Sylvester, who attended to his investments, collecting and depositing his income, and drawing such moneys as he needed from time to time.

Late at night on August 27, 1884, he went alone to the Union Street Station House, and requested to be allowed to stay there during the night. At that time he had been taking chloral or opiates. He was accused of taking chloral, but denied this, and said it was opiates. The natural result of this was to stupefy him. While there the lieutenant of police conceived the idea that decedent ought to be confined, and had him examined by two physicians. These men did not think him insane and refused to so certify, but recommended that he go to Burn Brae. They testified that they did not examine him enough to know if he was able to make a will. The lieutenant said that at that time, and from then out, he only had hallucinations.

Decedent refused to go to Burn Brae, and requested that his friend, Mr. Forten, be sent for. When Mr. Forten came decedent requested him to go for decedent's physician, giving his name and address accurately. He also requested that he should be allowed to go to his boarding house. He was on what the lieutenant called his parol of honor—a parol which the decedent recognized and spoke of —though he was not under restraint, and could have left had he chosen. When Dr. Price came he and the lieutenant had a conversation, he stating that deceased only needed rest, and abstinence from drink. As a result, it was thought best to take him to the Pennsylvania Hospital; but upon inquiry there it was learned that there was not sufficient room, and it was recommended that he be taken to the branch in West Philadelphia. This matter was explained to the decedent, and he consented to go as a voluntary patient, to leave when he pleased.

While there he would have but little to say to the attendants, but conversed freely and intelligently with all his friends. Dr. S. Preston

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Jones, the physician in charge, saw but little of him, too little as Dr. Jones says, for him at the time to form an opinion as to whether or not an organic change had taken place; he said decedent's mind would improve; but he said he did not think decedent could have recovered so as "to have enumerated his property for instance, or know his next of kin or friends." Dr. Jones also testified that Dr. Price, the attending physician, could best give an opinion of decedent's competency, and Dr. Price testified that he was always competent.

Dr. Bartles, who immediately attended decedent, thought that he was much improved, and would be better away from there because he would improve quicker, and so advised. He also said that decedent appeared to have been on a debauch, and was given liquor and anodynes while there.

Decedent left there September 2, 1884, and returned to his boarding house. He conversed intelligently and sensibly returning from there, and expressed the opinion that he would be better away from there. Subsequently of his own motion, he called up the question of payment for the carriage in which he came from the hospital, and paid back to his cousin, Wm. A. Ruddach, the amount the latter paid therefor. The decedent remained at his boarding house, seeing all who called, going in and out as he pleased, to bank, or to his friends, until September 20, 1884, when he left and went to the Delaware House.

On July 4th, 1884, Mr. Dixon died. Decedent thereupon renewed his importunities that plaintiff would marry him. She was unwilling to do so, because of his then illness, desiring that he would wait until he got well. He seemed to think that he would die before winter, and urged her for his sake to marry him at once, telling her that she would wait until it was too late. This he also said to a number of other people.

He also desired to have a will made in favor of Mrs. Dixon, and requested the Messrs. Sylvester to call for the purpose of drawing it, but they ignored his request. Mrs. Dixon not acceding to his request for an immediate marriage, he went to the Delaware House on September 20, 1884. While there he took chloral and opiates. With the other boarders there he would have no intimacy, but with the friends that called, and with his physician he was always intelligent.

He left the Delaware House and returned to his boarding-house on September 24, 1884, remaining there until the time of his death. He was out and around during all this time visiting friends and neighbors, and receiving return visits until a very short time before he died. He conversed intelligently, transacted his usual business affairs, gave minute and careful directions about his investments and securities, and generally doing all such things as any other person similarly situated would have done.

Decedent had spoken a number times to one William D. Forten about getting some one to draw his will for him, but Forten, not thinking that there was any special hurry, had given himself no concern on the subject. He subsequently, however, about November 1, 1884, spoke to J. Alexander Simpson, Esq., on the subject, and on November 11, 1884, requested him to go to decedent's house for that purpose.

On November 13, 1884, Mr. Simpson and Forten went to decedent's house. Mr. Simpson was a stranger to both Ruddach and Mrs. Dixon.

Arriving at the house, after the introduction between them, decedent asked Mr. Simpson if he called professionally. Mr. Simpson said that he did, and the first advice that he had was that they should get married. Decedent at once said that that was just what he had been wanting for some time. A number of things occurred at that time, in all of which the decedent acted intelligently and conversed intelligently. Mrs. Dixon consented, and Magistrate Collins was sent for and they were married. Magistrate Collins also was a stranger to these parties. There were six witnesses to the marriage, one of whom, Mr. Butcher, was sent for by decedent in compliance with a previous agreement between them, known only to themselves, decedent inquiring at the same time of Mrs. Butcher whether it would interfere with her husband's business. After the ceremony decedent directed one of the witnesses to pay the magistrate, and subsequently repaid him.

After every one else had left the room, decedent stated to Mr. Simpson that he wanted all his property left to his wife, and directed that she be made executrix of the will. This direction was repeated.

Between this date and the signing of the will decedent told a number of visitors of his marriage, spoke of it as the consummation of a long-cherished wish, and stated that by reason thereof he felt much better than he had previously. He also told others of the fact that he was expecting Mr. Simpson to come down with his will, and sent Forten to hurry him up.

On November 15, 1884, Mr. Simpson called with the will, witnesses were sent for, Mrs. Ruddach was asked to leave the room, and the will was distinctly read to decedent in the presence of the four witnesses. Decedent said that it was just what he wanted, and it was then and there signed by him and the witnesses. At that time he was looking much better, and said that he was feeling better.

After this he spoke to several persons of the fact that he had made his will, and that his mind was at rest by reason thereof.

The next day a relapse came, and he died. He

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was conscious until the last, spoke in the most affectionate way of his wife, regretted his past life, and desired to live only that he might show to the world that he had entirely reformed, and that he might in some small degree repay her for her affectionate care of him.

During all this time he was constantly visited by friends and neighbors, but only one relative, Wm. A. Ruddach, who, against his interest, testified that decedent was entirely competent. Decedent refused to permit his wife to write to his relatives during his illness.

He had the most unbounded confidence in plaintiff, and frequently said that he had entrusted her with large sums of money, as high as $60,000, and never missed a cent of it. Except when drunk, and then only on a few occasions, he spoke of her in the highest terms.

Dr. Price, the attending physician, visited him sixty-nine times from July 17, 1884, to the time of his death. He said that decedent was at all times competent to make a will, and said that the effect of his past excesses was only to injure the internal organs, and not to affect the mind; that when he was not in liquor his mind was perfectly clear, and that towards the last, by reason of the supply of liquor being stopped, he was always clear and intelligent.

Defendants' testimony tended to show that decedent died November 16, 1884, aged fifty-nine, possessed of a personal estate worth $58,000, and of improved real estate of an annual rental value of $3200. He was originally a man of strong physique, of good social position, of culture and of education, a physician by profession, and for many years prior to the summer of 1883 he had indulged in hard drinking and excessive venery.

In the summer of 1883, he began to show signs of moral deterioration by a change of habits, such as by associating with women of a very low character very openly and notoriously, by profanity in the presence of ladies, by slovenly and untidy dress, and by voracious and ungentlemanly habits at table.

Between the summer of 1883 and May, 1884, he drank and indulged in venery even more excessively than before.

In May, 1884, he was arrested upon a charge of bastardy and malpractice, and was bound over to Court to answer the same. The bill was ignored by the grand jury on July 3, 1884. This charge greatly worried and troubled him.

On July 3, 1884, he was taken by a friend to St. Joseph's Hospital. At that time he was greatly emaciated, and physically broken-down, and was suffering from chronic diarrhœa. The chronic diarrhœa continued during his whole stay at that institution, which he left on July 17, 1884.

Whilst there he gave no intelligent replies to the physicians and attendants, saying that he had relatives in Baltimore. He did not dress or undress himself. In trying to dress himself at times he put his feet into his coat sleeves, put his coat on over his shirt and drawers without pantaloons, put on his vest wrong side out, put on his long coat wrong side out. He at times sat in his room, which was visited by a female attendant, with his drawers half down, or entirely down. On August 26, 1884, he went unaccompanied to the police station-house. He then claimed that he was poor and had lost all his money, at a time when he had upon his person upwards of $1100 in bank notes, and was the owner of $58,000 of personal estate and real estate of an annual rental value of upwards of $3200. He allowed his money to be taken from him by the police lieutenant, who took charge thereof, without making any objection thereto. He was unable to give intelligent replies to the questions put to him by the police lieutenant, whom he knew and recognized.

On August 27, 1884, he was taken to the Pennsylvania Hospital for the Insane, where he remained until September 2. Whilst there he was unable to give any intelligent replies to the questions of the physicians and attendants. At times he was noisy and boisterous. He said he had not slept for thirty days, and that he could not sleep. He told the attendant if he went to sleep to be sure to waken him or he would die. He also complained of being poor. He sat at times looking at the ceiling, imagining that he saw persons there who wanted to shoot him. He would mutter unintelligibly.

On September 4, 1884, he removed from the box he had in the Fidelity Safe Deposit Company the title papers to his mortgages and stocks, and also coupon bonds to the amount of $10,000; took them to the house in which he was living; handed them to Mrs. Dixon, telling her he wanted her to keep them safe. "They belong to you; and if you find out you can't make any use of them, burn them up before you give them up."

On September 20, 1884, he went to a hotel where he had formerly lived, and where he remained until September 24, 1884, when he left in the company of friends, who told him they would try to obtain employment for him in the business place of one of them. At this hotel he imagined persons were hunting for him, trying to kidnap him or to arrest him; that he was poor and had lost all his money, and that it was necessary for him to obtain employment.

He complained of cold while the weather was warm, and tried to warm himself by a heater in which there was no fire. He imagined that his hands were dead. He was in constant fear of arrest.

He was in the habit of changing his shoes and

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stockings several times a day, saying they were wet when they were not. He would put on one boot, then another, take both off, and put them on frequently during the day. He was in the habit of sitting down with his head on his hands, resting his elbows on his knees.

From being a man of strong will he readily obeyed directions given him, such as to go upstairs and the like.

He may have indulged in drinking before some or all of these three occasions of his stays at St. Joseph's, in the Pennsylvania Hospital, and in the hotel, but he did not drink any considerable amount of liquor whilst he was in either place, and yet at no time did the peculiarities noted change during any period of his stay in either. At all times he recognized and called by name his acquaintances, and answered questions as to his physical condition.

There is no evidence that at any time he had hallucinations of animals, devils, or the like, or that he had constant tremor. There was no relief of his symptoms following sleep. There was no excess of perspiration combined with an active, excessive fear and dread of every person and thing. He made no attempt at resistance. The physician who treated him discovered and treated him for no syphilitic disease. His treatment was principally opium and cinchona. His physical condition was no better, perhaps worse, on November 1, 1884, than it was on September 24, 1884; his physician noted a marked change for the worse on or about November 10, 1884. He died on November 16, 1884, emaciated and thoroughly broken down physically.

His diarrhœa continued until the last; though occasionally checked by treatment.

Expert witnesses called by defendants testified that under the facts as set forth in defendants' testimony that decedent, upon the 13th and 15th days of November, 1884, was not in a fit mental condition to make a will or transact business.

The physician in charge of St. Joseph's Hospital testified that during his entire stay there he was perfectly imbecile and showed no mental improvement, that he was not suffering from immediate alcoholism or delirium tremens, but was in a morbid condition, physical, moral, and mental degradation and collapse, the result perhaps of his long career of alcoholism and vice.

The physicians in charge of the Pennsylvania Hospital for the Insane testified that during his entire stay there he was insane, suffering from dementia, which had been coming on him apparently for a long time and from which, in all human probability, he could never recover.

There was also evidence that testator had spoken of Mrs. Dixon as his mistress, that he complained of her unkind treatment, and extravagance, said that she tried to induce him to marry her, to which he would never consent, and that he desired to be rid of her.

It was shown that Dr. Ruddach was lifted in bed and his hand guided to execute the will.

Defendants offered in evidence the records of the Pennsylvania Hospital for the Insane for the purpose of proving that David J. Ruddach, the father of William H. Ruddach, was committed to that hospital in 1849 as insane, and that he died there after a residence of two months, the said records containing the date of his admission, at whose application he was admitted, the cause of his confinement there and the history of the case, being minutes of the corporation and ancient documents contemporaneously kept more than thirty years ago, the purpose of the offer being to show that the decedent derived an insane taint from an insane father. Objected to. Objection sustained. Exception. (First and second assignments of error.)

The Court charged the jury, *inter alia*, as follows:—

"It appears that on Saturday, the fifteenth day of November, 1884, Dr. Wm. Ruddach executed a paper, which it is here contended was his last will and testament. That this paper was executed in the manner prescribed by our Act of Assembly cannot be and is not controverted. It was signed by him at the end thereof, and is witnessed by four subscribing witnesses, which are two more than the Act requires, so that its formal execution may be said to be established.

"It is contended, however, that, at the time he signed this paper, he was not of sound and disposing mind, memory, and understanding; and, second, that at the time he signed it he was unduly influenced in the performance of that act.

"If you should find both or either one of these allegations to be true it would invalidate the instrument, although all the formalities necessary to its execution should have been observed.

"[The presumption, where a will is duly executed by a person of full age, is that the testator is competent to make a will, and that he was not unduly influenced in the making of it. This must be overcome not by doubtful testimony but by positive evidence.] (Seventeenth assignment of error.)

"A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, and an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. Or to sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?

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"Undue influence does not mean legally that influence which is acquired over a testator by acts of kindness or other acts of that character calculated to inspire affection and confidence. Neither does honest advice, nor suggestion. And it has even been held by our Supreme Court that one has a right by fair argument or persuasion to induce another to make a will in his favor.

"To constitute undue influence in the language of Judge WOODWARD: 'There must be a present constraint operating on the mind of the testator in the very act of making the instrument, and there must be some evidence tending legitimately to prove that some fraud has been practised at the time of making the will, or that some misrepresentation had been made, or that some physical or moral constraint had been employed such as to destroy his free agency. Neither moral nor physical constraint is to be inferred from mental weakness alone. That undue influence which suffices to destroy an alleged will is distinct from weakness and has no necessary connection with it.'

"These principles, says Judge THOMPSON, are fully supported by the best authorities.

"Dr. Ruddach, it appears by the will in question here, has left the whole of his property to his wife. He does not appear to have had any direct descendants, and those here disputing it are collateral relatives and legatees claiming under a former will. Mr. Reichenbach, who has been called a foster-brother in the discussion of the case, does not occupy that position according to the usual understanding of that phrase. Foster-brothers are children of different parents suckled by the same woman. Mr. Reichenbach was simply the son of the housekeeper of Dr. Ruddach's mother and was brought up in the family.

"That a man who marries should change any will made before that event is of course very usual. In fact, if he does not do so and dies, the widow can claim under the Intestate Act. The will of a single woman is revoked absolutely by her subsequent marriage.

"In the present case Dr. Ruddach was married on the 13th of November, 1884, made his will on the 15th, and died on the 16th. The nearness of these events is naturally calculated to excite remark and to require explanation.

"The witnesses for the plaintiff explain it by saying that the person whom the doctor married had been known to him for many years, and that their earlier union was only prevented by the fact that her husband, who had deserted her, was still living; that being a Catholic she was unwilling to avail herself of the law to obtain a divorce; that in July preceding Dr. Ruddach's death, her husband had died, and their union was then only postponed on account of Dr. Ruddach's illness, and it was the suggestion of Mr. Simpson, who was sent for by the doctor to make his will, that it had better be preceded by the marriage.

"That the marriage ceremony was gone through with was testified to by the magistrate who performed it, in the presence of Mr. and Mrs. Butcher, Peter Daly, Mr. Keseler, and Mr. Simpson, Sr., who have all sworn that Dr. Ruddach was entirely conscious of what was going on, and intelligently answered the questions which were addressed to him, and that neither the physician who attended him, nor any of his friends, anticipated that he would die so soon after it.

"The plaintiff here, who represents the will, has not chosen to rely exclusively upon the presumption arising from the formal execution of the paper, but has also produced affirmative testimony to establish the fact that the testator was of sound, disposing mind, memory, and understanding at the time that he signed it. The will was an extremely simple one.

"To establish not only the execution of the will, but the condition of the testator's mind, the plaintiff has called Mr. J. Alexander Simpson, the lawyer who drew and witnessed the will, and Peter Daly, Nicholas Kessler, and Mrs. Butcher, who appear as subscribing witnesses. They swear positively that the full contents of the will were made known to Dr. Ruddach, and that he was, in their opinion, in a condition of mind fully to understand it. Their cross-examination has been elaborate and exhaustive, and their previous testimony before the register gone over, and it is for you to say whether anything has been developed to cause you to believe that their testimony has been invalidated.

"In addition to the subscribing witnesses to the will, a number of others have been called, who have had a more or less extended acquaintance with or friendship with the doctor, and who, although they admit that he was more or less addicted to the use of liquor, do not consider that it ever disqualified him from the performance of the ordinary duties of life, or was ever carried to such an excess as to make him incapable of taking care of himself. Their reasons for this opinion have been thoroughly investigated, and it is for you to say whether it has shaken the faith in the justice of these conclusions.

"The mere fact that a man is addicted to drinking does not of itself disqualify him from making a will, if you believe that at the time he made it he was in a condition of mind to understand clearly the nature of the business in which he was engaged. Liquor affects people very differently, the capacity to resist its influence being very great in some and very small in others.

"Among the most important of these witnesses was, of course, Dr. Mordecai Price, a graduate of the University of Pennsylvania, and a prac-

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titioner of seventeen years' standing. He was called to attend Dr. Ruddach by Mr. Joseph Butcher. His attendance commenced on the 17th of July, 1884, and only ended with Dr. Ruddach's death. He testifies that, although he was a sick man, 'his mind was always perfectly clear, when you aroused him even at his weakest and worse period. That towards the latter part of his life he was freer from pain than before.'

"These are the main features of the plaintiff's case, and if you should consider them established, would certainly constitute a valid disposition of his property.

"The defence, as opened to you in this case, was: That it would be shown to you that Dr. Ruddach, so far from having any regard or esteem for Mrs. Dixon, whom he married, 'hated, abhorred, and detested her.' That the will devising to her this property was an infamous fraud perpetrated in a den in the lowest quarter of the city. That it was concocted by this woman, a negro politician, and a lawyer, Mr. Simpson, assisted by Mr. Daly, Mr. Kessler, and an apostate cousin.

"Denunciatory declamation is always very striking when well delivered, but in a Court of justice, unless justified by adequate testimony, is entitled to no consideration. Can you find, then, in the present case, anything, from the beginning to the end of it, which satisfies your mind that Dr. Ruddach 'hated, abhorred, and detested' Mrs. Dixon? Is not the great weight of the testimony entirely the other way?

"It is quite remarkable to my mind, that in Dr. Ruddach's free and unconcealed reflections on the women he consorted with, she never seems to have been included in the same category with them. It is not pretended that she was one of the thirteen whom he numbered, or that she was one of the eight for whom Mr. Theodore H. Broughton furnished liquor by the order of a gentleman he deemed out of his mind. Her appearance seemed always to be to protect and guard him, and whatever he ever said disrespectful of her, struck me more as the petulance of one who resented anything like interference with his vices.

"[That she was always kind, attentive and devoted to him, seems to me to have been overwhelmingly established in this case.]" (Nineteenth assignment of error.) "She performed the most menial services for him, and seems to have been the only one who ever pretended to care for him, look after him, or to check his indulgences. I do not recall that any one has asserted that her influence over him was ever exerted except for his own good.

"The testimony of the subscribing witnesses to his will, has not been attempted to be impeached by the evidence of persons who are willing to swear that they believed them to be unworthy of credit under oath. It is sought to discredit them by inducing the belief that the facts testified to by them could not be true.

"The defence here is a double one. Some of the defendants claim under a previous will dated January 26, 1884, and a codicil of March 24, 1884. They, of course, contend that, at the time of making that will and codicil the doctor was perfectly competent to make it, so that they fix the time of his disability subsequent to this date. The other contestants, who are not mentioned in that will, of course date his inability far enough back to invalidate that will as well as the one now in question.

"The claimants under that will contend that in the month of May, 1884, he was bound over by a magistrate to answer a criminal charge, and they date his general failure of mind from that time, he, it is said, having been greatly affected by it.

"Why a charge by a loose woman should have had such an effect upon a man of his character and habits is a little remarkable, for the grand jury ignored the bill; so that the result of the charge was a triumph for him, as it shows that, in the opinion of the grand jury, there was not enough in the charge even to put him on trial.

"From that date, a large number of witnesses have been called to show his condition from time to time, his conduct, his acts, his sayings and doings, and the opinion of the many as to his mental condition; the object of this testimony being to establish the fact that at certain times he was unable to make a will, and that this inability included the time at which the will was made.

"It is for you to say whether this has been successful.

"[The defendants concluded their case by the production of what is called expert testimony; this is, testimony not given in the usual manner by witnesses, who are only allowed to testify to what they know or saw, but called to give their opinions on matters testified by others.

"These gentlemen were of high character, and well known in the medical profession. The only one of them who ever saw Dr. Ruddach was Dr. S. Preston Jones. He had seen him at Kirkbride's, where he was a patient for six days, from the 27th of August to the 2d of September. The other experts had never seen him, but they are all quite positive that he had alcoholic dementia, a state of mind in which he was utterly incapable of intelligently transacting business or making a will. Dr. Jones thinks that he could not have sufficiently recovered to such an extent as would make him competent to transact business, or make a will at any time since he last saw him, on the 2d of September, 1884, until the time of his death."] (Part of fifteenth assignment of error.)

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"Among the witnesses who have testified in this case were the well-known real estate brokers, the Messrs. Sylvester. They had been for five years the men of business for Dr. Ruddach, and visited him on business, separately, ten or twelve days before his death, and two months after Dr. Jones had seen him. No one has pretended to say that they were not disinterested witnesses. That they evinced no favorable disposition to the plaintiff was quite evident.

"This is the account Mr. Charles Sylvester gives of his interview. [The Court here quoted at length the testimony of Messrs. Charles and Frederick Sylvester, and continued:—]

"The statements of these two witnesses are statements of actual occurrences, and not scientific opinions.

"[Dr. Price, who was called after the expert testimony had been called, says: 'If these gentlemen had seen Dr. Ruddach, and examined him themselves, I have no doubt that they would be perfectly able to give an opinion, but I do not think their opinion is worth one fig, given as it was.'

"Whether that is a correct estimate of the value of their opinions it is for you to say under all the evidence in the case."] (Remainder of fifteenth assignment of error.)

"As was said, however, by Judge HOUSTON: 'The facts and circumstances are the primary evidence on which the jury must rely, and not the opinion of witnesses as to the soundness of mind, or capacity to make a will. That is, the opinion of the jury, founded on facts and circumstances, which they believe to be proven, and not the opinion of witnesses, which is to decide the case.'

"In this case, as in all legal investigations, no testimony is admitted, unless the Judge considers it relevant to the issues which are being tried. The testimony is therefore to be considered as a whole, and you are to make up your minds from that, whether the plaintiff or defendant has satisfied your minds of the justness of his contention.

"That Dr. Ruddach was for years a man addicted to drink and lust, is undoubted, but that fact alone would not necessarily incapacitate him from making a will. If all people who drink liquor and are fond of women, are held to be incapable of making a will, I am afraid a great many people would die intestate.

"The question in this case is, did these habits so affect his mind that, at the time he made his will, he was incapable of making an intelligent disposition of his property?

"He was a man in the possession of a large property, and this he controlled and managed until the time of his death. [We have in Pennsylvania a law, which authorizes the Court to issue a commission, to determine whether a person is a lunatic or an habitual drunkard, on the application of any one related to him by blood or marriage, or of any one interested in his estate. When he has no relative by blood or marriage residing within this Commonwealth, then any disinterested person in the county may make the application.

"And the word 'lunatic,' it is further enacted, shall be construed to mean and include every person of unsound mind, whether he may have been such from his nativity, as idiots, or should have become such from any cause whatever.

"On the return of this inquisition, finding that the person is lunatic or habitual drunkard, the Court can commit the custody of the person or of the estate, or both, to such person as they may deem most suitable, who shall first give security in such sum as the Court shall direct, with condition for the faithful performance of said trust, and duly to account, according to law, for all property that may come into his hands.

"This course, no relative by blood or marriage, no one interested in his estate, no disinterested person, ever thought it necessary to adopt. One of the nearest relatives, and most frequent visitors, Mr. W. A. Ruddach, of Norristown, of course, could not do so, for he has sworn that, in his opinion, Dr. Ruddach was perfectly competent to take care of his property. The Messrs. Sylvester could not do so, for they knew he was competent, as he satisfied them by the directions he gave them in regard to the management of his estate. As to others, their anxiety about the safety of his property, and their concern as to the state of his mind, seem to have commenced after his death."] (Sixteenth assignment of error.)

"His was certainly not the case of an educated gentleman, who had suddenly and unguardedly fallen into bad company and dissolute habits. Whatever the company was, he deliberately selected it.

"The first house he selected for his home and his drug store was at Fourth and Lombard streets. He there boarded with his present wife and her mother, and he died in Gaskill Street, where he boarded with the same persons, Mrs. Dixon being a saleswoman at Heller's store, as she now is.

"Mr. Forten had known him for thirty years, and continued his friendly relations until his death.

"Mr. Joseph Butcher, in the employ of Joel J. Baily & Co., and his wife, for seven or eight years had been on intimate terms with him; and Mr. Kessler and his family for the same length of time.

"That Dr. Ruddach desired to make a will, is testified to not only by Mr. Forten, but by both the Messrs. Sylvester, whom he had several times asked to call on him for that purpose.

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"Whether he did make this will, clearly knowing and understanding the extent of his property, the business in which he was engaged, and without undue influence, is the question you are to decide."

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(4) There is no sufficient evidence in this case of a general insanity on the part of Dr. Ruddach, and, therefore, the burden of proof is on the defendants to show that at the very time he executed the will he was not of sound disposing mind, memory, and understanding, or that at that very time his free agency was destroyed. *Answer.* I affirm this point. (Third assignment of error.)

(5) Unless the jury are satisfied that the evidence shows unsoundness of mind or undue influence, at the very time of executing the will, the verdict must be for the plaintiff. *Answer.* I affirm this point. (Fourth assignment of error.)

(19) If, on considering all the evidence in the case, the jury should be in doubt, they should incline in favor of the plaintiff on both the issues. *Answer.* Testamentary capacity is the normal condition of one of full age. It is with him who undertakes to call it in question to establish it, not in a doubtful way, but in a positive manner. (Eighteenth assignment of error.)

Defendants requested the Court to charge, *inter alia*, as follows:—

(I.) That it is not requisite that such derangement of intellect should be proved as would amount to insanity to set a will aside, but that imbecility of intellect, though short of insanity, is sufficient for that purpose; and if the jury find, from all the evidence in the cause, that there was such imbecility of intellect arising from the use of alcoholic liquors or chloral, or from any other cause or causes as, in the opinion of the jury, rendered the testator incapable of appreciating, knowing, remembering, and calling to mind the value and extent of his property at the time of making and executing said will, or that there was then such imbecility as rendered him, in the opinion of the jury, not of sound and disposing mind, memory, and understanding with reference to his said property, then their verdict must be for the defendants. *Refused.* (Fifth assignment of error.)

(II.) That it requires less undue influence and less fraud to procure a will unlawfully from a person of weak and impaired intellect than from a person in full mental vigor, and that in determining the question of fraud and undue influence the jury may take into consideration the state and condition of mind of the testator at the time of making and executing the alleged will, the condition and relative situation of the testator and plaintiff, the situations, surroundings, and condition of the testator himself, the nature and extent of his property, all the circumstances under which the will was made, and the provisions of the will itself; and if, in the opinion of the jury, the alleged will was procured by fraud or undue influence, which the alleged testator in the condition which the jury may find he was, from all the evidence, at the time of making and executing said will, was too weak to resist, their verdict must be for the defendants. *Refused.* (Sixth assignment of error.)

(1) If the jury believe that Dr. Ruddach was incompetent to make a will at any time before the alleged will was made, they should find for the defendants, unless convinced that he had recovered or acquired and retained capacity to make a will at the time he undertook to make it. *Refused.* (Seventh assignment of error.)

(2) When he that is at the point of death, and hardly able to speak so as he may be understood, does not of his own accord make or declare his testament, but at the interrogation of some other answers "yes," or "I do so," such a testament is open to grave suspicion. *Refused.* (Eighth assignment of error.)

(3) A sane man may do what he likes with his own, but this liberty is not allowed to one who has given indications of mental unsoundness. In his case, every provision must be strictly scrutinized, and every sign of partiality or injustice viewed with strong suspicion. That mental disorders, such as would render a testator incompetent to make a will, may arise as the sequel or accompaniment of bodily disease, and is often indicated by weakness of judgment, loss of memory, imperfect appreciation of one's relation to others, disregard of propriety, freaks, caprices, vacillation, and change. And the evidence in this case for defendants in this case will, if believed, justify the jury in finding a verdict for defendants, on the ground of such mental disorder. *Refused.* (Ninth assignment of error.)

(4) If a man after having attained mature life undergoes a change of character and conduct, especially when connected with any derangement of the physical organism, it may well induce a belief that it is the result of some morbid condition of the intellectual faculties. *Refused.* (Tenth assignment of error.)

(6) That a revolution in character and conduct on the part of a decedent, whereby he adheres to what he has formerly shrunk from, and rejects what he has formerly loved, is an indication of and may be ascribed to an unnatural, morbid, and unsound condition of mind. *Refused.* (Eleventh assignment of error.)

(7) Unsoundness of mind, evinced by a revolution in character, may co-exist with an apparent use of the faculties in many respects. *Refused.* (Twelfth assignment of error.)

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(8) That when the faculties of a man predisposed to mental disorder by inheritance have been, by long-continued indulgence of the sexual passions and protracted alcoholism, reduced to such a condition, as described by the witnesses who saw Dr. Ruddach at the Pennsylvania Hospital, it should require very strong and satisfactory evidence to convince a jury that he could recover his senses sufficiently to make a will within a period of less than eighty days. *Refused.* Except as answered in the general charge. (Thirteenth assignment of error.)

Verdict for the plaintiff on both issues. A rule for a new trial having been discharged, defendants took this writ, assigning error as above, and also—

(14) The Court below erred in the predominance given to the plaintiff's testimony, and in virtually ignoring and passing by the defendants' evidence, and particularly in reading Mr. Sylvester's testimony to the jury, and the stress placed on it, "inasmuch as out of a charge of fourteen printed pages the learned Judge below gave but one and a half pages to the defendant's witnesses, and this mainly employed in criticising and condemning them, while six pages were given to the testimony of the Sylvesters alone, witnesses for the plaintiffs, the strongest parts thereof being read to the jury, while none of the language of defendants' witnesses was thus cited."

F. Carroll Brewster and *Richard L. Ashhurst* (*Bradbury Bedell*, *Henry F. Hepburn*, and *Charles Beasten* with them), for plaintiffs in error.

Alexander Simpson, Jr., for defendant in error.

October 7, 1889. THE COURT. The record of the hospital for the insane contained an entry which indicated that the testator's father was admitted in 1849 to the hospital because of intemperance continued for six months, and that he was affected with melancholia resulting from intemperance. As there was no proof, and no offer of proof that this species of melancholia is hereditary, we cannot see the relevancy of the record entry. It may be, or it may not be that this form of mental affection is transmissible by inheritance, but we cannot assume that it is in the absence of proof, and therefore the jury would not have been justified in inferring it had the entry been admitted. The first and second assignments of error are not sustained.

The plaintiff's fourth point was affirmed without qualification. The first clause of the point declared that there was no sufficient evidence of general insanity of the decedent, and the conclusion expressed in the second and last clause was that therefore the burden of proof was on the defendants to show mental unsoundness at the very moment of execution.

An unqualified affirmance of the whole point was a positive direction to the jury that the evidence was insufficient to show general insanity. In view of the large amount and serious character of the testimony given by the defendants as to the testator's mental condition shortly anterior to the making of the will, particularly during the summer of 1884, when he became an inmate of the insane asylum, we think it was going too far to say that there was absolutely no evidence of a general insanity sufficient for the consideration of the jury. The answer should have been qualified so as to subject the testimony to the action of the jury, and that if it failed to satisfy them that there was a condition of general insanity at any time before the will was made then the burden of proof as to the testator's condition at the time of execution was on the defendants. We feel obliged to sustain the third assignment of error. The fourth assignment is not sustained as it is certainly true that the unsoundness of mind, or undue influence which will defeat a will, must have been operative at the time the will was executed.

We do not sustain the fifth assignment because we think the defendants' first point is an overstatement of the essentials of testamentary capacity. It is certainly not the law that the testator must be capable of appreciating, and knowing, and remembering, and calling to mind the value, and extent of his property at the time of executing his will. The language of the point is exceedingly broad. Literally it means that there must be an ability to remember, and call to mind all the items of his property, and also to know and appreciate as well as to remember, the value of each item or at least each subject of ownership in order that the testator may reach the standard of the point. Persons having a large and diversified estate would be practically incapacitated from testacy if so severe and exacting a standard as this were established. We question whether there is any improvement in the definition of testamentary capacity upon that given by Judge KING in 1858 in the case of Leech *v.* Leech (21 Pa. 69), to wit: "A disposing mind and memory in the view of the law is one in which the testator is shown to have had at the making and execution of a last will, a full and intelligent consciousness of the nature and effect of the act he was engaged in; a full knowledge of the property he possessed; an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty."

This description of testamentary capacity has been many times approved and never questioned. While modification of it may be needed in particular cases to meet particular facts developed, it contains all the substance of a correct general definition, and may at all times be expounded to

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juries as a guide to them in their deliberations with entire safety.

The second point of the defendants should, we think, have been affirmed. We see no objection to its postulates just as they are stated. Nor is the point in any degree involved or obscure. It is drawn with much care, with clearness of expression, and with entire accuracy as to its legal truth. Thus, considering it in detail, it is certainly true that it requires less undue influence, and less fraud to procure a will unlawfully from a person of weak and impaired intellect, than from a person in full mental vigor. It is equally true that the jury in determining the question of fraud and undue influence may take into consideration the state and condition of mind of the testator at the time of executing his will, the condition and relative situation of the testator and the plaintiff, the situations, surroundings, and condition of the testator himself, the nature and extent of his property, and all the circumstances under which the will was made, and the provisions of the will itself.

In illustration of the propriety of this point it cannot be overlooked that, while the plaintiff was in fact the testator's wife when the will was made, she was in all probability his mistress up to that time and for several years before. He so declared her to be in her presence, and without contradiction from her to the witness, James T. Thompson, and to the witness Broughton, he said she had been his mistress for thirteen years. In addition to this, the entirely uncontradicted evidence as to the manner in which they lived together, was highly persuasive, indeed quite convincing, that this was their true relation. The circumstances, both of the marriage and the will, were also of a very unusual and gravely important character as affecting the very question of undue influence. The marriage took place on November 13, 1884, the will giving all the property of the testator to the plaintiff was executed on November 15th, and on the 16th he died. At the time of the marriage he was confined to his bed, as he was also when the will was made, with the last and fatal sickness, of which he died the next day. It was literally a death-bed marriage, and a death-bed will. That he was in an extremely enfeebled condition of body was the undisputed testimony of all.

That he was also extremely enfeebled in mind was alleged by the defendants, and that allegation was supported by a great mass of entirely disinterested, and, much of it, highly intelligent, and some of it highly skilled testimony. A very great number of distinct acts, transactions, facts, declarations, and conversations done and uttered by the deceased, which were quite inconsistent with his mental soundness, were given in evidence and might have been received and acted upon unfavorably to the will by any jury engaged in the trial of that question. The testator had made a will only a few months before, when he was certainly in a better condition both of mind and body, in which not a dollar of his estate was given to the plaintiff, a large part was given to a charity, and the remainder to relatives and friends. That will was the result of his personal dictation, and without doubt embodied his wishes with certainty. It is also a fact of importance that his estate was quite large, probably more than $100,000 in value. It was a fact entirely undisputed that the testator had for many years indulged in the excessive use of alcoholic stimulants and in excessive venery. The plaintiff's principal medical witness, Dr. Price, who attended him during his last illness and for some months before, was asked: "Q. What induced you to think, the first you saw of him, that his disease was incurable? A. Simply from his history, a long life of drinking and debauchery."

It is not necessary to review the testimony on this subject. It abounds with the usual disgusting details of a life of gross intemperance, profligacy, and sensuality. The results arrived in due time. In the summer of 1884 he was taken to St. Joseph's Hospital for a time, and after that to Kirkbride's Insane Asylum where he remained for several days.

Dr. Jones, who was for many years in charge of the male department of that institution and saw him and treated him while there, testified, that he was in a state of dementia with delusions. When asked to explain what he meant by this he said: "It is a state of great weakness of mind. It is the condition in which most insane patients ultimately sink, in which there is a loss of reason, intelligence, and a weakening in short of all the mental faculties." This was from August 27th to September 2, 1884, less than three months before his death.

The foregoing being a very brief mention of a part of the facts, either undisputed or very well supported by affirmative testimony, the matters of which the defendants' second point were predicated, brought them conspicuously and compactly together, and required their submission for the consideration of the jury.

Thus the point asked an instruction that the jury might take into consideration "the state and condition of mind of the testator" at the time of making the will, "the condition and relative situation of the testator and the plaintiff, the situations, surroundings, and conditions of the testator himself, the nature and extent of his property, all the circumstances under which the will was made and the provisions of the will itself." Most certainly all of these matters were entirely, indeed, eminently, proper to be considered by the jury, in determining the question of undue influence.

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The marriage was suggested by another and not by the testator, it was contracted, and the will was made in the house of the sole beneficiary, as to whom the defendants had a perfect right to argue, and ask for a finding, that she was the testator's mistress up to the moment she became his wife. In the case of Dean *v.* Negley (41 Pa. 312), we held that the mere fact of the unlawful relation of mistress to a testator was enough to justify an inference of undue influence, and that fact, together with the fact of the devise to her children, would be enough to justify a verdict against the validity of the will. During the largest part, nearly all, of the period of the intimacy between the testator and the plaintiff, she was the wife of another man from whom she was separated, but not divorced. If there was unlawful intercourse between them it was adulterous, and comes directly within the terms of the decision in Dean *v.* Negley. Added to that was the fact, that by the terms of the will, made almost in the article of death, in her house, within her custody, and substantially in her presence, drawn by a person who was at least a stranger to the testator, the whole estate of the testator was given to the plaintiff to the exclusion of all his relatives and of the deserving charity, who had been the sole objects of his bounty in his former will. This circumstance was considered of importance in the case of Rudy *v.* Ulrich (69 Pa. 177), commenting upon Dean *v.* Negley. While in the present case the fact that a marriage had taken place prior to the will relieves the plaintiff from the most serious risks which she would have encountered under Dean *v.* Negley, it does not relieve the testamentary act from the imputation of a continuance, and a present exertion of an undue influence, if the jury in view of all the facts of the case inclined to such a belief. But from this opportunity they were practically excluded by the refusal of the Court to affirm the second point of the defendants. We think the point should have been affirmed just as it stood, and therefore sustain the sixth assignment of error.

In one sense the first of Mr. Ashhurst's points is true, because it includes the idea that the testator, although previously incompetent, had become, and was, mentally capable at the time of executing the will, and regarded in that manner the point is certainly correct. Yet the point is so drawn that it might well mislead a Judge into the supposition that its real meaning was that if at any one time in the testator's previous life he had become temporarily incompetent, no matter how briefly, the whole burden of proving a subsequent recovery and a capacity at the time of execution rested upon the proponent. This is certainly not the law, and because we would not reverse on the ground alone of this one refusal we will not say there was error in refusing the point in the language in which it was framed. The seventh assignment is not sustained.

The eighth assignment is not sustained because while the point was abstractly true there are no facts in the case which make it applicable.

We cannot sustain the ninth assignment because the first two clauses of the point which it covers are too strongly stated, and the point was simply refused as an entirety. It is not legally true that one who has merely "given indications of mental unsoundness" is not at liberty to do what he likes with his own, or that in such case every sign of partiality or injustice must be viewed with strong suspicion. Persons may easily give "indications" of insanity without in reality being insane, and they cannot be charged with testamentary incapacity for so unsubstantial a reason as that. Dr. Ray's report in Pidcock *v.* Potter (68 Pa. 358) is not the opinion of the Court.

We cannot sustain the tenth and eleventh assignments because the points which they cover are not sufficiently certain or specific to justify the affirmance of either. The change of character spoken of may be from bad to good, and certainly such a change cannot be regarded as indicating mental aberration of any kind.

The twelfth assignment is sustained because the point to which it refers is entirely correct and should have been affirmed just as it stood.

The point covered by the thirteenth assignment is not a legal proposition nor is its deduction an inference of law from the facts of which it is predicated. The law cannot know whether it would require very strong and satisfactory evidence to convince a jury that a man conditioned as the testator was described by witnesses to be at the Pennsylvania Hospital, "could recover his senses sufficiently to make a will within a period of less than eighty days." The jury alone could know what their conception was as to Dr. Ruddach's mental condition when at the hospital, and they only could know how much and what kind of testimony could remove their impressions upon that subject at any particular time. We do not see what relevancy or legal propriety there is in suggesting a period of eighty days as a possible limit within which a radical change of mental condition could not take place, when there was abundance of testimony as to what his actual condition was at the end of that period and ample opportunity to deliver direct testimony on that subject.

The idea of the point seems to be to substitute a theoretical inference as to what the testator's condition ought to be, or might be expected to be, at a given time, for specific evidence as to what it actually was. Courts have nothing to do with declaring propositions such as this, and the point was properly refused

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The fourteenth assignment is of much more importance and we think it is sustained. Of course when the learned Court below selected the testimony of two witnesses on one side, upon one subject, and read it at much length to the jury, it would naturally be inferred by the jury that in the opinion of the Court that testimony was of controlling importance, and when there was an entire omission to read any of the evidence on the other side having a contrary tendency they would naturally consider that in the opinion of the Court such opposing testimony was of no efficacy and was not entitled to any consideration from them. If the testimony upon one side of a controverted question of fact is made prominent and conspicuous in the charge, common fairness requires that equal prominence should be given to opposing testimony having a contrary tendency. A careful reading of the charge impels us to say that we think it amenable to the criticism of this assignment. Though there was much statement and considerable argument, in the charge, of the testimony favorable to the plaintiff, and of the theories upon which her side of the case was submitted, we do not discover the least allusion to the great bulk of the defendant's testimony, and only an allusion to the testimony of Dr. S. Preston Jones, who testified in the most emphatic manner, giving reasons which seem to be of grave importance and founded upon ample observations, for the conclusions which he reached and announced. But there was beside all this a great amount of testimony to specific acts, conversations, and declarations of the testator, indicating not merely a weak but a disordered mind, established by what seems to be entirely credible testimony, and to all or any of this there is not the slightest allusion in any part of the charge. There was considerable testimony that the testator was subject to delusions of an extraordinary and absurd character, but no reference to any of it was made in the charge. There was much testimony as to his excessive use and abuse of intoxicating liquors, and the effect thus produced both upon his mind and body. The only reference in the charge to this branch of the defendants' testimony is the following: "That Dr. Ruddach was for years a man addicted to drink and lust is undoubted; but that fact alone would not necessarily incapacitate him from making a will. If all the people who drink liquor and are fond of women, are held to be incapable of making a will, I am afraid a great many people would die intestate." That such a remark as this might be made with propriety in a case where the testimony showed nothing but an occasional indulgence in liquor or sexual intercourse, may not be questioned, but to dispose in this way of the entire mass of the testimony in this case, on these subjects, showing such a complete breaking down of the testator's physical powers, and a very serious impairment of the powers of his mind, was not in our opinion an adequate or a correct treatment of the testimony.. Edward Lynch, an attendant at Kirkbride's, described his condition thus: "He was very peculiar; more so than any patient I had seen there. His mind was entirely gone; one time he admitted to me he had been a doctor, and that is the only thing I could get from him. He was incoherent, and he was full of delusion. I heard him say once that there had been men all around him going to shoot him —men all around his room—and he used to get very noisy in his talk. He appeared to have imaginary objects before him all the time." Strawbridge, a watchman at the same place, said: "His talk was at times loud and incoherent; at times he acted more like a man frightened and in fear of something, seeming to shrink from some possible enemy, deprecating or apprehending some injury, and he would make such noises or exclamations as would indicate fear or dread." After he left Kirkbride's in the latter part of September, 1884, he was staying at the Delaware Hotel. Hugh Jones, the proprietor, after describing some of his peculiarities, said: "He required exercise, and he would sit there from morning to night in a chair taking no exercise, and I would say to him, 'Doctor, why don't you go out and take exercise?' He said, 'I am afraid; don't you see those fellows watching me. The moment I go out they will arrest me.' I tried to convince him there was no person there to disturb him but I could not." The same witness further testified: "I recollect one day, he put his hand in his pantaloons pocket and pulled out I should judge from two dollars to four dollars in silver, but I do not know exactly the amount, and he said to me, 'Mr. Jones, this is all the money I have in the world. I must get something to do or I will starve.' He was very much distressed. I tried to convince him it was a fallacy but I did not succeed." Dr. S. Preston Jones, the physician in charge at Kirkbride's, said: "He was stupid and dull. I could get no responsive replies from him to my questions. He could not give me any account of his feelings, or tell me anything about himself, who he was, where he was and so on. . . . . I then observed him for the next two or three days more closely or quite closely, and became satisfied he was of unsound mind." Plumley, another witness, testified after giving many other facts and particulars, as follows: "Q. Toward the last, when he became weaker, was he harder to manage by Mrs. Dixon, or was he more easily managed by her? A. He was easier managed. Q. Explain how that was. A. All she would have to do would be to say to him when he wanted to do anything, 'Will, you must not do that,' and he

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would drop like a child. It made no difference what it was." . . . "Q. What did he say about wanting you to bury him, how would he express himself about it? A. He said that he was poor —that he had nothing, that they had got every cent of his money, that they had got all he had and he wanted me to bury him." This was when he was fast in bed shortly before his death. These are a very few of the matters in evidence as to his mental and physical condition. Other delusions and other facts were shown tending to establish the effect of his habits of dissipation and debauchery upon his mind and body, and they were far too numerous in the aggregate, and of too serious a character, to be passed over with so slight a reference in the charge as heretofore stated. A large amount of expert testimony was given by physicians of experience, character, and ability, on behalf of the defendants. It was all disposed of in the charge by repeating a remark of Dr. Price, the plaintiff's medical witness, that he had no doubt the defendants' medical witnesses were competent to give an opinion if they had seen Dr. Ruddach, but given as it was he did not think it worth a fig. Such a treatment of that testimony by the Court in charging the jury would naturally lead the jury to treat it in the same way. The writer has read that testimony and feels obliged to say that it was entitled to a far more serious consideration. A long hypothetical question, embodying the facts in evidence, was propounded to the medical witnesses. All of them expressed the opinion that, upon the facts stated in the question, Dr. Ruddach was of unsound mind with scarce a possibility of recovery at the time the will was made. Dr. Wood, one of these witnesses, being asked to state his reasons for his opinion said: "In the first place the history is plain of a long continued and excessive abuse of alcohol and of venery—causes which lead to mental deterioration and may lead to absolute dementia, or loss of mental power. . . . The symptoms were in a word those of chronic alcoholic dementia at that time, and were clearly not those of acute alcoholic poisoning or of delirium tremens. The history of the case during the man's stay in the Pennsylvania Hospital is clearly that of chronic alcoholic insanity with dementia. The history of the case so far as it is afforded after that time is that during his stay in the hotel the characteristic symptoms of alcoholic dementia were present and those of delirium tremens certainly not at all. Such a state I believe could scarcely be recovered from even if it had lasted but for a few days. Having however lasted for a succession of weeks and the man dying a few months afterwards, or a short time afterwards, it is almost impossible there should be a recovery with mental capacity."

Some idea of the extent of the testator's habit of drinking is conveyed by the testimony of one of the saloon-keepers. He was asked: "Q. During the last year of his life how frequently do you suppose he would take drinks at your place a day? A. I could safely say twenty. Q. Do you mean to say that he would average twenty a day? A. Yes, and I guess a great many more than that. I am positive of twenty. Q. What kind of liquors did he drink? A. Whiskey and champagne. Q. Was he in the habit towards the latter part of the time of getting whiskey at your place for nights? A. Yes, sir; he always used to take a small flask home with him on a night, saying that he couldn't sleep without it. Q. What would he put in it? A. Whiskey."

When it is considered that this was only one of the places he visited, it is not difficult to understand the effects which resulted upon the testator's mental and physical condition. We have made these few references to the testimony simply to illustrate what seems to us the incomplete character of the charge of the Court in dealing with the case. In Burke *v.* Maxwell (81 Pa. 139), the present Chief Justice in delivering the opinion said: "When there is sufficient evidence upon a given point to go to the jury it is the duty of the Judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially, that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him." In the case of McTaggert *v.* Thompson (14 Pa. 149) we said: "In addition, the defendants have just reason to complain of the one-sided character of the charge. It is objectionable because it resembles the argument of the advocate rather than the impartial survey of the Judge." In Penna. Canal Co. *v.* Harris (101 Pa. 80) we said: "The main complaint is that the case was not justly and fairly submitted to the jury; that the evidence and theory of the defendant were fully and prominently presented, and the strength of the plaintiff's case was so presented as not to call their attention to the main points in the plaintiff's case. . . . It is error to confine the attention of the jury to one view of the case where there is more than one which they should consider." After referring to some of the testimony given by the plaintiff the opinion proceeds: "If this evidence be correct it should be submitted to the jury as having great force, yet the evidence was incidentally referred to by the Judge, and in a manner not calculated to induce them to give it a proper consideration." We have so frequently held that giving undue prominence to the testimony on one side of a case is

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error that a reference to the cases is unnecessary. The fourteenth and fifteenth assignments are sustained.

We are not referred to any testimony proving that no proceedings in lunacy were commenced against the testator in his lifetime, and we do not know whether such was the fact or not. This being the case we think there was no propriety in the remarks of the learned Court upon that subject, winding up with this statement in regard to the contestants: "Their anxiety about the safety of his (testator's) property and their concern as to the state of his mind seem to have commenced after his death." Such a remark would naturally tend to create a prejudice in the minds of the jury against the defendants, and for that reason it is out of place in a charge. Even if there had been proof that no proceedings in lunacy were commenced against the testator in his lifetime we do not think that circumstance would be of any weight in view of the facts of this case. It is true that in Irwin *v.* West (82 P. F. S. 157) it was held that the omission to commence such proceedings might have some weight to be considered by the jury, but that was said with reference to the facts of that case. In the present case the testator had no near relatives—no parents, no children, or lineal descendants—and nearly all of such relatives as he had lived out of the State. His nearest relative in Pennsylvania, W. A. Ruddach, a cousin living at Norristown, said he did not have knowledge of a proceeding in lunacy, but that he thought there was such a commission; he had heard so but could not tell where. As the testator was neither an idiot nor a lunatic, and the worst effects of his mode of life did not become so very serious until shortly before his death, we do not see that the omission to commence proceedings was of any weight whatever as against the good faith of the present contest over his will, and in any other point of view such omission was not a proper subject of remark. We, therefore, sustain the sixteenth assignment of error.

As to the seventeenth and eighteenth assignments we think it altogether likely that the learned Judge did not mean to convey the idea that proof of incompetency or undue influence must be positive as distinguished from circumstantial, in the character of the testimony offered, but nevertheless he did so charge in literal terms and of course it was error. There is no rule of law that allegations of mental unsoundness or undue influence in feigned issues on wills must be established by positive evidence and, hence to say that it must, in a charge to a jury, tends to give the jury an erroneous idea of the quality or character of proof required. We are, therefore, obliged to sustain these assignments.

We do not think the nineteenth assignment is of any material consequence and, therefore, do not sustain it. The words "overwhelmingly established" in the charge in relation to Mrs. Dixon's conduct towards the testator are, perhaps, too strongly stated, in view of some of the evidence, but the whole subject is one of very minor consequence, and we would not feel at liberty to reverse on that ground.

Judgment reversed, and a new venire awarded.

Opinion by GREEN, J.

[See Reichenbach *et al.* *v.* Ruddach, 22 WEEKLY NOTES, 205.

H. C. O.

Common Pleas.

C. P. No. 4. October, 1889.

In re Assessment of Damages for Vacation of Howard Street.

Vacation of streets—Assessment of damages for—Act of May 8, 1854—Construction of Act of April 21, 1858—Constitutional law—Appeals—Exceptions.

Sur exceptions and rule to quash appointment of jury.

Upon petition, under the Act of May 8, 1854, Howard Street, between Cresson and Apple streets, in the Twenty-first Ward of the city o. Philadelphia, was vacated under a decree of Court Subsequently upon petition a jury was appointed under the Act of April 21, 1858, to assess the damages caused by the vacation, who awarded the petitioners $1275 damages, and assessed the same upon William Rice, Louis Bean, and Clayton G. Rice, trading as Rice, Bean & Co., owners of land specially benefited on the line of said street.

Appeals were then taken and exceptions filed to the report of the jury, the following being the ones most relied upon:—

(1) Because no authority exists in law to select juries to assess damages for vacating streets in the city of Philadelphia.

(2) Because the jury had no authority in law to exercise any of the powers assumed by them under the appointment of the Court.

(3) Because the appointment of said jury was unauthorized by law.

(4) Because the Act of April 21, 1858, under which the jury was appointed is unconstitutional.

A rule was also taken to quash the appointment of the jury.

George P. Rich and *Francis S. Cantrell*, for the exceptions and rule to quash.

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The Act of April 21, 1858 (P. L. 386), assumes that provision already existed for the selection of juries to assess damages for vacating streets, and it is only juries previously appointed and selected for the express purpose of assessing such damages who are authorized to exercise the powers conferred by the Act.

No provision was made or has ever been made for the payment of any damages by the Commonwealth in the case of vacating a street, for the reason that surrendering the right of way over a public road by the Commonwealth to the owners of the soil is not taking private property for public use. It is difficult to see how, even if the Commonwealth chose gratuitously to assume the payment of such damages, she could cast any portion of them on the parties benefited.

Paul *v.* Carver, 24 Pa. 207.
McGee's Appeal, 114 Id. 470.

The Commonwealth in opening or widening a street takes private property for public uses, and is therefore under the Constitution bound to make compensation to the owners injured. The fund must be raised by taxation general upon all the inhabitants of the Commonwealth, or special upon those specially benefited.

In re Washington Ave., 69 Pa. 352.
Pittsburgh *v.* Scott, 1 Id 309.
Lambertson *v.* Hogan, 2 Id. 24.
Brown *v.* Hummell, 6 Id. 91.
McMichael *v.* Skilton, 13 Id. 217.
Kneass's Appeal, 31 Id. 90.
Lance's Appeal, 55 Id. 16.
Palairet's Appeal, 67 Id. 479.
John Dolman, contra, relied on—
In re Centre Street, 115 Pa. 247.

October 4, 1889. THE COURT. Exceptions dismissed and rule to quash discharged.

T. T. L.

Orphans' Court.

May 15, 1880.

Linnard's Estate.

When legacies are charged on real estate—Bequests of pecuniary legacies far in excess of the personal estate, with a clause indicating an evident desire to dispose of all the estate, charges the legacies on the real estate—Words held to constitute a residuary clause.

Sur petition for payment of balance due on legacies out of real estate.

The facts were as follows:—

The will of decedent dated December 5, 1877, which contained many alterations and interlineations in her own hand-writing, provided for the payment of numerous pecuniary legacies aggregating $18,925, besides sundry legacies of specific articles. It was provided that one of the pecuniary legacies after the death of a life-tenant "shall become part of my residuary estate," and a codicil to the will bequeathed an additional $900 "should there be any residuary." These clauses contained the only reference to a residuum in the will or codicils.

The account showed a personal estate of $15,502.04; and the real estate of which testatrix became seised prior to the date of her will was valued for collateral inheritance purposes at $6731.25.

At the audit of the first account the fund for distribution being insufficient to pay legacies in full, they were abated proportionally, and a final order was made April 17, 1880, awarding a dividend of sixty-nine and one-half per cent. thereon. (See opinion of HANNA, P. J., 8 WEEKLY NOTES, 80; affirmed by Sup. Ct., 37 Leg. Int. 297. See also Linnard's Appeal, 12 Nor. 331.)

Whereupon the petition of The American Board of Commissioners for Foreign Missions *et al.*, was presented, setting out the foregoing facts, and asking for a citation to the heirs-at-law of decedent requiring them to show cause why her real estate should not be sold for the payment of the balance due on said legacies.

A citation having issued the answer of Susan Linnard *et al.*, was filed admitting the main allegations of fact contained in petition, but submitting that the pecuniary legacies were not charged on the real estate of decedent and praying the Court to determine the same.

Samuel C. Perkins, for petitioners.
J. Howard Gendell, contra.

May 29, 1880. THE COURT. The personal estate of testatrix being insufficient to pay in full the pecuniary legacies, the question is now presented whether the real estate is charged with their payment. If it be held that the realty is not thus charged, then testatrix will have died intestate as to the real estate, and the same will pass by descent to her heirs-at-law, and the legatees will be deprived of the balance due of their legacies. Was this result intended by testatrix?

The will is peculiar in its structure, and bears the evident impress of the special characteristics of the testatrix's own mind and feeling. No abstruse or deeply technical phraseology was needed to express her intention as to the objects of her bounty, and the professional adviser who drew the will at first could not have been informed that she had real estate to be affected. But besides, she made with her own hand alterations in the body of the will, and subsequently added

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several codicils. There is an apparent obscurity as to whether she was bequeathing to the objects of her bounty her personal estate only, or that she intended to devote her entire estate, real and personal, to the payment of the legacies she bequeathed. The inquiry thus presented depends for its solution upon the further question, Did testatrix intend to die intestate as to any portion of her estate? And this, as settled by the authorities, is never to be presumed, when the language used is sufficient to include the whole estate. (Stehman *v.* Stehman, 1 Watts, 466; Little's Appeal, 31 P. F. Smith, 190; Raudenbach's Appeal, 6 Norris, 51; Hofius *v.* Hofius, 37 Leg. Int. 203.) As remarked by WOODWARD, J., in Gilbert's Appeal (4 Norris, 350), "while in order to make legacies a charge on land, it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest on direct expression." "It is enough if the intention appears by natural and obvious implication from the provisions of the will." "No form of words is necessary to produce the effect, and where the intent is manifest, Courts are bound to carry it into execution." In the case before us, we must presume that testatrix knew that the law would first apply her personal estate to the payment of the legacies. With this knowledge we find her bequeathing legacies aggregating nearly $19,000, while her personal estate amounted to almost one-third less, and she must have therefore known it would be insufficient to pay the legacies. Nor is it a violent assumption that her intention was that her entire estate should be appropriated to the payment of the legacies to her relatives and the denominational charities with which she had been identified. This is also evident from the second codicil whereby she anticipates that possibly a balance might remain after payment of the prior pecuniary legacies, and in this event she provides that "should there be any residuary I direct that," etc. This is equivalent to saying "out of the residue of my estate I direct that," etc. And "the residue of an estate in testamentary language means whatever is not specifically devised or bequeathed, and it ought to have that meaning unless the whole will taken together shows clearly it was not so intended." (TRUNKEY, J., in Hofius *v.* Hofius, *supra.*) "Legacies are charged on the land where the 'residue' of the realty and personalty is bequeathed in one mass." (Wigram on Wills, 241.) It is also worthy of notice that testatrix does not with any particularity refer to either real or personal estate. She uses the word *estate* but twice; first in regard to the collateral inheritance tax upon the legacies; and second, in the first codicil when referring to the absence of any obligation "to leave any of my estate to my relatives." Nor is any power of sale given to the executor. But these omissions we think, in view of the fact already stated of the manner in which the will and codicils were written, tend to support the view we have adopted, rather than militate against it. Again the number of codicils and the specific disposition of a number of family relics and mementos, all exhibit the intention of testatrix to leave nothing undisposed of, irrespective of the character of her estate, whether part realty and part personalty. After a careful consideration of the entire will, we have reached this conclusion, and being of opinion that the language employed by testatrix is sufficient to repel any presumption that she intended to die intestate as to her real estate, and indicates her intention that her entire estate, real and personal, should be applied to the payment of the legacies, the executor is therefore directed to forthwith apply to the Court for authority to sell sufficient of the real estate to pay the balance due the legatees.

Petition granted.

Opinion by HANNA, P. J.

[See next case.]

March 22, 1884.

Wiltberger's Estate.

Legacies charged on real estate—What words of a testatrix and circumstances may indicate an intention to dispose of all her property for benefit of legatees so as to charge real estate with payment of legacies—Form of decree making such charge—Words held to have the effect of a bequest of the residuum.

Sur petition for a decree charging real estate with the payment of legacies.

The petition of Theodore M. Wiltberger *et al.*, filed February 16, 1884, disclosed the following facts: Decedent died July 26, 1883, leaving a will, dated May 18, 1883, duly proven, whereby she bequeathed numerous pecuniary legacies, aggregating $31,000, including legacies to the petitioners, and in conclusion provided as follows: "All that is in my brother's hands, over and above what is written here, to go to my brother Theodore and his heirs."

At the time of decedent's death she resided at the house of the said Theodore M. Wiltberger, and kept there in her own possession the title papers of her real estate, the rent of which he collected as her attorney-in-fact. The personal estate of decedent was appraised at $27,190.84, and would be insufficient to pay the legacies in full; and the real estate was appraised for collateral inheritance purposes at $5000, and consisted of a ground-rent reserved by her in 1865.

The petition prayed for a citation to the ex-

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ecutor and heirs-at-law of said decedent to show cause why a decree should not be made charging the legacies on the real estate of decedent, and directing its sale for their payment.

This citation having issued, the answer of John M. Wiltberger, one of the heirs-at-law of said decedent, was filed, acquiescing in the prayer of said petition. No other answer was filed.

Henry Pleasants, Jr., for petitioners.

In accordance with the tests applied by the Courts in similar cases, the testatrix's intention to charge her real estate with the payment of the legacies is here plainly inferrible from the following circumstances:—

(1) The real and personal estate are completely blended by the will, there being no reference to them as such.

Jane Gallagher's Estate, 12 Wright, 121.
Davis's Estate, 2 Norris, 353.
Linnard's Estate (reported *ante*, p. 492).

(2) As if to avoid dying intestate as to any part of her property, she provides: "All that is in my brother's hands," etc., thus bringing her will within the rulings in—

Rudenbach's Appeal, 6 Norris, 51.
Hofius *v.* Hofius, 11 Id. 367.

(3) And the close approximation of the value of her whole estate to the amount of her legacies explains why a more specific residuary clause was not made. This case is ruled by Linnard's Estate, decided May 29, 1880 (reported *ante*, p. 492).

THE COURT subsequently entered the following decree:—

"And now, March 24, 1884, proof of service of the citation issued in above estate having been made and adjudged sufficient, and no cause being shown to the contrary, the Court, on motion of Henry Pleasants, Jr., and having given the petition of Theodore M. Wiltberger *et al.*, and the matters therein contained, full and careful investigation, and being of the opinion that the legacies left by said decedent, Julia A. Wiltberger, are, by the terms of her will, charged upon the real estate described in said petition, do order, decree, and direct that Henry Pleasants, M.D., the executor of the estate of said Julia A. Wiltberger, deceased, sell the said real estate for the payment of said legacies, and the costs and expenses of this proceeding, by public vendue or outcry, after giving due and timely public and legal notice thereof, and do make return thereof to the Court for confirmation.

Per HANNA, P. J.

[NOTE.—At the audit of the executor's account in said estate, July 7, 1884, a claim was made by Theodore M. Wiltberger, as the residuary legatee of said decedent under said clause in her will, and the matter passed upon by the Auditing Judge (HANNA, P. J.) in the following extract from his adjudication:—

"The personal estate appearing to be insufficient for the payment of the expenses of the settlement of the estate, and the legacies bequeathed by the will, upon petition of certain legatees the Court ordered and decreed that the legacies were a charge upon the real estate of testatrix, consisting of a ground-rent which, in pursuance of the order of the Court, was sold, and the proceeds are now for distribution.

"On behalf of Theodore M. Wiltberger, the residuary legatee mentioned in the will, it was claimed that he should be awarded the balance in the hands of accountant after payment of the legacies, and which balance would consist of the residue of the proceeds of the sale of said ground-rent after the payment of the legacies.

"It appears clearly from the will that testatrix intended said Theodore M. Wiltberger to be her residuary legatee of all belonging to her that was in his hands, but it is not so clear she intended him to be the residuary legatee of her entire estate, real and personal. She does not mention any real estate, though she was then the owner of the ground-rent. Nor does she blend her real and personal estate in making the bequests. She does not refer to her 'estate,' not using the word in the entire will, but simply gives pecuniary legacies aggregating more than her personal estate. She evidently supposed she had sufficient moneys to pay said legacies in full then in her brother's hands, owing by him to her, and in addition a balance would remain after payment of the legacies. This balance she gives to him absolutely.

"But it may be that said ground-rent was also in her brother's hands, he having custody of the deeds, etc. If so, it may well have been included in the bequest to him, and that testatrix, not recognizing it was real estate, contemplated it together with the mortgage due by him to her, as a fund for the payment of all the legacies.

"This is not at all improbable, particularly in connection with the fact that testatrix's brother was largely indebted to her, and for which indebtedness, or the greater part of it, she held his bonds and mortgages upon his real estate. In confirmation of the view contended for by the residuary legatee, were produced and offered in evidence two prior wills of testatrix, and a codicil in lead-pencil in her handwriting, dated April 9, 1881, signed by her also, in which she revokes that part of her first codicil 'wherein it gives part of the residuary fund to the Western Home for Poor Children, and give the above to my brother Theodore and his family, consisting of himself, his wife, and three daughters.'

"It will be observed that in her last will she bequeaths five hundred dollars to said charity, and by the last item still has in view her intention of giving the residue to her brother Theodore.

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"Recognizing the well-settled principle that a testator is never to be presumed to have intended to die intestate as to any part of his estate, if a contrary intent can be fairly gathered from the will, the Auditing Judge concludes from the will itself, and the evidence before him, not only that testatrix intended her whole estate, real and personal, to constitute a fund for the payment of the legacies, thereby charging them upon the ground-rent; but that she bequeathed the balance of the fund after payment of the legacies to her brother Theodore as residuary legatee, and the same is awarded to him."]

[See preceding case.]

May 20, 1889.

Sterling's Estate.

Decedent's estate — Will — Construction of — A devise to trustees of a fund to pay the income thereof to testator's son W. and daughter A. with a power of appointment conferred on them as to one-half of the said fund, and as to the other half "should either or both die without children to be divided pro rata to my other surviving children," held to refer to those children who were alive at the time of testator's death and not to those who survived A. only.

Sur exceptions to adjudication.

At the audit of the account of the Fidelity Trust and Safe Deposit Company, trustees, under the will of Henry Sterling, the decedent, it appeared that the testator died in 1868, and by his will provided as follows:—

It is my desire that the assets devised in the said will to my son William H. Sterling and to my daughter Anna M. Sterling should be safely invested in good bank stocks or United (States) securities or in mortgages on real estate, so that the interest arising from the same should be paid to them at least semi-annually for their support during their lives. And it is my desire that the said investments and income arising therefrom should be so invested and secured that they cannot be deprived of the same by any person or on any purpose whatever. And if either or both of them should die without leaving children to inherit their estates, then, in that case, the one-half of said estates shall be divided *pro rata* to my other surviving children mentioned in my aforesaid will and other halves of the estates may be disposed of by the aforesaid Wm. H. Sterling and Anna M. Sterling to whomsoever they choose, either by will or otherwise, with the exception of the amount of the mortgages devised in said will to them.

Henry Sterling left four children, Robert B., who died in 1877, William H., still living, Anna M., the life-tenant of this trust, who died in 1889, and J. Franklin, still living.

Before the Auditing Judge (ASHMAN, J.), it was urged in behalf of William H. and J. Franklin Sterling that at the time of the decease of the life tenant "the other surviving children" were William H. and J. Franklin Sterling, who are thus entitled equally to that half of the trust over which Anna M. had no testamentary power.

The Auditing Judge held that the word "other" in the will was meaningless if the testator intended the remainder to vest at the death of both life-tenants, in which case there could be "no other survivors." He therefore awarded one-third of the fund to William H., one-third to J. Franklin, and one-third to the estate of Robert B. Sterling, deceased.

Other facts are sufficiently set forth in the opinion of the Court, *infra*.

John Marshall Gest, for the accountant and exceptants.

If there is no previous interest given in the legacy then the period of division is the death of the testator, and the survivors at his death will take the whole legacy.

Stringer *v.* Phillips, 1 Eq. Cas. Abv. 293.

But if a previous life estate be given then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.

Russell *v.* Long, 4 Ves. 551.
Daniell *v.* Daniell, 6 Id. 297.
Jenour *v.* Jenour, 10 Id. 562.

In Bindon *v.* Lord Suffolk the House of Lords found a special intent in the will that the division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. See, also—

Olney *v.* Hull, 21 Pick. (Mass.) 311.
Hulburt *v.* Emerson, 16 Mass. 241.

Henry M. Dechert and *Henry T. Dechert*, for Elizabeth R. and Robt. B. Sterling, and Susan B. Duprey, legatees, and for estate of Robt. B. Sterling, dec'd, and executor of Anna M. Sterling, dec'd, cited—

Manderson *v.* Lukens, 11 Harris, 31.
Johnson *v.* Morton, 10 Barr, 245.
Ross *v.* Drake, 1 Wright, 373.

June 1, 1889. THE COURT. Though it disregarded many previous decisions and changed a principle established for more than a century, the doctrine enunciated by Sir JOHN LEACH, in Cripps *v.* Wolcott (4 Mad. 11), which has been followed by subsequent cases in England and adopted by most of the States of the Union, that in a testamentary gift to several persons and the survivors and survivor of them, taking effect at the expiration of a prior estate, the survivorship, in the absence of evidence of a contrary intent, is to be referred to the period of division and not to the death of the testator, may, as an abstract proposition, be admitted to be correct: but *qui hæret in litera hæret in cortice*, and in the interpretation of wills the precise, literal signification of words is not to be too closely

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adhered to. The rule referred to, like all rules merely defining the meaning of words, must therefore give way when it conflicts with fundamental principles, not affected by the rules of grammar or etymology: as that one standing in the relation of heir or next of kin to the testator will not be displaced by words of doubtful import, and all intendments will be made in his favor; and in construing an ambiguous word a meaning will not be given which may lead to an intestacy if it be susceptible of another which will not.

Where the persons taking at the expiration of the prior estate are the children of the testator, if the word survivor is so construed as to limit the class of takers to those living at the time of distribution, children who may previously die are cut out altogether, even though they may have left children; the latter, being grandchildren of the testator, being excluded by the restriction of the gift to his children: while if none should survive, there would be an absolute intestacy. To prevent either of these results, the doctrine of Cripps *v.* Wolcott has been expressly repudiated in Pennsylvania, and, in the absence of controlling evidence of a different intention, the primary meaning of the word will be rejected, in such cases, and the survivorship understood as referring to the death of the testator. (Johnson *v.* Morton, 10 Barr, 245; Ross *v.* Drake, 1 Wright, 373; Barker's Appeal, 2 Cent. Rep. 282. See also, Lipman's Appeal, 6 Casey, 180; Buckley *v.* Reed, 3 Harris, 83; Lapsley *v.* Lapsley, 9 Barr, 130; Lewis's Appeal, 6 Harris, 318; Cresson's Appeal, 26 Smith, 19.)

In the present case, however, even if Cripps *v.* Wolcott were an authority here, the will furnishes evidence that the testator did not intend by the use of the word "surviving," as descriptive of the children taking at the death of his daughter without issue, to refer to that event as determining any question of survivorship. The gift is not, as in Cripps *v.* Wolcott, or even in Johnson *v.* Morton, to the "survivors or survivor"—words implying survivorship as between the beneficiaries: there is simply a direction that the estate shall then "be divided *pro rata* to my other surviving children mentioned in my aforesaid will." The direction to "divide *pro rata*" among the persons who are to take is wholly inconsistent with the idea of an intention to give to a single survivor should all die but one; while the fact that the division is to be among the surviving children "*mentioned* in my aforesaid will" shows that the word "surviving" is used in the sense of "living" at the time of the execution of the will, and with reference to another child who had, as was stated at the argument, died previously. It was impossible to mention in the will those who would be surviving at a future time. Upon this point, all doubt disappears when it is found that the same expression is used in the will itself, in a place where future survivorship was manifestly not thought of: thus, after giving to each of his children a specified share of his valuable assets, the testator adds, in general language, "I ALSO desire that my books shall be divided in lots of equal value among my *surviving children*."

It would be attended with serious consequences to one of the exceptants if this will should be construed literally. The trust created by the testator embraced his share as well as that of the daughter and the provision for ultimate devolution is that "if either or both" of the *cestuis que trust* should die without leaving children, etc., the division shall be among the "*other*" surviving children. If the word "surviving" is to be taken in a sense which will exclude the brother who is now dead, the exceptant, though still surviving, is certainly not of the class spoken of as "other."

We see no reason why the portion of the estate which passes under the daughter's power of appointment should not go directly to her appointees. They take, it is true, under the original will; but the fund for this trust having been set apart upon the settlement of the account of the executors, it would lead only to delay if they are again put in possession, simply to hand it over to the appointees. (See King's Estate, 14 WEEKLY NOTES, 77; 4 Kent, 327.) Nor need it be paid to the daughter's executors, since she does not blend it with her own estate, as in Stokes's Estate (20 WEEKLY NOTES, 48). It is true that in Bell's Estate (12 WEEKLY NOTES, 372) the original executors were permitted to retain the fund; but that was because the donee of the power deferred the time of distribution until the death of her husband, to whom she gave the income only; and as by the terms of the original will the distribution was to be made by the executors, they necessarily remained in possession until the arrival of the time at which it was to take place. The case was exceptional and bears no resemblance to that now under consideration.

It is scarcely necessary to say that the daughter's estate is entitled to the income upon the trust securities accruing after the last payment in her lifetime to the time of her death. The income so apportioned will be paid to her executor.

The exceptions are dismissed, and the adjudication, modified in accordance with this opinion, confirmed absolutely.

The necessary decree will be prepared by counsel.

Opinion by PENROSE, J. W. L. S.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, NOV. 8, 1889.* [No. 28.

Supreme Court.

Jan. '89, 409. May 9, 1889.

Western Union Telegraph Company v. Stevenson.

Telegraph company—Liable for negligence in transmission of messages—How far regulation of company may restrict liability—When restriction waived—Evidence—Substitutionary and hearsay.

A telegraph company having brought suit to recover a balance alleged to be due for telegraphic messages sent, defendant, an oil-broker, pleaded a set-off on account of a loss in a transaction in oil, caused by a mistake in the transmission of one of his messages. Defendant, who lived in Bradford, and acted in his business upon quotations as to the price of oil furnished by plaintiff, was allowed to testify as to messages sent by him over the company's lines, to his agents in Oil City and New York, directing the purchase and sale of oil, and the messages received from the company's operators in reply. He testified that he knew his orders were acted upon in Oil City and New York, because the oil was delivered and the transactions settled. The agents were not called upon to testify:

Held, that the evidence was properly admitted. The correspondence was notice to the company that defendant acted upon the quotations given; and although the testimony of the agents would have afforded more direct proof of the transactions, it would have been proof of the same grade offered.

The requirement that the best evidence applicable to each particular fact shall be produced, means that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had.

The rule excludes only that evidence which itself indicates the existence of more original sources of information; but where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not impinged.

As between living witnesses, one is not to be excluded because another had a better opportunity of knowing the fact alleged and attempted to be shown.

The company plaintiff had a rule printed at the head of its message blanks, to the effect that "the company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," etc. In the Oil Exchange at Bradford, the business conducted was of such a peculiar nature, and required such rapid action, that the messages were delivered to the operator verbally for transmission, and the answer delivered in the same manner:

Held, that it was a question for the jury, whether or not under the circumstances, the company, by dispensing with the use of the blanks, did not intend to relieve their patrons from the stipulations contained therein.

A telegraph company may make reasonable rules, not inconsistent with the public good, affecting the measure of its responsibility in the ordinary course of telegraphy. The rule now in question is not so far contrary to private interests, or the public good, as to justify a Court of justice in pronouncing it invalid.

Passmore *v.* Telegraph Co., 78 Pa. 239, followed.

A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety and diminish the loss in the event of accident, and declare, if these are not observed, the injured party shall be considered in default, and precluded by the doctrine of contributory negligence.

Error to the Common Pleas of McKean County.

Assumpsit, by the Western Union Telegraph Company against C. P. Stevenson, to recover $1330.69, balance alleged to be due for services rendered. Pleas, *non assumpsit*, payment, and set-off, with leave, etc.

Upon the trial, before MORRISON, J., it appeared that the plaintiff is engaged in the general telegraphic business in the principal towns and cities of the United States, including Bradford and Oil City, in Pennsylvania, and New York City, at which places it kept and maintained telegraph offices, with operators and employés, to and from which offices it had connecting lines and wires, for the purpose of receiving, transmitting, and delivering messages for the general public. The defendant is an oil broker, engaged in the business of buying and selling oil, his principal place of business being the oil exchange at Bradford, Pa., where he gave the business his personal attention, and had agents in the Oil City and New York exchanges, with whom he had correspondence over the plaintiff's line nearly every moment of the day during exchange hours, relating to purchases and sales of oil in said exchanges. Defendant also had an arrangement with the plaintiff by which it was to furnish him at Bradford, over its said lines, with the fluctuations or varying prices of the oil market in New York and Oil City for a reward agreed to be paid at the time complained of in this action. During business hours defendant remained upon the floor of the Bradford Exchange, at a point where he had a speaking-tube connected with the plaintiff's telegraph office in an adjoining room. When the defendant desired to execute an order to buy or sell oil in Oil City or New York he would call to the operator

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through the tube to buy or sell a certain number of barrels of oil; the operator would then place the order upon a book furnished by defendant for that purpose and transmit the same as directed to defendant's agents, and upon receipt of a message from defendant's agents at Oil City or New York the plaintiff's operator would deliver the same to defendant through the tube, and would also deliver said quotations through the tube in the same manner.

After the close of the day's business the operators would report to plaintiff's manager the number of messages sent by defendant which had not been paid before sending from the Bradford office; also the number of messages received at the Bradford office from defendant's agents which had not been prepaid; also the number of quotations received by defendant during the day (if the quotations for that day were to be paid so much for each quotation); and thereupon the manager would make up the defendant's account for that day; and so on for the month; and on the first day of each month an itemized statement showing the totals for each day's business of the preceding month was delivered to defendant by the plaintiff, which statements for a long time prior to August, 1885, were promptly paid by defendant. Such statements were rendered to defendant for the months of July, August, and September, 1885, showing a total balance due the plaintiff of $1780.69, less a credit of $400 on account of the July statement, leaving a balance due the plaintiff from defendant of $1380.69, with interest, for the recovery of which this action is brought.

One of the conditions of the company's regulations printed upon its blanks was:—

"To guard against mistakes or delays, the sender of a message should order it *repeated:* that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for non-delivery, of any *repeated* message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. . . . . .

"The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message."

There was no substantial controversy in the evidence as to the correctness of the plaintiff's claim.

The defendant, upon the trial below, claimed certain damages by way of set-off, the nature of said claim being as follows:—

Defendant testified that on July 8, 1885, he directed the plaintiff to send a message to his agent at Oil City to *sell* 50,000 barrels of oil at 97¾ cents, and that the plaintiff sent the message *buy* 50,000 barrels of oil at that price, and that he sustained damages by reason thereof in the sum of $158.75; that on August 3, 1885, he received a quotation over plaintiff's line stating that the market at Oil City was 99 cents and fractions, and alleges at that time the market was 98, and that in consequence of this report defendant sold 90,000 barrels of oil through his agent at Oil City, supposing it was being sold at 99 and fractions, whereas his agent sold the same at 98 and fractions, and that defendant sustained damages, by reason of the plaintiff's negligence, etc., in misquoting the market, in the sum of $713.35.

The defendant was the only witness in his own behalf; and it was proposed to show by him what was done at Oil City and New York by his agents in executing orders given to them by him to buy or sell oil, and the damages sustained by him at these places by reason of the mistakes of plaintiff's operator. This evidence was admitted under objection from the plaintiff. Defendant testified that when he said he bought or sold a certain number of barrels of oil in Oil City or New York he was not present at those places at the time, but that he directed such purchase or sale by telegram; and that what he spoke of doing in Oil City and New York he merely directed to be done; but he afterwards stated that he knew what he directed to be done was done, for the oil bought or sold was actually delivered, the various transactions settled, and the money received or paid out in accordance with his directions.

The admission of this evidence was the subject of the first assignment of error.

Other facts are set forth in the opinion of the Supreme Court.

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) If the jury believe from the evidence that the plaintiff prescribed valid rules and regulations in regard to transmission of messages, as contained on its printed blanks, and that the defendant knew of these rules and regulations at the time that he sustained the alleged damages, he is bound by said rules and regulations, although he did not send the messages upon the printed blanks. *Answer.* Affirmed, unless the jury find from the evidence under our instructions, in the general charge, that the plaintiff waived these regulations as to this defendant. (Second assignment of error.)

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(3) If the jury believe from the evidence that the defendant requested the plaintiff's operator at Bradford to send a message to his agent at Oil City to send 50,000 barrels of oil, and the plaintiff's operator sent the message "buy" 50,000 barrels of oil, it is incumbent on defendant to show by legal evidence that his agent at Oil City executed the order, and that by reason thereof he sustained an actual damage thereby; and in the absence of such evidence there can be no offset against the plaintiff's claim. *Answer.* Affirmed as a legal proposition, but we do not mean to say that there is no evidence of the execution of the order, and the damages caused thereby. (Third assignment of error.)

(5) The Court is requested to charge the jury that the defendant's oral testimony as to the purchase and sale of oil at Oil City and New York, as reported to him by his agents at Oil City and New York (the defendant being in Bradford at the very time the alleged purchases and sales were made), is hearsay, and not the best evidence, and the alleged damage claimed by defendant has not been proven thereby by legal evidence that can be submitted to the jury. *Answer.* Under the evidence in this case, we answer this point in the negative. (Fourth assignment of error.)

(10) One of the conditions of the plaintiff's rules and regulations, as contained on the printed blanks, provides that the company shall not be liable for damages unless notice of the loss be presented in writing within sixty days from the time of loss. The defendant being familiar with such rules and regulations, and not having presented any written notice whatever of his alleged claim for damages within the time prescribed, is precluded thereby, and cannot defalk the said damages as against the plaintiff's claim in this action. *Answer.* This point is affirmed, unless the jury find that this rule was waived, or that the defendant had no notice of it. If it was not waived, and the defendant knew it, and you find that, under the evidence it correctly states the law. (Fifth assignment of error.)

(9) If the jury believe from the evidence that the plaintiff did quote the Oil City market at 99 and a varying fraction, when the market at Oil City was 98 and a varying fraction, whereby the defendant sustained great loss, he can only offset as against the plaintiff's claim such damages as may be fairly supposed to have entered into the minds of the parties at the time they entered into the transaction. The action of the oil market was uncertain; it might advance or decline, and the plaintiff's operator could not contemplate what it would have done were the message delayed, and, if errors occurred, the damages, if any, were wholly an unknown quantity and could not have been contemplated, and what was really contemplated was the tolls paid by the defendant for the quotation of the market, as expressed and agreed in the plaintiff's rules and regulations for the transmission of messages, as contained on the printed blanks, the contents of which were known to the defendant. *Answer.* We answer this point in the negative. (Sixth assignment of error.)

The Court also charged the jury, *inter alia*, as follows: "Notwithstanding the fact that they have printed rules and regulations, they can do business in other ways; and if the jury find that they saw fit to do business with this defendant in a different manner, disregarding these rules, and not having the messages signed and put upon blanks or paper, but delivered verbally, and undertaking to receive, send, and deliver them verbally, it was their duty to use care and skill in receiving and sending them, and in the whole transaction of the business. If it was their mistake, through the carelessness or negligence of their agents, we think it is an answer to so much of the claim. If Mr. Stevenson, as the testimony may show, was engaged in the transactions as he testifies, and the business was done as he says it was, and the oil sold, and on account of this mistake he suffered this loss, we think it would be a proper subject of set-off."

Verdict for plaintiff for $517.06, being the amount of the claim, less the set-off, and judgment thereon. Plaintiff then took this writ, and assigned error as above.

Silas W. Pettit and *John B. Chapman* (*W. B. Chapman* and *John R. Read* with them), for plaintiff in error.

The evidence of defendant was hearsay, and should not have been admitted. If it had been excluded, there would have been no evidence against plaintiff's claim.

1 Greenleaf Ev. 99.
Queen *v.* Hepburn, 7 Cranch, 290.
U. S. *v.* Reyburn, 6 Peters, 352.
Cummings *v.* Gann, 52 Pa. 484.
Paull *v.* Mackey, 3 Watts, 110.
Carr *v.* Sellers, 100 Pa. 169.
Fenn *v.* Early, 113 Id. 264.

There is no evidence that plaintiff waived its rules as to the transmission of messages, and defendant was familiar with them. If the defendant chose to deliver his messages to plaintiff's operator verbally, it was at his own risk.

Wolf *v.* W. U. Tel. Co., 62 Pa. 83.
Passmore *v.* W. U. Tel. Co., 78 Id. 239.

The claim of defendant not having been presented in writing within sixty days, the company, under its printed regulations, is not liable in any event.

Wolf *v.* W. U. T. Co., *supra.*
Passmore *v.* W. U. T. Co., *supra,*
Express Co. *v.* Caldwell, 21 Wallace, 264.
Farnham *v.* C. & A. R. R. Co., 55 Pa. 53.

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The plaintiff has a system of repeating messages, by which it can, as it supposes, insure accuracy, but is willing to send messages without repeating them, provided that if any mistake occurs in the transmission or delivery, or for the non-delivery of the unrepeated message, it shall not be held liable for any sum beyond the amount received by it for sending the same. This all Courts have held to be reasonable.

Schwartz *v.* A. & P. Tel. Co., 18 Hun, 159.
W. U. Tel. Co. *v.* Carew, 15 Mich. 525.
King *v.* W. U. Tel. Co., 65 N. Y. 169.
Wolf *v.* W. U. T. Co., 62 Pa. 82–87.

The plaintiff therefore insists that under the weight of authority no such case has been made out under the evidence as would entitle the defendant to offset, as against the plaintiff's claim, more than the amount paid for sending the messages, especially since the burden of proof is on the defendant to show not merely the fact of failure to transmit the messages correctly, but also actual gross negligence or wilful misconduct on part of plaintiff.

W. U. Tel. Co. *v.* Buchanan, 35 Ind. 429.
Baldwin *v.* U. S. Tel. Co., 45 N. Y. 752.
Hart *v.* W. U. Tel. Co., 66 Cal. 579.

J. W. Lee (*Hastings & Criswell* with him), for defendant in error.

The stipulation as to repeating messages does not relieve the company from the effect of its negligence in delivering an incorrect message to a third person.

N. Y. & W. P. Tel. Co. *v.* Dryburg, 35 Pa. 298.

October 7, 1889. THE COURT. The defendant, C. P. Stevenson, at the time the matters involved in this suit occurred, was a member of the Bradford Oil Exchange, and was engaged in buying and selling oil on his own account and as a broker for others. The Western Union Telegraph Company, for a certain stipulated sum per month, agreed to furnish him accurate quotations of the price of oil from the exchanges in New York and Oil City. The oil market being exceedingly sensitive was subject to the most frequent, indeed almost momentary, changes, and these changes, it would seem, varied slightly in the various markets, so that a person might at times by carefully noting the quotations buy in one market and sell in another. Transactions in the exchange were very rapid, and were noted generally upon mere memoranda until the close of the day's business. Success in buying oil in one market to sell in another at a profit, therefore, rested wholly in the accuracy of these quotations upon which the dealer is necessarily obliged to depend.

Acting upon these quotations the defendant had various transactions in the purchase and sale of oil, which were conducted by telegrams transmitted over the plaintiff's lines, for which telegrams he paid or agreed to pay at certain specified rates. In establishing his set-off the defendant certainly had a right to show what quotations were given him by the company from the New York and Oil City exchanges, and what he did relying upon their accuracy; that he dictated certain messages for transmission over the company's lines, directing the purchase and sale of oil by his agents, and received from the operators of the company certain messages in reply. The correspondence was notice to the company that the defendant acted upon the quotations given. When the defendant says that he bought or sold a certain number of barrels of oil in Oil City or New York, he states that he was not present in those places at the time, but that he directed such purchase or sale by telegram over the company's wires. What he speaks of doing in Oil City or New York he admits that he merely directed to be done, but he afterwards states that he knows what he directed to be done was done, for the oil bought or sold was actually delivered, the various transactions settled, and the money received or paid out in accordance with his directions. The testimony of the agents who effected each of the several sales and purchases of oil, or of those with whom the agents dealt, would doubtless have afforded more direct proof of the fact, but it would have been proof of the same grade offered. The defendant testified to what he personally knew, and of which his agents were probably ignorant; he testified to the consummation of the contracts which his agents reported, through the plaintiff, they had made. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information; but where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not impinged (Greenleaf, 82). The warden of a penitentiary would perhaps be able to give the strongest proof that a person had been, at a particular time, a convict imprisoned in the penitentiary, as he keeps a registry in which is noted the exact time of the admission and discharge of the convict, but the fact may be shown by any other competent proof (Howser *v.* Commonwealth, 51 Pa. 332). The date of a birth or death or of a marriage could best be established by a person present at the event, but any other legal proof is admissible for the purpose. Handwriting may be proved by another without calling the writer, or a sale of oil or of any other commodity may be shown by the acts or declarations of the par

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ties, although a witness may have been actually present and fully conversant with the whole transaction. As between living witnesses, one is not to be excluded because another had a better opportunity of knowing the fact alleged and attempted to be shown. We are of opinion, therefore, that the evidence of the defendant, although perhaps not the strongest proof, was sufficient to send the case to the jury on the questions raised by the defence.

The defendant alleges, as the first matter of defence to the plaintiff's claim, by way of set-off, that on the morning of the 8th of July, 1885, he had on hand about 97,000 barrels of oil; that the market at first advanced, and he bought 40,000 more; that the market then indicated a break, and he gave to the company a verbal message to his agent at Oil City, to *sell* 50,000 barrels at 97¾; that the company failed to send the message as directed, but instead negligently sent a message to the agent to *buy* 50,000 at that price; the market price being about 97 to 97¼. He says he called the company's attention to the error at the time, and that his actual loss in the transaction was $178.75. That the order dictated to the messenger was an order to *sell* and not to *buy* is established by the verdict of the jury, and the case must be considered upon the assumption of this fact. As against this claim of the defendant, the plaintiff interposes the rule of the company printed at the head of their message blanks, to the effect that "the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," etc. That the company may make reasonable rules, not inconsistent with the public good, affecting the measure of their responsibility in the ordinary course of telegraphy, is settled in Passmore *v.* Telegraph Company (78 Pa. 239). In that case this Court held, adopting the language of Judge HARE, that the rule or regulation now in question was not so far contrary to private interests or the public good as to justify a Court of justice in pronouncing it invalid. "A railway, telegraph, or other company," says the learned Judge, "charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety and diminish the loss in the event of accident, and declare, if these are not observed, the injured party shall be considered in default and precluded by the doctrine of contributory negligence." In the case at bar, however, the ordinary blanks upon which these regulations and restrictions were printed were not used, and the manner of conducting the business was somewhat peculiar. The great number and variety of the transactions, and the rapidity with which they were necessarily conducted, gave occasion for a large amount of telegraphic communication of a complex character. Momentary changes in the market demanded the utmost dispatch in telegraphic communication; written messages were dispensed with in the business of the exchange. All the messages were given to the operator verbally; not one in a thousand was written. The members of the exchange, standing about the ring, whispered the messages they wished to send into the ear of a messenger boy employed by the company, and he communicated the message to the operator. For a part of the time they were conveyed through a speaking tube from the defendant's room to the ear of the operator. The exigencies of the business were such as to require that the usual methods of procedure should be dispensed with; there was not time to write the messages. The company would appear to have undertaken to transmit these messages correctly without reducing them to writing, either at the place of reception or delivery; the company received them orally and delivered them orally. The business, as it was conducted in the exchange, compared with the general and ordinary business of the company, was special and peculiar, and it was a question for the jury whether or not, under the circumstances, the company, by dispensing with the use of the blanks, did not intend to relieve their patrons from the stipulations contained therein. Such an inference might fairly be drawn from the extraordinary manner in which the business was conducted. We cannot say there was no evidence to justify such an inference. If there was a rule of the company by which its responsibility for the accuracy of messages transmitted over its lines was restricted to such as were repeated, and that any claim for damages must be made in writing within sixty days, the defendant was bound by such rules, if he had any knowledge of them, and they had not been waived or dispensed with by the company in its dealings with the defendant. These were questions of fact which were properly submitted to the jury.

The defendant further claims damages sustained by reason of a misquotation of the market at Oil City. On the 3d day of August, 1885, oil at Oil City was quoted to the defendant at 99 and a fraction. Relying upon the accuracy of this quotation, the defendant ordered his agent at Oil City to sell 90,000 barrels. It turned out, however, that the quotation furnished was inaccurate, and the loss was $713.35. As the company had contracted to furnish the defendant the quotations of the New York and Oil City markets, it was bound to furnish them with accuracy and the

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defendant was justified in relying upon them. The questions bearing upon this branch of the case have already been considered and we do not wish to repeat what has been said.

We think the learned Judge of the Court below was right in his instructions to the jury, and the

Judgment is affirmed.

Opinion by CLARK, J. H. C. O.

Jan.' 89, 357. May 20, 1889.

Rudy v. The Commonwealth.

Murder—Right of Commonwealth to stand aside jurors brought in on a special venire—Evidence—Alibi—Statement of the law in reference to.

In a trial for murder, the Commonwealth has the same right to stand aside jurors brought into Court on a special venire, as it has when the jurors are brought in on a general venire.

The evidence against the prisoner being entirely circumstantial, and it being shown that when the body of the murdered man was found the prisoner exclaimed, "That is my father, some of those poor-house fellows have killed him," one of the witnesses for the defence was asked, (1) whether the prisoner did not also say at the same time that the inmates of the poor-house had stolen from him and abused him, and (2) whether the deceased had not complained to him of abuse from the inmates of the poor-house:

Held, that these questions were properly excluded, there being no evidence that the inmates of the poor-house had anything to do with the killing.

As to the defence of alibi offered by the prisoner, the Court charged "The setting up of an alibi by the prisoner does not relieve the Commonwealth from furnishing, as it has done here, full proof of the commission of the offence or crime charged. Nor does his setting up an alibi as a defence change the burden of proof cast upon the Commonwealth by his plea of not guilty, or waive his right to demand from the Commonwealth, before he can be convicted, full and complete proof of his guilt, beyond a reasonable doubt."

Held, that this was a clear and accurate statement of the law upon the subject. The first sentence relates to the necessity of proving the *corpus delicti*, and the second to the full and complete proof of guilty participation in the felony.

Error to the Oyer and Terminer of Lancaster County.

Indictment of John W. Rudy, for the murder of his father Christian Rudy. Defendant pleaded not guilty.

At the trial, before LIVINGSTON, P. J., the panel of jurors being exhausted, a special venire issued, and subsequently a special alias venire issued and the Commonwealth stood aside one of the jurors from this panel. This was objected to by defendant. Objection overruled. (First assignment of error.)

The *corpus delicti* was clearly proved. The body of Christian Rudy was found dead on the morning of December 5, 1887, near some houses which were being built and a short distance from the County Almshouse. There was a clean cut on the head above the ear, as if made by a sharp instrument, and the occipital bone was crushed as if by some blunt instrument, which wounds were the cause of his death. On the same morning John W. Rudy, a son of the deceased, was arrested for the murder.

There was no direct evidence that he had committed the crime, but all the circumstances pointed toward that conclusion; the only motive assigned was that defendant would receive on his father's death an interest in a very small benefit policy.

The murdered man, who walked slowly on account of his leg being paralyzed, was last seen on the afternoon of December 4, at half-past four o'clock, some distance from where he was found. At five o'clock, according to the testimony of a brother-in-law, two sisters, and a niece of the decedent, defendant was at his home a distance of a mile and a half from the scene of the murder. When the body was found, defendant exclaimed, "Some one of those poor-house fellows killed my father."

Jacob Witch, a witness for defendant, was asked the following questions:—

Q. Did, or did not, John Rudy, at the time he said "some one of the poor-house fellows killed my father," also say they have stolen his goods and were always annoying him, and teasing him, in the presence of the body immediately after it was discovered that his father was killed? Objected to by the Commonwealth. Objection sustained. Exception. (Second assignment of error.)

Q. Did Christian Rudy complain to you that the people at the poor-house and the inmates abused him and treated him badly? Objected to by the Commonwealth. Objection sustained. Exception. (Third assignment of error.)

The Court, after declaring the law as to circumstantial evidence, charged the jury, *inter alia*, as follows:—

"In addition to and under his plea of not guilty, the prisoner sets up as a defence an alibi. . . . .

"When an alibi is satisfactorily established it forms one of the strongest, fullest, and most perfect defences it is possible for a man to make, because no man can be in two separate and distinct places at one and the same time.

"[The setting up of an *alibi* by the prisoner does not relieve the Commonwealth from furnishing, as it has done here, full proof of the commission of the offence or crime charged.] Nor does his setting up an alibi as a defence change

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the burden of proof cast upon the Commonwealth by his plea of not guilty, or waive his right to demand from the Commonwealth, before he can be convicted, full and complete proof of his guilt beyond a reasonable doubt.

"[Where a prisoner sets up an alibi as a defence, the burden of proving his alibi to the satisfaction of the jury is thrown upon him. If he does not do this his defence of alibi fails entirely.]

["Where a defence rests on proof of an alibi, such proof must cover the whole time during which the crime charged was perpetrated—the time when the evidence shows it was committed, so as to preclude the possibility of the presence of the prisoner at the place where and at the time when it was perpetrated.]

["The value of this defence, the alibi, clearly consists in the prisioner proving his alibi to the satisfaction of the jury; if he fails to do so, it is valueless as a complete defence.]

"But an alibi is as much a traverse of the crime charged, however, as any other defence, and proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of the guilt of the accused, and, therefore, it must not be excluded from the cause and the jury.

"Where the fact of killing proved by the Commonwealth is, as in this case, not defined distinctly in point of time, but may have taken place within or between certain periods of time, the alibi must cover the entire period in its proof, otherwise, the evidence given in proof of the alibi may be true, and the fact proved by the Commonwealth may also be true. There is no contradiction unless the evidence supporting the alibi covers the whole period. [And where the evidence is so imperfect as not to satisfy the jury as to an alibi, they will not find it to be a fact, and will not say it is a defence.] But will then look at and examine all the evidence in the cause, including that which relates to the alibi, and from the whole evidence make up their verdict.

"You, gentlemen of the jury, must be satisfied from the evidence beyond a reasonable doubt, in order to warrant you in finding a verdict of guilty—

"(1) That Christian Rudy was murdered—that a murder was committed.

"(2) That John W. Rudy, the prisoner at the bar, is the guilty party—is the man who committed the murder.

"Of the first proposition I presume you will have no doubt—a murder has been proved. Christian Rudy was killed as charged in the indictment.

"Therefore, the great question here is, was this murder committed by John W. Rudy, the prisoner at the bar?

["In seeking a solution of this pivotal question, you will probably first examine the testimony as to the alibi, and in doing this you will examine all the evidence in the cause bearing upon the presence of the prisoner, John W. Rudy, at the time and place of the murder, as well as that bearing upon his absence from that place at that, the time of the murder. You have heard it all from the stand, and you have heard it more fully and ably commented on by the learned counsel than is usual in Courts of justice, and from it must form your own judgment. If the evidence has satisfied you that the prisoner has proved his alibi, that he, John W. Rudy, was at some other place, or at other places at and during the whole period of time when this murder was committed, and was not there at the place when it was committed, then your verdict should be not guilty; for, as we have said, a man cannot be in two different and distinct places at the same time.]

["But, if the evidence presented in this case on this question of alibi does not prove an alibi, you will then from a full, fair, careful examination of all the testimony presented in the cause, say whether or not the prisoner killed the deceased—whether he committed the murder or not, and if he did, do all the circumstances presented and proved enable you to say beyond a reasonable doubt that such murder was committed by him, wilfully, deliberately, and premeditatedly, with intent to kill. If you find it was, then your verdict should be guilty of murder in the first degree.]

"Or if he committed this murder, through or under circumstances showing only depravity of heart, and disposition of mind regardless of social duty, and no intention to kill can be reasonably and legally inferred from the evidence produced, your verdict should be guilty of murder in the second degree.

"Or if he unlawfully killed Christian Rudy without malice, but when the blood was heated by provocation as we have stated, and before it had time to cool, then he would be guilty of voluntary manslaughter, and that should be your verdict.

"All the evidence is before you—and you must consider it all—the witnesses were all competent; their credibility is for you. You will consider the evidence as to the whereabouts and conduct of Christian Rudy, on that Sunday afternoon and evening, the whereabouts of and conduct of John W. Rudy, during the same afternoon, evening, and night. He himself has testified; the law has made him a competent witness; his credibility is for you like that of any other witness. You will also consider the nature and character of the wounds. The evidence as to the blood found on the hatchet of John Rudy,

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and analyzed by Drs. Davis and Weaver—the hatchet produced which, the prisoner says, was his. The evidence as to the blood on the egg-shells and clay, and the can, and where they were found. The conduct of the prisoner when the body was found. What he said and did on that occasion. Every portion of the evidence which tends to show his guilt or innocence.

"If you find him guilty, you must, by your verdict, say whether he is guilty of murder in the first degree, murder in the second degree, or of voluntary manslaughter.

"If you find from the evidence that the prisoner is not guilty, or if you have a reasonable doubt of his guilt, such reasonable doubt as arises out of the evidence and clouds the judgment, your verdict should be not guilty, for the prisoner is entitled to the benefit of such doubt."

Verdict, guilty of murder in the first degree, and sentence accordingly.

Defendant took this writ, specifying for error (1) the standing aside of the juror from the special panel; (2 and 3) the refusal to admit the questions as above set out; and (4 to 9) the portions in brackets of the charge above quoted.

John A. Coyle and *Marriott Brosius* (*B. Frank Eshleman* with them), for plaintiff in error.

William N. Appel and *William D. Weaver*, district attorney (*E. K. Martin* with them), for defendant in error.

October 7, 1889. THE COURT. The prisoner was tried and convicted of patricide of the first degree, the most heinous type of murder. The *corpus delicti* was clearly proved. The evidence was quite sufficient to justify the jury in finding that the prisoner's father was brutally murdered. The position in which the deceased was found, the nature of the wounds that must have caused his almost instantaneous death, the character of the instrument with which they appeared to have been inflicted, and all the surrounding circumstances pointed to the commission of a wilful, deliberate, and premeditated murder. But of course that was a question of fact for the jury, and to them it was fairly and impartially submitted.

The main question of fact was whether the prisoner was the guilty agent. There was no direct and positive evidence of his guilt. The evidence was entirely circumstantial, but it was sufficient to justify the submission of the case to the jury; and that was done in a clear and comprehensive charge embodying such instructions as were necessary for the guidance of the jury in properly considering and applying the evidence.

Some exceptions taken to the rulings, and charge of the Court have been assigned for error.

The first specification is without merit. The practice of standing aside jurors had its origin in the construction given by the Courts to the statute 33 Edward I., enacted in 1305; and like many other customs, it descended to us from the mother country. In the higher grades of felony, at least the practice has been so long customed, and so uniformly sanctioned that it has acquired the force of positive law. (Haines *v.* Commonwealth, 100 Pa. 317.) No good reason can be suggested why it should not be adhered to in the case of jurors brought into Court on a special venire as well as those on the regular panel.

There was no error in disallowing the questions recited in the second and third specifications. Under the circumstances the proposed evidence was neither competent nor relevant.

The subjects of complaint in the fourth to ninth specifications inclusive are instructions on the subject of *alibi*. The sentence which constitutes the fourth specification is improperly severed from its connection with the next succeeding sentence. When read together as they appear in the charge they are as follows: "The setting up of an *alibi* by the prisoner does not relieve the Commonwealth from furnishing as it has done here, full proof of the commission of the offence or crime charged. Nor does his setting up an *alibi* as a defence change the burden of proof cast upon the Commonwealth by his plea of not guilty, or waive his right to demand from the Commonwealth before he can be convicted, full and complete proof of his guilt beyond a reasonable doubt." The first sentence relates to the necessity of proving the *corpus delicti*. The second to the necessity for full and complete proof of guilty participation in the felony. There is no error in either, and when read together as they were to the jury, the idea intended to be conveyed is perfectly clear, and must have been so to the minds of the jury.

What was said by the learned President of the Oyer and Terminer, in relation to the defence of alibi, constitutes a full, clear, and accurate statement of the law on that subject. The burden of proving it was clearly on the prisoner. If he failed to do so to the satisfaction of the jury, the alleged alibi, as a substantive defence, was valueless; but that did not deprive him of the benefit of his evidence on that subject, so far as it, in connection with other testimony in the case, may have had a tendency to create a reasonable doubt as to his guilt. Immediately after instructing the jury that an alibi "is valueless as a complete defence," unless it is proved "to the satisfaction of the jury," the learned Judge said: "But, an *alibi* is as much a traverse of the crime charged, however, as any other defence, and proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of the guilt of the accused, and therefore it must not be excluded from the cause and the jury."

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In Meyers *v.* Commonwealth (83 Pa. 141), cited by the prisoner's counsel, the Court below had instructed the jury that they "must be satisfied beyond a reasonable doubt," etc. This Court, commenting on that part of the charge, said: "This statement is too stringent, and throws the prisoner upon a degree of proof beyond the legal measure of his defence. That measure is simply proof which is *satisfactory*—such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. . . . Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner, and this proof should be considered *satisfactory*." Other authorities to the same effect might be cited, but it is unnecessary.

All the evidence, including that bearing on the question of *alibi*, was fully and carefully submitted to the jury with special instructions that if, from all the evidence in the case, they had a reasonable doubt of the prisoner's guilt, their verdict should be not guilty.

If there was any error in the trial of the cause it was in the finding of the jury that the prisoner was the guilty agent. The Court below, who heard the testimony and saw the witnesses, was satisfied with the finding of the jury. There is nothing on the record to justify us in setting aside the verdict.

Neither of the specifications of error is sustained.

Judgment affirmed, and it is ordered that the record be remitted to the Court of Oyer and Terminer of Lancaster County, for the purpose of execution.

Opinion by STERRETT, J. W. M. S., JR.

Jan. '89, 237. March 22, 1889.

Furst v. Building and Loan Association.

Contract—Statute of Limitations—Payment to toll bar of statute.

Where a building association enters into a written agreement with a mortgagor to indemnify him against a mortgage given to a Mutual Saving Loan Association, the right of action upon this agreement will be barred six years after the maturity of the mortgage.

When part of the consideration for the said agreement was a check given by the mortgagor to the secretary of the building association, who was also secretary of the Mutual Saving Loan Association, which check was good when given, but was never presented at bank, payments subsequently made upon the check by the mortgagor to the owner of the mortgage, after the suspension of the bank, on account of the dividend allowed him on his deposit by the receiver of the bank, cannot be considered as payments by the building association so as to toll the bar of the statute.

Error to the Common Pleas of Clinton County.

Debt, by the Mutual Saving, Loan, and Building Association of Clinton County, against the Building and Loan Association of Lock Haven, upon a certain obligation or agreement of indemnity.

On the trial, before MAYER, P. J., the record was amended, and John S. Furst, to the use of the Mutual Saving, Loan, and Building Association of Clinton County, Pa., made the party-plaintiff.

The facts material to the questions at issue were as follows: The defendant association made certain loans to one Henry Sperring, against whom John S. Furst held a judgment, the lien of which was prior to the association's loans. Furst had also given a mortgage to the Mutual Saving, Loan, and Building Association, use plaintiff in this action. It became necessary for the defendant association, in order to secure its loans, to control the prior judgment held by Furst. It therefore, through a committee duly appointed, in consideration of the transfer to it of the Sperring judgment and of a check for $113.80, agreed to save Furst harmless from the above mortgage, and to have the same satisfied when it became due. The check for $113.80 represented the difference between the value of the mortgage and that of the judgment.

The agreement was as follows:—

LOCK HAVEN, PA., June 16, 1877.

Received of J. S. Furst, transfer of judgment, Clinton County, No. 152, Dec. Term, 1874, of J. S. Furst *v.* Henry Sperring, for $1120.00 with $44.87 interest from October 30, 1876, to June 30, 1887, and $1.75 entry fee, making $1166.62, and check $113.88, making in all $1280.50 in payment of $1300 balance of mortgage of J. S. Furst & Sons to the Mutual Saving, Loan, and Building Association of Clinton County, Pa., in payment of $50 monthly, beginning August 31, 1876, and without interest until due, present value, June 30, 1877, being $1280.50. And it is agreed with the Building and Loan Association of Lock Haven, Pa., to whom the above has been transferred, that they will keep the said J. S. Furst & Sons harmless from and satisfy the within-mentioned balance of mortgage at or before its maturity. W. W. RANKIN, President.

A. N. RAUB, Secretary.

The other facts are sufficiently set forth in the opinion of the Supreme Court, *infra*.

The Court granted a nonsuit, and subsequently refused a motion to take it off. Whereupon plaintiff took this writ assigning for error, *inter alia*, the action of the Court in granting the nonsuit, and refusing the motion to take it off.

Charles Corss and *Cline G. Furst* (with them *J. R. Youngman*), for plaintiff in error.

W. C. Kress, for defendant in error.

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October 7, 1889. THE COURT. The contract upon which this suit is founded is an agreement in writing, but not under seal, the purport of which is, that the Building and Loan Association of Lock Haven, Pa., will keep J. S. Furst & Sons harmless from, and satisfy the balance of a mortgage given by J. S. Furst & Sons to the Mutual Saving, Loan, and Building Association of Clinton County, Pa. The writing, which is a receipt to J. S. Furst for a transferred judgment of Furst against Henry Sperring, and a check of Furst for $113.88, concludes with a statement of the agreement to save harmless. The agreement is between Furst and the Building and Loan Association exclusively. The Mutual Saving, etc., Association is no party to it in any sense whatever. That association held, and thereafter continued to hold its mortgage against Furst & Sons, with which it did not part. The last money due on this mortgage matured on September 30, 1878. The agreement in suit was made June 16, 1877. This action was brought December 12, 1885. The cause of action, which was the non-payment of the mortgage by the defendant corporation, commenced on the first day of October, 1878, and when this action was brought on the agreement to save harmless, upwards of seven years had elapsed. The Statute of Limitations was pleaded, and it was a perfectly good defence, unless there was something to take the case out of the operation of the statute. The only matter alleged to have this effect is a payment, which it is said was made on account in 1880. It is candidly admitted by the counsel for the plaintiff, that unless there was such payment they have no case, and the bar of the statute is a good defence. The learned Court below was of opinion that no such payment was established, and therefore directed a nonsuit to be entered, and this is the error complained of. It is only necessary to investigate the facts regarding the alleged payment in order to determine the question. Of course, if the defendant recognizing its obligation under the contract in question, consciously and actually made a payment on account of it in 1880 the statute would not be a bar.

It is necessary to say that the suit was originally brought in the name of the Mutual Saving, Loan, and Building Association alone. That corporation was the holder of the mortgage against Furst & Sons. As that company, however, was in no sense a party to the contract in suit, which was made only between J. S. Furst individually and the defendant corporation, it was soon perceived there could be no recovery in an action brought in its name. This being so, the counsel for the plaintiff, on March 8, 1887, applied for amendment, by which the name of John S. Furst, for the use of the Mutual Saving, Loan, and Building Association, was substituted as plaintiff for the name of the association alone. This amendment was allowed by the Court below, but only after objection and exception by the defendant. It is difficult to see how this amendment could have helped the plaintiff's case, as the statute was a complete bar at the time it was made, and it is perfectly well settled that amendments will not be allowed when they deprive the opposite party of any rights. (Kaul *v.* Lawrence, 73 Pa. 410; Trego *v.* Lewis, 58 Id. 463; Kille *v.* Ege, 82 Id. 102.) But, as in our view of the case, there never was a payment sufficient to bar the statute, it is unnecessary to rest the decision upon that ground. The learned Court below held, rightly as we think, that the introduction of Furst's name as plaintiff did not help the case.

In order to appreciate correctly the force of the facts relating to the alleged payment it must be remembered, that the only real plaintiff in the case is John S. Furst. It was upon a contract with him alone that the action was based. If the payment was not a payment upon that cause of action, it was not a payment which would bar the statute. What then are the facts in regard to the payment? When the receipt was given by the president of the defendant corporation to John S. Furst, a judgment for $1120 with $44.87 interest due thereon, held by Furst against Henry Sperring, was transferred, and to make up the balance of $1280.50, which was taken as the amount to be paid of the $1300 due on the mortgage, John S. Furst gave his personal check for $113.88 dated June 16, 1877, on the Lock Haven National Bank in favor of "A. N. Raub, Sec. Building Ass'n." At the time the check was given it was good, as Furst had an ample deposit with the bank to meet it, but for some unexplained reason it was never presented for payment and was of course never accepted by the bank and hence the bank never became liable to pay it. (First National Bank *v.* Shoemaker, 117 Pa. 94.) The bank was located in the same city where the payee lived and did business. About the last of July or first of August, 1877, being about six weeks after the date of the check, the bank failed and went into the hands of a receiver. The check was never proved against the bank and consequently no dividend was ever awarded to it. The legal status of the check therefore was that it was a mere worthless piece of paper. The payee never could, and never did maintain any action or proceeding of any kind upon it. The drawer of the check, John S. Furst, had no right of action upon it of course, as it was his order to the bank to pay out money to another. (Bank *v.* Shoemaker, *supra.*) Furst, however, was a depositor in the bank and in that capacity he received a number of dividends upon the amount of his deposit. Being examined as

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a witness on the trial of this case, he testified that on October 4th, 1880, he paid to Charles Corss, who was then the solicitor for the Mutual Saving, Loan, and Building Association, $91.10, and that on March 14th, 1882, he made another payment of $22.38 also to Mr. Corss. He further testified that he paid these sums on account of the mortgage held by the association against Furst & Sons. These two payments are indorsed upon the check by Mr. Corss as solicitor for the Mutual Saving, Loan, and Building Association. Mr. Corss, being examined on the trial, testified that he was solicitor for the plaintiff corporation from 1876 or 1877 to the time of the trial, that he received the check from A. N. Raub, that A. N. Raub was secretary for the plaintiff corporation at the time he gave the witness the check, which was shortly before October 1, 1880, and being further examined testified as follows: "*Q.* Was that check given to you for the plaintiff? *A.* Yes, sir, given to me to collect for the plaintiff. *Q.* And those credits that are written on the back of the check who gave you? *A.* Those payments were dividends declared by the receiver of the bank upon the deposit that John S. Furst had in the bank, and he received it for convenience and brought it to me instead of my proving the check against the bank. I allowed him to do that, receive the dividend in his own name, and pay it to me." It is only necessary to add that A. N. Raub while he was secretary of the defendant corporation in 1877, when the check was given, was also secretary of the plaintiff corporation at all times from its organization, and in 1880, when he gave the check to Mr. Corss, the counsel for the plaintiff corporation, for collection. The undoubted facts then as established by the plaintiff on the trial, were that the two payments of October 4, 1880, and March 14th, 1882, instead of being payments by the defendant, were payments made by John S. Furst himself, he being the plaintiff in the case, with his own money drawn directly by him from the receiver of the bank who owed him the money as dividends on his deposit. Further payments were made to Mr. Corss, who held the check for collection, not from defendant, but from the plaintiff corporation, who by its secretary had delivered the check to him for its own account. The payments were indorsed upon the check as being made upon it not by any authority of the defendant, but by Corss acting as counsel for the plaintiff corporation. As a matter of course if Mr. Corss had assumed to act on behalf of the defendant in making these entries he could not possibly have charged the defendant with any responsibility for them, but he did not at all assume to act in that capacity. What he did was the act of the plaintiff and of course it could have no legal effect as the act of the defendant. In legal effect the entries were simply nugatory in any event. The check was absolutely worthless as such. J. S. Furst as the drawer might be responsible to a holder if it had been presented for payment in proper time and refused and had been duly protested. Or he may have chosen to regard himself as liable morally for its payment and made the payments accordingly, but to speak of such payments made by him alone, voluntarily and without a scrap of evidence that the defendant knew of the payments or authorized them to be made, as being payments made by the defendant either upon the check or the mortgage, is simply impossible. There is no evidence to show that the check was ever delivered by the defendant corporation to the plaintiff corporation. It was delivered by A. N. Raub, who was secretary of both corporations, to Mr. Corss, but there is no evidence that Mr. Raub was ever authorized by the defendant corporation to deliver it to the plaintiff corporation, or that the latter ever accepted it for any purpose whatever or even authorized Mr. Raub to deliver it to Mr. Corss. As it was an utterly worthless paper against anybody except possibly Furst himself, and then only in a contingency which has not been proved to exist, it is of no consequence what was done with it by Furst or Corss. Neither of them had any authority to bind the defendant by anything they might do or say in regard to it. It would be most extraordinary if the plaintiff Furst could be permitted to charge the defendant with the consequences of a payment made by himself voluntarily but in discharge of his own obligation, as being a payment made actually, knowingly, and purposely by it in discharge or on account of an obligation of its own. Every element of a payment of the latter kind is absent from this case. The check was not an obligation of the defendant in any point of view. It was not payable to bearer or to order. There was nothing to show it was either indorsed or assigned by anybody or to anybody—the title to it would not pass by mere delivery, and as before said, there is no proof that the defendant ever consented to any delivery of it to the plaintiff corporation. Further discussion of the subject is entirely unnecessary. In no conceivable point of view is it possible to regard the payments made by Furst in 1880 and 1882 as payments made by the defendant, and as there is not a particle of proof that the defendant corporation ever delivered or authorized the delivery of the check to the plaintiff corporation there is nothing upon which to base an inference of payment of anything by defendant to plaintiff at any time within six years before suit brought.

Judgment affirmed.

Opinion by GREEN, J. H. S. P. N.

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Jan. '89, 353. May 2, 1889.

Brooks v. First Presbyterian Church.

Will—Release of interest in estate obtained by fraud—Evidence sufficient to prove release void.

Where an officer of a religious corporation, which is a residuary legatee under a codicil to a will made eight days before the testator's death, and therefore void, writes to one of the daughters of testator, residing in Atlanta (Georgia), stating that he was a personal friend of her father, well acquainted with all his wishes, and offering himelf, as her friend, to secure her interest under the will, but also stating that her small claims against the estate were somewhat doubtful; that he would use every effort to get them for her; that he had used his influence to have her sister make a will in her favor, but never stated that the legacy to the corporation which he represented was void, he establishes a relation of trust and confidence, which he dare not abuse to her prejudice.

It should be left to a jury to determine whether a release, good on its face, executed by the testator's daughter under such a statement of facts and under such circumstances, was obtained by fraud or not.

An executor who pays the residue of the estate to the corporation is protected by the release, but the corporation is a volunteer, and liable to pay back the money so received.

Error to the Common Pleas of Crawford County.

Assumpsit, by Abigail M. Brooks against the First Presbyterian Church and Congregation of Meadville, to recover her proportion of a certain legacy paid to said church by Edward Northam, executor of the will of Alanson Lindley, deceased.

On the trial the following facts appeared: Alanson Lindley died May 21, 1881, having first made and published his last will, dated May 29, 1880, with two codicils, one dated August 31, 1880, and the other dated May 13, 1881. He left surviving him, as his heirs-at-law and next of kin, three children, Abigail M. Brooks, Helen M. Bigelow, and Lucy K. Lindley. The second codicil to the will was as follows:—

I, Alanson Lindley, the within-named testator, do hereby make and publish this second codicil to my last will and testament, bearing date May 29, 1880, in manner following, to wit: All the residue of my estate of whatsoever nature, which has not already been disposed of, I hereby devise, give, and bequeath to the First Presbyterian Church and Congregation of Meadville, Pa., in trust for the benefit of the poor of said church, and for such other beneficial objects as shall seem just and proper to them, but that the interest of this sum so given shall be so used, and the principal shall be kept as a perpetual fund, to be known as the Alanson Lindley fund for the benefit of the poor.

Other facts necessary to an understanding of the case are set forth in the opinion of the Supreme Court (*infra*), the release therein referred to being as follows:—

I, Abigail M. Brooks, of the city of Atlanta, Georgia, heir and legatee of my father, Alanson Lindley, deceased, late of Meadville, Pa., having been furnished with a copy of the last will and testament of my father, now deceased, and being desirous that the said will and testament shall be sacredly regarded, and in all particulars complied with, do hereby ratify and confirm the same, in consideration of one hundred dollars, a balance of an annuity claimed by me, and of fifty dollars interest claimed by me to be due on a note of my father's, given to me by A. K. Spencer, when he paid me my interest in my father's estate. And I do hereby request and direct Edward Northam, executor of the estate of my father, to pay over to the several legatees named in the will, the legacies therein devised, according to the terms therein expressed, and especially any balance that may be devised to the First Presbyterian Church and Congregation of Meadville, Pa., and after the full and complete payment to me of the one hundred and fifty dollars claimed by me to be due and unpaid, and also after all the other legacies mentioned in said will are paid, I hereby assign all interest I may have in any remainder to the First Presbyterian Church and Congregation aforesaid.

Witness my hand and seal this eleventh day of June, 1881. ABBY M. BROOKS. [L. S.]

The plaintiff submitted the following point:—

"That to sustain the release offered in evidence by defendant in the position of the parties under all the evidence, the burden of proof is upon them to show to the satisfaction of the jury that the same was executed and delivered with full knowledge of the character, intendment, and effect of the same; and if the jury find from the evidence that the same was procured by the confidant of the testator, and the defendant, having knowledge of all the facts, without communicating the character, intendment, and effect of the release, the same is a constructive fraud, prohibited by law, and void, and the plaintiff having shown that she is one of the children and heirs-at-law of the testator, and that the defendant has a portion of the residue of the estate of her father, is entitled to recover her proportion of the same in this suit." *Refused.* (Fifth assignment of error.)

The Court further charged the jury, *inter alia*, as follows:—

"[She is, of course, confronted with her own writing, executed as in the evidence shown, after due consideration and with all the necessary formalities.] To escape this obvious legal effect, she alleges it was obtained from her by fraud and deceit, and therefore, it is not binding.

"[Fraud, when relied upon to overthrow a written instrument like that under consideration, must be proved, not merely by such evidence as in an ordinary case is sufficient, but to use the language of the Supreme Court, by evidence that is 'clear, precise, and indubitable.' It is not enough that we have reason to suspect unfair dealing and misapprehension. There must be actual fraud fully and clearly established.]

"[Looking now at all the evidence in this

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case, the Court is unable to see therein enough to justify a verdict for the plaintiff. Certainly the evidence is not of that 'clear, precise, and indubitable' kind required by the law.]

"[That Doctor White, in writing to the plaintiff, failed to furnish her with legal opinions as to her rights, or to tell her the value of the residuary estate, is not enough to warrant the Court and jury in striking down the written assignment.]

"Doctor White was not the executor of the will, and seems to have been a stranger to the plaintiff. In his first letter to her he only undertakes and offers to fully inform her in regard to the particulars of her father's death and of his will, and he states to her that if she wishes to know these things, she can call on him, with the assurance that he will furnish her with the information. That is all he seems to have undertaken to do for her benefit.

"That he undertook to do more for the benefit of the church with which he is connected, and of which he is the trustee of the charity, is quite apparent.

"Seemingly, gentlemen, he was not aware himself of the value of the residuary estate until in the latter part of June, 1881. The assignment bears date the 11th of the same month.

"Moreover, it is not all clear, even if he were aware that the codicil might involve a contest, provoke litigation, that it was either voidable or void. That does not appear from the evidence in this case.

["Gentlemen, for the reasons just given, the Court is constrained to instruct you to render a verdict in favor of the defendant.] If such direction is wrong the case is left in such shape that it can be reviewed by the Supreme Court, and justice be ultimately done to the plaintiff.

"Plaintiff's counsel request exceptions to the answer to the point, and the general charge, and at their request bill of exceptions sealed for the plaintiff."

Verdict for defendant and judgment thereon. Whereupon plaintiff took this writ assigning for error the answer to the above point and the portions of the charge included between brackets.

Joshua Douglass and *G. W. Haskins* (with them *A. B. Richmond*), for plaintiff in error.

The plaintiff cannot be precluded by an election by matter *in pais* made without a full knowledge of all the circumstances and of her rights.

Anderson's App., 36 Pa. 476.
Kreiser's App., 69 Id. 194.

The conduct of defendant was a constructive fraud while it may not have originated in evil design. This is sufficient to avoid the release.

Darlington's App., 86 Pa. 512.
Miskey's App., 107 Id. 611.
Worrell's App., 110 Id. 349.
Cunningham's App., 22 Weekly Notes, 538.
Bixbee *v.* Kimble, 17 S. & R. 298.
Elbert *v.* O'Neil, 102 Pa. 302.
Shea's App., 121 Id. 302.

William R. Bole and *Pearson Church* (with them *James W. Smith*) for defendant in error.

October 7, 1889. The Court. The sole question for our consideration is whether the evidence was sufficient to have warranted the jury in finding that the release, interposed as a bar to plaintiff's claim, was fraudulently procured and therefore void. If it was wholly insufficient to justify such a finding, there was no error in withdrawing it from the consideration of the jury and directing a verdict for defendant.

The claim against the corporation defendant appears to have originated as follows: Plaintiff's father, by the second codicil to his will, executed eight days before his decease, bequeathed his residuary estate, amounting nominally to nearly $20,000, to the defendant in trust for charitable purposes. It is conceded that under our statute the bequest, thus made less than one calendar month before testator's death, was absolutely void, and plaintiff as one of his heirs-at-law was legally entitled to one-third of said residuary estate. In due course of administration it would have been converted into money and she would have received her share of the proceeds; but about three weeks after her father's death she was induced to execute a paper releasing all claim thereto, and requesting the executor "to pay over to the several legatees named in the will the legacies therein devised according to the terms therein expressed, and especially any balance that may be devised to the First Presbyterian Church and Congregation of Meadville, Pa.," the defendant in this suit. In less than six months thereafter the executor assigned and transferred to defendant the residuary estate, nominally amounting to $19,257, consisting of mortgages, judgments, and other evidences of indebtedness, the real value of which is said to be about $13,000. Afterwards plaintiff discovered, as she alleges, that the release had been fraudulently procured from her by Mr. White, who was an officer and agent of the corporation defendant, and thereupon she determined to insist on claiming her interest in the residuary estate. The release, being regular on its face, was of course a sufficient warrant to the executor for disposing of the residuary estate, as he did, and hence plaintiff had no recourse to him. She then brought this suit to recover the value of her interest in the residuary estate, which came into defendant's possession by virtue of the release and assignment aforesaid.

Evidence was introduced for the purpose of showing the invalidity of the release, but the

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learned Judge who presided at the trial was of opinion that it was insufficient to justify a verdict in favor of the plaintiff, and he accordingly directed the jury to find for defendant.

It is not our purpose to refer in detail to the evidence relied on by plaintiff, but a careful consideration of it as a whole has led us to a different conclusion. Mr. A. McLean White, through whose active agency the release was procured, was a trustee of the corporation defendant and secretary of the board of trustees. As the confidential friend of the testator he wrote and witnessed the will, and as appears by printed exhibit contained in defendant's paper-book he was present when the will was read, on the day after the funeral, and heard Mr. Bole, who had been general counsel for testator, announce that the second codicil, containing the residuary bequest to defendant, was void for want of time between the date thereof and the death of testator. A few days thereafter, with full knowledge of that fact and, as he himself declares, knowing everything about testator's property and how he disposed of it, Mr. White addressed a letter to plaintiff, in which he volunteered to furnish her "all the details frankly and carefully," in relation to her father's death and the disposition he made of his property. He also suggested that there was some interest coming to her on a certain note which he would endeavor to secure for her, etc. The letter in full is as follows:—

"MEADVILLE, PA., May 30, 1881.

"MRS. A. M. BROOKS, Atlanta, Ga.

"Dear Madam: As an intimate and confidential friend of your father, having written his will and knowing everything about his property and how it was disposed of by him, I write to say to you that if you desire to communicate with me in order that you may be fully informed in regard to the particulars of his death and his will, you can do so with the assurance that I will take great pleasure, out of regard to his memory, to furnish all the details frankly and carefully.

"The letter you wrote to him on the 16th instant did not get into his hands, which I am sorry for. It is now before me, and its contents does honor to you, which I know would have given him unspeakable pleasure had he been permitted to see or hear it read. He spoke of you often to me, and his heart went out towards you with due paternal affection. Mrs. Bigelow did not get here until after he died. She is now ill at the old home, but expects to leave for the East to-morrow or the day after."

"Although your father had himself settled his bequest to you and had your receipt in full for your interest to his estate, yet I think there is some interest coming to you on that $1000 note, which I think the executors would pay you by my request. If such is the case and you will inform me, I will use my influence to secure what balance of interest may be yours, if you feel satisfied that you should have it. This will be without any expense to you. What I will do will be out of a deep regard for the sense of justice that your father desired me to maintain, and which for his sake I will aid to carry out."

After receiving her prompt reply, he again wrote June 7, 1881, giving a detailed account of her father's last illness and death, etc., and then referred to the residuary bequest to the church, thus: "He was deeply interested in establishing a fund for the poor of his church. That troubled him for a long time how to do it. He thought at first of making Mr. Northam the trustee, but when he remembered that the church was incorporated and perpetual in its duration, he made it his trustee. As he had many bad debts, some outlawed, it is hard to tell what the remainder may be. Everything else must be paid—his legacies, debts, a law suit, just begun against him by the Whitmans, must be fought again, lawyers' fees, but if we could get the estate settled without delay, and thus save executors' and Court fees, it would prove much more than if prolonged, and that brings me to the business and conclusion of this long letter."

"In conclusion, let me say in regard to the claims you present . . . . The executor, Mr. Northam, is perfectly willing to pay over to you everything that the Board of Trustees of the First Presbyterian Church instructs him to pay, which, of course, must be deducted from what your father left the poor of the church. Without the consent of the Board, however, he cannot pay anything to you legally. I have no doubt as to either of your claims in equity; most probably under the will neither of them could be enforced, but I have this assurance from a part of the Board of Trustees—the secretary of which I have been for quite a number of years—that having written your father's will, and being fully conversant with his desires, that if I fully concur in recommendation to the Board that this amount shall be given to you out of the fund entrusted to the church, and present a paper from you that will be satisfactory to the Board, and also to the executor as his voucher to be passed upon by the Court when he closes his account, then I can get a resolution passed by the Board to pay the $150 over to you, or rather have Mr. Northam do so, for he has one year to settle his matters, and I think I can get this from him at once and without delay."

"I have, therefore, prepared a paper about like that the other heirs signed, which was done to cheapen and expedite the settlement of the estate so that it might be saved and not be unnecessarily wasted. Upon the return of that paper to me, I think that within two weeks at farthest

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I will be able to send you a draft for the whole amount, or will instruct the executor to do so."

"I know there will be no exception taken to your claim for interest, and I will urge the other to be paid. I have not the least doubt you will get both, but should anything occur to prevent it (not probable), I will return you the paper at once and also your receipt. Let me add in confidence this: This is because I honored your father and desire to act justly towards *all* his children. I will write Lucy's will soon. She has so requested me. I feel that it is her duty to make her sisters her residuary legatees. I shall use all my influence in that direction, for I believe your father would desire it, and it is just in every respect. I shall be the friend of yourself and Mrs. Bigelow, and anything you desire to know I will cheerfully communicate it. The paper inclosed after being dated and signed must be acknowledged before a notary public (not an alderman or justice). Please sign the receipt also."

It is impossible to read the letters above quoted from, and consider them in the light of the evidence without coming to the conclusion that the main, if not the sole object of the writer thereof, in opening the correspondence with plaintiff was not to "frankly and carefully" furnish her with such information in regard to the situation of her father's affairs as she was most interested in knowing, or to assist her in obtaining from his estate what she was justly and legally entitled to, but to conceal from her the fact that the residuary bequest was null and void, and induce her to act upon the belief that she had no claim whatever on her father's estate (except, perhaps, the pittance of $150, balance of interest, etc., above referred to), and thus by misrepresentation of facts and suppression of the truth obtained from her, without consideration, the release of her vested interest in the residuary estate. These, of course, were questions of fact for the jury, and should have been submitted to them under proper instructions.

The evidence tends to show that by strong professions of friendship, and expressions of desire to gratuitously render her all the assistance in his power, even to the extent of persuading her sister Lucy to make her one of her legatees, etc., he invited and succeeded in establishing, between himself and plaintiff, a relation of trust and confidence which he was not at liberty to abuse, to her prejudice, by misrepresentation of facts or suppression of the truth in relation to her interest in the estate. His assertion that, without the assent of the corporation defendant, the executor could not legally pay her anything, not even the $150 that she claimed her father owed her, was not only untrue, but it was tantamount to a declaration that the residuary bequest to defendant was valid and binding. It is difficult to understand how he could have supposed there was any truth in either. But, whether he so believed or not, the evidence tends to show that plaintiff was misled as to the true situation of her father's estate, and thereby induced to execute the release in question.

The defendant corporation is a mere volunteer. It gave no consideration for plaintiff's share of the residuary estate. The release, it is true, recites a pecuniary consideration of $150, but that represents the two items claimed by plaintiff as due from her father. On the trial she offered to prove in sur-rebuttal that $50 thereof was interest due on the $1000 note, and the remaining $100 was money her father owed her on another matter. Defendant's counsel waived the proof by admitting the facts as stated in the offer. Plaintiff is thus made to occupy the somewhat anomalous position of having provided the pecuniary consideration of her own release. In point of fact, the defendant gave no consideration for the interest it claims to withhold from plaintiff by virtue of her release. It is a mere volunteer and cannot claim exemption from the legal consequences of its agent's acts.

Without further comment on the evidence, we are of opinion that it was proper for the consideration of the jury, and should have been submitted to them.

Judgment reversed, and venire facias de novo awarded.

Opinion by STERRETT, J. H. S. P. N.

Jan. '89, 376. March 11, 1889.

Hiestand v. Williamson.

Judgments—Lien of—How affected by conveyance by judgment-debtor—Estoppel.

A sheriff's sale of lands under a judgment obtained after the execution of a conveyance by the defendant, affects only the interest remaining in the vendor, and does not discharge prior liens.

H., being seised of certain lands subject to liens, among which was a judgment in favor of W., conveyed the lands to his son D., subject to said liens. This deed was duly recorded. Subsequently another judgment in favor of S. was entered against H., and execution issued thereon, and the land sold. W. having issued a scire facias to renew the lien of his judgment, with notice to D. as terre-tenant, D. filed his affidavit of defence claiming that at the time the land was sold he had reconveyed the property to his father H., although the deed was never recorded, and consequently when the right, title, and interest of H. upon the judgment in favor of S. was sold, it divested the lien of W.'s judgment. The Court entered judgment for want of a sufficient affidavit of defence:

Held, not to be error.

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It appeared that at the sale on the judgment in favor of S., D. gave written notice to the sheriff that the real estate was not the property of H., but was owned by himself, and that he would contest the title of the purchaser. D. bought the land at the sheriff's sale for $100:

Held, that D. was estopped from setting up the alleged deed to his father H., whereby the sale on the S. judgment divested and discharged the lien of the W. judgment and passed an absolute title to D.

Error to the Common Pleas of Northampton County.

Scire facias sur judgment *et quare ex. non* and to revive and continue lien by Leah Williamson, and by her husband George Williamson, in right of the said Leah, *et al.*, against Henry Hiestand *et al.*, defendants, with notice to Daniel Hiestand, terre-tenant, and other terre-tenants and occupiers.

On motion for judgment for want of a sufficient affidavit of defence, it appeared that Henry Hiestand being seised of two tracts of land in Allen Township, Northampton County—upon which there were the following liens: (1) Sundry charges created by the will of his father Abraham Hiestand, from whom Henry derived title; (2) A mortgage in favor of John T. Knight, assigned by mesne conveyances to E. J. Fox; (3) The judgment upon which the scire facias in question issued—upon April 9, 1879, conveyed the said real estate to his son Daniel for the consideration of one dollar, subject to the said charges and "to all mortgages and judgments now remaining a lien on said land." This deed was duly recorded. Subsequently several judgments were entered against Henry Hiestand, one by Reuben Kroch and another on October 29, 1883, by David Schmoyer. Execution was issued the same day upon the latter. On July 9, 1884, the sheriff, under the Schmoyer execution, sold the real estate for $100 to Daniel Hiestand, he having prior to the sale given written notice to the sheriff not to sell it, claiming it as his own, and that he would contest the title with the purchaser.

The present scire facias was issued on February 27, 1884, with notice to Daniel Hiestand as terre-tenant. Thereupon Daniel Hiestand filed his affidavit of defence claiming that on November 6, 1883, he had by deed reconveyed the real estate to his father, which deed, however was never recorded; that the title to the land when sold was, therefore, in Henry Hiestand, and the lien of the judgment upon which the scire facias issued was divested; and further, that the amount of the judgment had been greatly reduced by several payments below that claimed in the affidavit of claim. The plaintiffs claimed that they had in their judgment at the time of the sheriff's sale a lien against an entirely different title of said defendant in said real estate from that which was sold by the sheriff, and that their lien was not divested or discharged by said sheriff's sale.

The Court entered judgment for want of a sufficient affidavit of defence, SCHUYLER, P. J., filing the following opinion:—

"From the affidavits of claim and defence we glean the following facts: The judgment sought to be revived was entered March 3, 1879, and became a second lien upon the real estate of the defendant, the first lien being a mortgage. On April 9, 1879, the defendant conveyed his real estate to his son Daniel for the consideration of $1, subject of course to the liens against it. On October 29, 1883, one Daniel Schmoyer obtained judgment against the defendant Henry Hiestand and on the same day issued execution. On November 6, 1883, Daniel Hiestand for the consideration of $1 and subject to liens, reconveyed the real estate to his father. On July 9, 1884, the sheriff, under the Schmoyer execution, sold the real estate for $100, Daniel Hiestand for the second time becoming the purchaser. Prior to the sale Daniel gave to the sheriff written notice not to sell the real estate, claiming it as his own and threatened that he would contest the title with the purchaser. The present scire facias was issued February 27, 1884, and notice having been served on Daniel as terre-tenant, he is here single handed resisting the revival of the judgment as against himself on the theory that the lien of the judgment had been discharged by the sheriff's sale. At the time of the sheriff's sale the deed from Henry Hiestand to his son had been recorded, but the deed reconveying the property was never recorded.

"The rule that a judicial sale divested all liens is a creation of the Courts and of ancient establishment, but it is not of universal application. Special cases require special adaptation of it. (Fisher's Appeal, 33 Pa. St. 295.) In that case it was held that a sheriff's sale of lands under a judgment obtained after the execution of a conveyance by the defendant, which is fraudulent as to creditors, does not discharge prior liens. The ground of the decision was fraud. [Here too we have fraud most palpable. The claim made to the sheriff by Daniel, that the property belonged to him was a shameless falsehood. Moreover it was a falsehood that was well calculated to deceive, because the deed to Daniel from his father had been carefully placed on record, whereas the deed from Daniel back to his father had been just as carefully withheld from record. That the claim did deceive is a fair inference from the fact that the real estate was struck down to Daniel for a sum, which was barely sufficient to pay the costs indorsed on the execution.] [Fortunately for the cause of justice the time when such trickery as this could successfully shield itself behind a technical rule has long since passed.] [The fact of the claim and notice to the sheriff is taken from

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an averment in the affidavit of claim, which is not denied by the affidavit of defence. The averment is necessarily involved in the plaintiff case and being undenied, it must be taken as admitted.] (Bank *v.* Thayer, 2 W. & S. 443; Montour Iron Co. *v.* Coleman, 31 Pa. 82.)"

Whereupon the defendants took this writ assigning for error, *inter alia*, the action of the Court and the portions of the opinion given above in brackets.

William Fackenthall, *B. F. Fackenthall*, and *John D. Stiles* (*Harry G. Stiles* with them), for plaintiffs in error.

George F. P. Young, for defendants in error.

October 7, 1889. THE COURT. The deed to Henry Hiestand of Daniel Hiestand was dated April 9, 1879, and, for anything that is shown, was on that day delivered. The judgment of David Schmoyer *v.* Henry Hiestand was not entered until the 29th of October, 1883, which was four years, six months, and more after Henry Hiestand had parted with his title. If the sale and conveyance were in good faith, the judgment was not a lien upon the lands in question. If the transaction was fraudulent, the sale would seem to be a means of vesting in the purchaser the right which the creditors had to avoid the conveyance; it would not affect prior liens except such as were entered after the date of the fraudulent deed. In this instance, if we leave out of view altogether the effect of the deed of November 6, 1883, the sheriff's sale on the execution of Schmoyer discharged the Kroch and Schmoyer judgments. These judgments were liens upon such interest only as Henry had in the land, for his creditors, after he had delivered his deed to Daniel Hiestand. If that conveyance was *bona fide*, he had no title whatever remaining; if not, his creditors affected by the fraud had a right to resort in this form to the land for payment of their debt. The title conveyed by the sale was conditioned, therefore, upon the existence of fraud, and such a sale would not discharge the liens against the absolute title.

As this Court said in Fisher's Appeal (33 Pa. 294), one set of creditors cannot raise a clamor of fraud which would discharge the liens of others against the absolute and indefeasible estate. To this effect, also, are Byrod's Appeal (31 Pa. 241), and Hoffman's Appeal (44 Pa. 95). It is clear, then, if the case rested here, that the plaintiff would be entitled to revive this judgment, as not only the deed of April 9, 1879, but also the sheriff's deed of 18th of February, 1884, was subject to the lien of the plaintiffs' judgment.

But it is said that on the 6th of November, 1883, Daniel Hiestand reconveyed the land to his father, Henry Hiestand, and, although the deed was not recorded, the subsequent levy and sale on the Schmoyer judgment passed the absolute estate to Daniel, freed and discharged of this lien, and subject only to the liens created by the will of Abraham Hiestand, deceased, and the Fox mortgage. However this might have been under ordinary circumstances, it does not lie in the mouth of Daniel Hiestand, the terre tenant in this case, to say so. He attended the sheriff's sale in person and gave explicit and clear notice that his father, Henry Hiestand, had no interest in the property, but that he, Daniel Hiestand, was the owner thereof, by virtue of the deed of the 9th of April, 1879. This was a wilful and deliberate falsehood, for he could not have been ignorant of the fact, that only three months before he had delivered a deed to his father reconveying the absolute estate; an act so deliberate could not, in so short a time, have escaped his memory. The notice was calculated to deceive, and was, doubtless, so intended. That the plaintiffs acted upon it is plain, for that fact is set out in the affidavit of claim as the ground of their recovery. The theory of their case was and is that, under the rule of the case cited, they had "a lien against an entirely different title of the defendant in said real estate from that on which it was sold by the said sheriff, and that their lien was not divested or discharged by the sheriff's sale." The notice at the sale is wholly inconsistent with the evidence he now proposes to give, and as the plaintiffs appear to have acted upon the notice, he will not now be allowed to set up the deed to their injury; having deliberately asserted a falsehood to their injury, he will not now be heard to assert the truth. If it be true that the judgment was entered in a sum too large, that is the fault of the affiants. They should have set out in their affidavits, with a reasonable degree of particularity, how and when the payments were made. If any injustice has been done in this respect, they may, perhaps, have relief in another form.

The judgment is affirmed.

Opinion by CLARK, J. S. H. T.

Jan. '89, 164. May 22, 1889.

Warfel v. Knott.

Rules of the Supreme Court—Assignments of error—Articles of agreement to convey—When admissible in evidence—Deeds and conveyances—Metes and bounds therein—How ascertained.

Assignments of error should embody in each case the bill of exceptions on which they rest, so that the question raised may come to the Supreme Court as it was presented in the Court below. If an assignment of error contains nether the offer, the objection, nor the ruling of the Court below it is not in accordance with the rules of the Supreme Court, and may be disregarded.

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Where exception has not been taken to the admission of any evidence at the time it is offered, it is too late to do so before the Supreme Court.

Where there is an ambiguity in a deed of conveyance the articles of agreement to convey are admissible for the purpose of arriving at a correct understanding of the deed.

In an action of trespass *quare clausum fregit* between A. and B. there was a question as to the boundary line between their respective properties. It appeared that A. who owned both properties had entered into articles of agreement to convey one of them to C. from whom B. claimed. Subsequently a deed was executed and delivered by A. to C. The deed contained nothing from which the point of beginning in marking its courses might be ascertained. The Court admitted in evidence a portion of the articles of agreement for the purpose of fixing this starting point:
***Held*, not to be error.**

Error to the Common Pleas of Lancaster County.

Trespass *vi et armis, quare clausum fregit*, by A. K. Warfel against Henry Knott.

On the trial, before LIVINGSTON, P. J., the facts appeared, as set forth in the portion of the charge of the Court given below.

The defendant offered in evidence articles of agreement to convey, between himself and one Alexander M. Wilson, of the premises in dispute. Objected to. Objection overruled, and so much of the agreement admitted as follows: "Adjoining the properties of the said Knott, except four inches of the two feet four inch alley, consisting of twenty-two feet front, strict measure." (First and second assignments of error.)

The plaintiff on the trial did not except to the rejection of the rest of the articles of agreement upon the admission of the above portion, but he afterwards assigned for error the not admitting in evidence so much of the agreement to convey as appears therein, viz: "The said Wilson shall have the right of the four inches, fenced in with said private alley, as long as the said Knott does not build or sell the ground adjoining." (Third assignment of error.)

The plaintiff submitted, *inter alia*, the following points:—

(2) If the jury believe that the defendant has got his four inches, as reserved in his deed, then he has all he is entitled to, and any encroachment by him is a trespass, and the plaintiff is entitled to recover. *Answer.* If the defendant has all he reserved (and as he reserved of the alley of 2 feet 4 inches), he has all he is entitled to, and if he trespassed beyond that on land of Warfel, plaintiff is entitled to recover. (Fourth assignment of error.)

(3) To ascertain a given point in the description of real estate, designated by deed as the point of beginning, the starting point named in the deed must be accepted, and not any other point. *Answer.* This is correct, where a starting *point* is named or specified in the deed. (Fifth assignment of error.)

(4) The deed from Knott to Wilson, and from Wilson to Warfel, both having named the north line of the alley as the starting point, the same must be accepted as such. *Answer.* This is refused, as neither deed before us fixes the north *line* of the alley, or any point upon it, as the starting point. (Sixth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"It appears that in 1871 Knott, the defendant, owned a lot or piece of ground in the city of Lancaster, extending from the Reading Road to North Queen Street, along North Queen Street, and along the Reading Road and Christian Street.

"He built on this lot, in 1871, two houses together—twin houses—having between them a 9-inch division wall, into which the joists and supports of each entered. In July or August, 1871, he made a contract with Wilson for the sale of the north house, the deed to be made in December, 1871.

["On the north side he had a fence, and had an alley way 2 feet 4 inches wide.

"In his written agreement he contracted to sell Wilson that house and the lot, excepting 4 inches from the 2 feet 4 inch alley, making 22 feet strict measure.]

"The deed was made and delivered; it specifies the quantity conveyed as 22 *feet front on North Queen Street*, etc. In it there is a reservation of the 4 inches of ground included in the private alley, and the fence, with the right to remove it.

"Mr. Wilson afterwards sold to Mr. Warfel, the plaintiff, the same property. Of course, he could not sell and make title to more than he owned.

"After Warfel moved in and took possession of the property he purchased of Wilson, Knott removed the fence, and cut off the four inches reserved. This was done by the city regulator to lay out the line on which the fence was to be built. The regulator gave him the line, drove the stakes, etc.

Mr. Warfel then began to build the fence; he made a line for himself, and called a witness to see where it was fixed, and took out the stakes set by the regulator for Knott; the trouble then began, as you have heard.

"The north line became a disputed line, and has so continued. What did Knott sell to Wilson, and Wilson sell to Warfel?

"The deeds specify the quantity conveyed as 22 feet front on North Queen Street, from the north line. [Where is the north line? The deeds do not state where it is; they give no definite mark,

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no pin, stone, post, no definite point, as deeds frequently do.] It appears from the draft, and the evidence of Mr. Gerhart, the engineer, that measuring from the middle wall between the houses of Knott and Warfel, Warfel has 4½ inches over the 22 feet, including the alley, and that the line is 5½ inches south of where the old fence stood.

"In the deed Knott reserves four inches of a private alley. The deed does not show how wide the private alley was. [To get the width of the private alley, we admitted the agreement between Knott and Wilson, which was produced. It does not contradict the deed, but it does show and define the width of the alley, before the deed was made, as 2 feet 4 inches. They fixed the width of that private alley then and there. Agreed it was 2 feet 4 inches, and Knott reserved 4 inches of the 2 feet 4 inches, thus leaving the alley two feet wide; that was the alley Wilson bought, and he could convey no more than he bought.]

["Taken in that way, and measuring from the *house* north, would fix the north line, and measuring from that point south to the middle of the division wall between Knott and Warfel's houses, would be two feet, but the draft shows the alley to be 22 feet 4½ inches now, as Warfel has set his fence, and makes his front, instead of 22 feet, 22 feet 5½ inches, as the fence now stands."]

Verdict for defendant, and judgment thereon. Whereupon the plaintiff took this writ, assigning for error the admission of the agreement as above set forth, the answers to the points, and the portions of the charge given above in brackets.

Philip D. Baker, for plaintiff in error.

David McMullen (*H. C. Brubaker* with him), for defendant in error.

October 7, 1889. THE COURT. The controversy in this case is over a very narrow strip of land, and the debatable ground covered by the legal questions is but little wider. The first, second, and third assignments of error are not in accordance with the rules of this Court. Neither the offer, the objection, nor the ruling of the Court below appears in either of these assignments. Each assignment should embody the bill of exceptions on which it rests, so that the question raised may come to us as it was presented in the Court below. But notwithstanding the disregard of our rules, we have taken pains to look over the appendix and ascertain the ground of complaint, and we are of opinion that it is not tenable. The contract between Knott and Wilson for the lot in controversy was competent for the purpose of aiding in arriving at a correct understanding of the description of the same in the deed before the Court. We do not see why any portion of it was rejected, but the plaintiff in error did not object to such rejection. He seems rather to have asked it, and he cannot now complain. The remaining assignments of error are to the answers to the written points submitted on the trial, and relate to the proper mode for ascertaining the boundary line between the lot in controversy and the land of Knott lying on the north of it. The deed from Knott to Wilson, as well as that from Wilson to Warfel, described the lot conveyed as twenty-two feet wide on North Queen Street, and as including an alley on the north side of the house then on the lot. The alley is described as having a breadth of two feet four inches, which is reduced by the deeds to two feet, the four inches being reserved therefrom. There was no north line marked on the ground, and the question was how that line should be located. The Court below held that the jury ought to begin at the middle of the party-wall between the house on the lot and that on the lot adjoining on the south, and measure along the line of North Queen Street twenty-two feet. This would locate the corner from which the division line between the parties should start, and determine their respective rights. This was clearly right. The party-wall was a permanent monument which fixed the location of the south line, and the north line was just twenty-two feet from and parallel with it. Another method would be to measure from the north side of the house just two feet, the width of the alley on that side, and this would fix the north line of the alley, which is also the north line of the lot.

The evidence shows that both methods reach the same result. The Court instructed the jury that if Knott's fence left Warfel twenty-two feet, measuring from the middle of the party-wall along North Queen Street, this was all he had shown title to under his deed, and all that he could recover in this action. We do not see how it was possible to reach any other conclusion. The precise location of the fence on the north side of the alley at the time of the sale to Warfel was unimportant, because Warfel did not allege an adverse possession sufficient to give him title under the Statute of Limitations, but depended upon his paper title. This was for twenty-two feet along North Queen Street, which the jury found to be in his actual possession.

The judgment is affirmed.

Opinion by WILLIAMS, J. S. H. T.

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Jan. '89, 350. May 1, 1889.

Springfield Fire and Marine Insurance Co. v. Brown.

Insurance—Proofs of loss—Reasonable time allowed for where no time is fixed—Act of June 27, 1883, construed.

Where no particular time is fixed in a policy of insurance within which proofs of loss shall be furnished, but it provides that *immediate* notice should be given, a reasonable time is allowed; and what is a reasonable time depends upon all the circumstances of the case, and is a question for the jury.

The Act of June 27, 1883 (P. L. 165), provides that "When any property shall be destroyed by fire in this Commonwealth, where the same is covered by policies of insurance, the conditions of insurance as to the notice of loss and the furnishing of preliminary proofs shall be deemed to have been complied with if the assured shall furnish the company at its general office, or to the agent of the company who countersigned the policy, the notice of loss within ten days from the date of the fire, and the preliminary proofs within twenty days from the said date."

Held, that this Act was passed for the protection of the insured; it avoids all controversy as to compliance with these conditions if the insured gives notice and furnishes proof of loss within the time therein mentioned; but it does not exact notice from him within that time.

Error to the Common Pleas of Crawford County.

Debt, by C. H. Brown against the Springfield Fire and Marine Insurance Company, upon a policy of fire insurance.

Upon the trial, before WICKHAM, P. J., of the Thirty-sixth Judicial District, the substantial facts appeared to be as follows: On January 5, 1886, plaintiff bought out the stock of country merchandise of one Spear, and on June 11 procured from the defendant a policy of insurance for $500 on his stock and household goods. On September 11, 1886, a fire took place, and nearly all the property was destroyed. The plaintiff notified the company of the fire, and on September 13 their agent called to adjust the claim, who required the plaintiff to get duplicate bills and account of his purchases from Spear, and also a sworn statement from him. Plaintiff testified that the agent then refused to settle on that basis, and told him that he would send him blanks to fill out, but that he never did so, but sent him written notice on October 5 that he must make out his proofs in due form. The forms not being sent, plaintiff made out proofs showing his loss, and sent them to the company. Several efforts were made to settle the case, but they were unsuccessful, and finally, on March 14, 1887, this suit was brought.

The policy of insurance provided, *inter alia*, as follows:—

In case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss under oath, stating the time, origin, and circumstances of the fire.

Defendant's agent denied that he had promised to send blanks, and testified that he had done everything in his power to adjust the loss, and finally notified him that he must make out proofs of loss in accordance with the requirement of the policy.

Defendant requested the Court to charge, *inter alia*, as follows:—

(1) The policy in this case requiring, amongst other things, that the particular account of the loss shall give the whole value and ownership of the property, and the amount of loss and damage to it, the proofs of loss in this case do not contain any statement of the whole value and ownership of the property insured, and in this respect are defective. Such defect has not been lawfully waived, and hence the condition precedent to plaintiff's right to maintain his action has not been complied with, and therefore the verdict must be for the defendant.

Answer. The Court cannot affirm this point, as it assumes facts contrary to the evidence. In the body of the paper constituting the principal part of the proofs of loss, it is expressly stated that the schedule marked "A" contains a detailed statement of both the value and loss. Construing both papers together, and in a fair and reasonable manner, I think they give the defendant as much information as the policy requires to be furnished. It is true that on the margin of the schedule we find the words "loss and damages," but referring to the principal paper we are told the figures in the schedule really refer to both value and loss. Moreover, if this were left a little doubtful, the proofs say that "any other information that may be required will be furnished on call, and considered a portion of these proofs." So far as the evidence shows, no call was made for any further information, nor complaint or objection made by the defendants to the form or sufficiency of the proofs actually furnished. (First assignment of error.)

(2) Precedent to plaintiff's right to maintain an action on the policy for loss and damages by fire, he must have given forthwith notice thereof to the defendant company, and must have delivered in as soon as possible thereafter, under oath or affirmation, a particular account of the loss and damages, together with a statement of his other insurances, and also have produced to the company satisfactory proof thereof, as required by condition of the policy. *Answer.* This point is refused. (Second assignment of error.)

(3) According to plaintiff's own testimony that from the 5th or 11th of October, 1886, to the 15th of December, 1886, he did not furnish to

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the defendant company a particular statement or account of his loss and damage as required by condition of the policy, and such neglect to furnish such preliminary proofs is a non-compliance with the terms of the policy, and is fatal to plaintiff's right to maintain this action, and the verdict must be for defendant. *Answer*. This point is refused. (Third assignment of error.)

(4) Under testimony of plaintiff himself, as to the occurrences and negotiations between plaintiff and defendant, there has been no lawful waiver of the requirements of the policy, that the preliminary proofs under the conditions be delivered unto the company before his right of action accrued, and the condition precedent to plaintiff's right to recover has failed, and the verdict must be for the defendant. *Answer*. This point is refused. (Fourth assignment of error.)

(5) The Act of Assembly of 27 June, 1883 (P. L. 165), has fixed the limit of time as ten days from the date of the fire within which the insured may give notice of loss, and twenty days from said date within which the insured shall furnish preliminary proofs of his loss; and, therefore, any furnishing of preliminary proofs after twenty days from the date of the fire is unreasonable, and, therefore, the plaintiff, under the evidence in this case, cannot recover in this suit, unless such furnishing of proof has been expressly or impliedly waived by the defendant in a lawful manner, and of which there is no evidence in this case. *Answer*. This point is refused. (Fifth assignment of error.)

(6) The fire having occurred September 11, 1886, and the preliminary proofs not having been furnished until December 15, 1886, this delay is unreasonable, unlawful, and unwarranted by the terms of the policy, and is a bar to plaintiff's recovery in this suit. *Answer*. This point is refused. (Sixth assignment of error.)

(10) Under the law and the evidence in this case the plaintiff is not entitled to recover, and the verdict must be for the defendant. *Answer*. This point is refused. (Seventh assignment of error.)

(12) The policy providing as follows: "And it is expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of the policy, unless such waiver shall be indorsed hereon in writing;" and there being no such indorsement on the policy, there is no evidence in this case from which the jury can find a waiver of the condition requiring proofs of loss to be furnished within a reasonable time, and said proofs not having been furnished within such reasonable time, the verdict must be for the defendant. *Answer*. I cannot affirm this point, and thus take the decision of the case out of the hands of the jury. (Eighth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"A waiver may be inferred from the fact, if it be a fact, that the insured went on to adjust the loss, negotiated for its payment, without demanding formal proofs, or complaining that they were not furnished. Having in this way lulled the assured into a feeling of security, the insurer cannot then turn upon him when it is too late to comply with the condition, and for the first time set up the delay as a defence. In the present case I feel free to say that there is, in my opinion, considerable evidence tending to show a waiver on the part of the defendant of the condition spoken of. Nevertheless, you must decide this question for yourselves, looking at all the evidence offered on both sides." . . . "The Springfield Insurance Company, whose case we are now considering, contends that the proofs of loss actually furnished came too late and are insufficient. Under all the circumstances of this case, I cannot instruct you as a matter of law that this position is correct. In the opinion of the Court, the proofs having been received without objection are sufficient, in the particulars especially complained of, and as to the alleged unreasonable delay in furnishing them, that is a matter for you to consider and decide in the light of all the evidence. No particular time is fixed in this policy for handing in the proofs of loss. The law, however, requires that it shall be done within a reasonable time. What is a reasonable time, in this case, is a matter for you to decide."

Verdict for plaintiff for $1116.25, and judgment thereon. Defendant took this writ, assigning for error the answers to the points and the portions of the charge above quoted.

Pearson Church, for plaintiff in error.

George F. Davenport, for defendant in error.

October 7, 1889. THE COURT. The real question in this case is whether the proofs of loss were furnished in time. The contract of insurance provides that "in case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss under oath, stating the time, origin, and circumstances of the fire." The loss occurred on the 11th of September, 1886, and the proofs were furnished on the 15th of December following. Where no time is fixed by the policy within which the proofs of loss shall be furnished, a reasonable time is allowed. What is a reasonable time depends on the circumstances. In the present case the question was referred to the jury with the instruction that if the proofs of loss were not furnished in a reasonable time after the fire there could be no recovery.

The contention of the plaintiff in error is that this was a question for the Court, and it is urged

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in support of it that a proper constructon of the Act of June 27, 1883 (P. L. 165), requires the assured to furnish the preliminary proofs of loss within twenty days from its occurrence, and that upon the whole evidence a case of unauthorized and unreasonable delay in making the proofs is presented. The Act of June 27, 1883, provides that "the conditions of insurance as to the notice of loss and the furnishing of preliminary proofs, shall be deemed to have been complied with, if the assured . . . . shall furnish to the company at its general office, or to the agent of the company who countersigned the policy or policies of insurance, the notice of loss within ten days from the date of the fire, and the preliminary proofs within twenty days from said date." It is an Act for the protection of persons sustaining loss of property by fire where the same is covered by contracts of indemnity by fire insurance companies, and it is so entitled. It avoids all controversy as to compliance with these conditions if the assured gives notice and furnishes proofs of the loss within the time therein mentioned, but it does not exact from him the notice or proofs within that time. It may aid, but it cannot embarrass him, in the enforcement of his claim.

Whether the proofs were furnished in a reasonable time is to be ascertained from the circumstances developed by the evidence, from the conduct of the insurers and the insured, and from their negotiations, and what passed between them respecting the loss, and the time and manner of proving it. When the facts and circumstances are not clearly established, and the evidence as to them is conflicting, the case is for the jury under proper instructions as to the law governing it. (Insurance Co. *v.* Davis, 98 Pa. 280; Insurance Co. *v.* Hazen, 110 Id. 530.)

In the present case, if the evidence produced by the assured is credited there was an honest effort on his part to comply with the directions of the company in everything relating to the proof and settlement of his loss. It shows that considerable time was necessarily occupied in procuring duplicate bills and accounts of his purchases, and other *data* as required by the company, and in obtaining the sworn statements of Spear in pursuance of the agreement of October 4; that in the latter part of November the insurers refused to adjust the loss on the basis before agreed upon, directed him to make formal proofs, and premised to send him blanks for the purpose, but did not, and that after the proofs were furnished no objection was made to the delay in sending them.

We think the question, whether the proofs of loss were furnished in a reasonable time, was properly referred to the jury, and that it was correctly answered by the verdict.

Judgment affirmed.

Opinion by McCollum, J. W. M. S. Jr.

[See next case.]

Jan. '89, 349. May 1, 1889.

National Insurance Co. v. Brown.

Insurance—Waiver of defence—Estoppel.

A provision in a policy of insurance, that "no suit or action against this company for the recovery of a claim, shall be sustainable in any Court of law or chancery, unless such suit or action shall be commenced within six months next after the loss shall occur: but such lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding," may be defeated by conduct which constitutes an estoppel or a waiver to interpose this limitation as a defence, but there must be evidence of conduct from which an intention to waive it can be fairly inferred and of an act, which, in equity, ought to estop the company from setting up this defence.

In the present case suit was begun after the lapse of six months, and the company filed an affidavit of defence, in which they failed to mention specifically this defence, but reserved the right to make further valid defences at the trial. Subsequently, on the day the case came up for trial, the company offered to settle the case, and, upon failing to accomplish a settlement, filed an additional plea that the plaintiff did not bring his suit within the time limited by the policy:

Held, that the defendant was not bound to insert its whole defence to the action in the affidavit to prevent judgment, nor was the offer to settle a waiver of this technical defence. Neither of these matters were sufficient to authorize the inference of a waiver, or to create an estoppel.

Coursin *v.* Penna. Insurance Co., 46 Pa. 323, distinguished.

Error to the Common Pleas of Crawford County.

Debt, by C. H. Brown against the National Insurance Company, to recover upon a policy of fire insurance.

The facts of the case are the same as in the preceding case of Springfield Fire Insurance Company *v.* Brown, with which this case was tried. The policy in this case was upon the same property, and the only material difference was the limitation in the policy of the National Insurance Company, of the time within which suit must be brought, which was as follows:—

16. Limitation to Suits.—No suit or action against this company for the recovery of a claim, shall be sustainable in any Court of law or chancery, unless such suit or action shall be commenced within six months next after the loss shall occur; but such lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Defendant requested the Court to charge, *inter alia*, as follows:—

(3) According to plaintiff's own testimony, that from the 5th or 11th of October, 1886, to the 15th of December, 1886, he did not furnish to the defendant company a particular statement on

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account of his loss and damage, as required by condition No. 11 of the policy, such neglect to furnish such preliminary proofs is a non-compliance with the terms of the policy, and is fatal to plaintiff's right to maintain this action, and the verdict must be for defendant. *Answer.* This point is refused.

(4) Under testimony of plaintiff himself, as to the occurrences and negotiations between plaintiff and defendant, there has been no lawful waiver of the requirements of the policy, that the preliminary proofs under condition 11 be delivered unto the company before his right of action accrued, and the condition precedent to plaintiff's right to recover has failed, and the verdict must be for the defendant. *Answer.* This point is refused.

(5) The Act of Assembly of June 27, 1883 (P. L. 165), has fixed the limit of time as ten days from the date of the fire within which the insured may give notice of loss, and twenty days from said date within which the insured shall furnish preliminary proofs of his loss; and, therefore, any furnishing of preliminary proofs after twenty days from the date of the fire is unreasonable, and, therefore, the plaintiff, under the evidence in this case, cannot recover in this suit, unless such furnishing of proof has been expressly or impliedly waived by the defendant in a lawful manner, and of which there is no evidence in this case. *Answer.* This point is refused.

(6) The firing having occurred September 11, 1886, and the preliminary proofs not having been furnished until 15th December, 1886, this delay is unreasonable, unlawful, and unwarranted by the terms of the policy, and is a bar to plaintiff's recovery in this suit. *Answer.* This point is refused.

(7) The condition in the policy requiring suit to be brought within six months after loss is valid and binding upon the insured, unless waived; and the affidavit of defence and the pleadings in this case, the omission to file additional plea till December, 1888, and all the testimony as to negotiations for settlement of this case with the one against the Springfield Insurance Company, taken together, do not amount to a waiver of the said limitation; and, therefore, this suit not having been brought until the expiration of six months after the occurrence of the loss, the verdict must be for defendant. *Answer.* This point is refused.

(8) Under the law and the evidence in this case the plaintiff is not entitled to recover, and the verdict must be for the defendant. *Answer.* This point is refused.

The Court charged the jury, *inter alia*, as follows:—

"A waiver may be inferred from the fact, if it be a fact, that the insured went on to adjust the loss, negotiated for its payment without demanding formal proofs or complaining that they were not furnished. Having in this way lulled the assured into a feeling of security, the insured cannot then turn upon him when it is too late to comply with the condition, and for the first time set up the delay as a defence. In the present case I feel free to say that there is, in my opinion, considerable evidence tending to show a waiver on the part of the defendant of the condition spoken of. Nevertheless, you must decide this question for yourselves, looking at all the evidence offered on both sides." . . . . "In regard to this matter, you are instructed that if the insurance company, after the expiration of the six months mentioned in the policy as the time wherein such suit should be brought, treated the policy as still in force and subsisting—that is, to be more specific, if the company conducted negotiations for the adjustment of the loss, set up other defences, and wilfully concealed from the plaintiff any intention to rely on the limitation clause, and by acts of commission or omission deliberately misled him in this respect, and thus caused him to incur and undergo expenses, labor, and anxiety in pressing his claim and conducting his suit—you may assume that the defendant waived the benefit of the limitation clause."

Verdict for plaintiff for $558.12, and judgment thereon. Defendant took this writ, specifying for error the answers to the points and the portions of the charge quoted.

Pearson Church, for plaintiff in error.

George F. Davenport, for defendant in error.

October 7, 1889. THE COURT. The policy of insurance on which this action was brought contained the following provision: "No suit or action against this company for the recovery of a claim shall be sustained in any Court of law or chancery unless such suit or action shall be commenced within six months next after the loss shall occur; but such lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The loss occurred September 11, 1886, and this suit was commenced March 14, 1887. It is conceded that this limitation was then in full force and a complete bar to the action, as the company had done nothing to waive it.

On the 4th of June, 1887, an affidavit of defence was filed by the defendant company, which alleged that the proofs of loss had not been furnished within the time required by the contract of insurance, and that when they were finally presented they were false and fraudulent in many essential particulars, and reserved "the right to show on the trial other valid grounds of defence

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to said action." On the 20th of December, 1886, the president of the company proposed a settlement of the suit, and a special plea was filed formally setting up this limitation as a further defence.

The Court below allowed the jury to find that the insurance company had waived its right to make this defence by neglecting to mention it in the affidavit and by the offer of settlement on the 20th of December. In Northwestern Ins. Co. *v.* Phœnix Oil Co. (31 Pa. 448) it was decided that if parties by their contract agree that no suit shall be sustained thereon unless commenced within six months after the cause of action shall accrue, such stipulation will be binding upon them, and no action can be maintained on the contract unless commenced within the period therein limited. In Farmers' Mutual Fire Ins. Co. *v.* Barr (94 Pa. 345) it was held that when a condition of a policy of insurance requires suit to be brought within six months, and it is a part of the contract as contemplated by both parties at the time the risk was assumed, the insured cannot be released from this condition by a mistake in the policy as to the time when the risk commenced; and Mr. Justice STERRETT said: "While the refusal of the company to recognize its liability on the ground that the risk had expired may have operated as a waiver of its right to insist on preliminary proof of loss, etc., it did not relieve the plaintiff, who claimed that the contract was in full force when the fire occurred, from bringing suit within six months. His failure to do so was a bar to any claim he may have had against the company." Among the recent cases which enforce this limitation and discuss the subject of waiver and estoppel as applicable to it, are Waynesboro' Mutual Fire Ins. Co. *v.* Conover (98 Pa. 384) and Universal Ins. Co. *v.* Weiss (106 Id. 20). That it may be defeated by conduct which constitutes an estoppel or a waiver of the right to interpose it as a defence, is not denied; but there must be evidence of conduct from which an intention to waive it can be fairly inferred, and of an act which ought in equity to estop the company from relying upon it.

In the present case, by the express terms of the contract, there was no right of action upon it when the suit was instituted. All claims under it were destroyed by lapse of time, and the limitation was then a perfect answer and defence to the action. If it is not so now it is because some omission or act of the company, pending the litigation, has deprived the insurers of the right to plead the limitation and thus restored to life a demand that was barred and made invalid by the agreement of the parties.

It is claimed that the omission to specifically mention this defence in the affidavit filed June 4, 1887, was an abandonment of it, or at least evidence from which a waiver of it may be inferred; and that the insured was induced by it to incur further expense in a litigation which he commenced with full knowledge that his right of action was barred and that the claim declared upon was invalid. But a defendant is not bound to insert all the defences to the action in the affidavit to prevent judgment, and his antagonist has no right to assume that the valid defences not stated therein are abandoned or waived, especially when the right to make such on the trial is expressly reserved. Nor was the offer to settle the suit a waiver of a defence to it. The plaintiff below was not injured or misled by the offer as it was made at a term when the suit was on for trial, and on the day the special plea setting up the limitation as a defence to it, was filed. We are of opinion that the evidence was not sufficient to authorize an inference of waiver, or to create an estoppel. In reaching this conclusion we have not overlooked Coursin *v.* The Penna. Ins. Co. (46 Pa. 323). It rests on its own facts and circumstances, which do not clearly appear in the report of the case, and decides that these justified the Court in referring the question of waiver to the jury. It is not an authority for the proposition that a barred claim, after suit brought upon it, can be revived, or that a valid defence to it can be destroyed by the evidence relied on in this case to accomplish such results.

Judgment reversed.

Opinion by McCOLLUM, J. W. M. S., JR.

[See preceding case.]

Common Pleas.

In re Howard Street.

Reported *ante*, p. 491.

The report omitted to state that *Mr. Dolman* moved to strike off the appeal, contending that it was not within the provisions of Art. XVI., § 8, of the Constitution, and the Act of June 13, 1874. The opposing counsel relied on Pusey's Appeal (83 Pa. 67); Kelly *v.* City (46 Leg. Int. 26); *In re* Centre Street (115 Pa. 247), and McGee's Appeal (114 Id. 470). The Court refused the motion.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, NOV. 15, 1889.* [No. 29.

Supreme Court.

July '88, 148. March 12, 1889.

Northampton County v. Lafayette College.

Taxation — Colleges — Charities — Exemption under Act of May 14, 1874.

The buildings owned by a college, and which are located within its inclosure, whether filled with teachers or scholars, belonging to and forming part of the true college—the institution of learning—are part of the seat or home of the institution, and as such are entitled to the same treatment at the hands of the taxing power. Such buildings occupied by professors and the gardener are exempt from taxation.

When the privileges and advantages of a college are open to all independently of any special religious belief, and it is subjected to visitation by the State, and when its land, buildings, library, apparatus, etc., and its endowment fund have been given to it, it may be said to be founded and endowed by "public or private charity."

That a small fraction of its annual cost may be paid by tuition fees is not enough to deprive an institution substantially maintained by charity of the protection of the Act of May 14, 1874 (P. L. 158).

Thiel College *v.* County of Mercer (101 Pa. 533) commented upon.

Error to the Common Pleas of Northampton County.

Case stated, between the county of Northampton, plaintiff, and the Trustees of Lafayette College, defendants, wherein the following facts appeared:—

"The Trustees of Lafayette College" a corporation constituted and organized under the Act of March 9, 1826, and its supplement, for the purpose of erecting, establishing, and conducting a college to be called "Lafayette College" for the education of youth in the various branches of science and literature, the useful arts, and the learned and foreign languages. The Act of incorporation provides, *inter alia*, "that persons of every religious denomination shall be capable of being elected trustee, nor shall any person, either as principal, professor, tutor, or pupil be refused admittance into said college, or denied any of the privileges, immunities or advantages thereof, for or on account of his sentiments in matters of religion."

The college building was erected by voluntary donations, and the original buildings have been extended and increased, and the educational facilities enlarged by voluntary donations from various persons.

No distinction is made in the admission of students on account of their religious belief, and they are allowed to worship God in whatever church they may desire.

A tuition fee of $45 per annum is charged in certain courses, and $75 in others, to all students who are able to pay, but the same full educational advantages are given to students who, the corporation are satisfied, are not able to pay for their tuition. About one-half of the entire number of students have received their tuition gratuitously.

A statement of the sources of income and of the expenditures is given in the opinion of the Supreme Court, *infra*.

The said defendant corporation has the title in fee simple to real estate located in the Third Ward of the borough of Easton, in Northampton County, as follows, viz.: Fifteen acres of land upon which the college buildings are erected, and which are used in connection therewith; a main college building in which are the chapel, library, recitation rooms, dormitories of students; Pardee Hall, a building containing recitation rooms, oratorial hall, museum, apparatus for instruction in mechanics, mineralogy, and civil and mining engineering; West College Office, in which are located the treasurer's office and other offices for the transaction of the business of the defendant corporation, and the lecture-room of the professor of philology; an astronomical observatory, a building used for the teaching and study of astronomy; Jenk's Hall, a building used for the teaching and study of chemistry; McKeen Hall, Martien Hall, Powell Hall, Blair Hall, Newkirk Hall, and East Hall, buildings erected and used as dormitories by the students in attendance upon and studying at said Lafayette College.

The trustees of the college are also seised of ten dwelling-houses in the said ward, which are occupied by professors in the college. The right to occupy these buildings being part of their salary or compensation.

Another dwelling-house owned by defendants is occupied by the gardener, who cares for the college grounds. And another house owned by them is occupied by the secretary to the president of the college, who has a right to occupy it in part compensation for his services.

Five vacant lots adjoining the college grounds are owned and held by defendants for the purpose of erecting buildings for college purposes thereon, and no income is received from these lots.

The above buildings were erected with moneys voluntarily given by friends of the college, and no income is received from them, except in so far

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as their occupancy is taken as part compensation by certain professors. They are all within the general college inclosure.

The house known as the president's house is not within the college inclosure. It was built and donated by John I. Blair, Esq., with the intention that it should be occupied by the president of the college faculty. It is rented for $550 per annum, and this rent is applied to the payment of the salaries and other expenses of the college.

The grounds and buildings, not constituting the college proper, were assessed for county purposes at $37,500, the tax thereon being $105.14.

If the Court should be of opinion that the said property was taxable for county purposes, then judgment to be entered in favor of plaintiff for $105.14, but if they should be of opinion that it was not taxable, then judgment to be entered in favor of defendants.

After argument, the Court entered judgment in favor of defendants, in an opinion by SCHUYLER, P. J.; whereupon plaintiff took this writ, assigning for error the action of the Court in entering judgment for defendants.

H. S. Cavanaugh, for plaintiff in error.

George Junkin and *Edward J. Fox* (with them *Edward J. Fox, Jr.*), for defendants in error.

October 7, 1889. THE COURT. The argument in this case, both in this Court and the Court below, has gone beyond the question raised by the case stated to that of the right of Lafayette College to be exempted from taxation. We will consider first the question presented by the case stated and then that which has been raised on the argument. The case seems to concede that the college is not taxable, but asserts that the houses occupied by the professors and the gardener are not part of the college or entitled to share in the exemption which is practically conceded to the halls and dormitories. If they constitute part of the college they are certainly entitled to the same treatment at the hands of the taxing power.

The word college is employed in this country to indicate an institution of learning, having corporate powers and possessing the right to confer degrees. Looked at with reference to its educational work the college consists of the trustees, teachers, and scholars. They make up the membership of the college, and represent its active work. Viewed with reference to its taxability, he college edifice with the dormitories and other buildings in the same general inclosure, used for the purposes of the school, constitute the college.

They are the seat, the home, of the institution, and the place where its educational work is done. Almost without exception colleges find it necessary to undertake supervision and control of the deportment of scholars and the restraint of the turbulent and reckless. The disciplinary powers are second only in importance to the work of the class-room. In order to facilitate this it has been found necessary to place the teachers in close relations with their pupils, and lodge as many of them as possible in or near the dormitories occupied by students. If Lafayette College lodged its whole force of instructors in the halls and dormitories, thereby rendering the erection of several additional ones necessary, it is probable that no question like that under consideration would be raised, but because some of them having families are placed in a separate building in the same inclosure and in close proximity to the halls and dormitories it is thought the buildings so occupied are not part of the college. But we see no line of distinction and no reason for one. Buildings outside the college grounds are not relieved from taxation because occupied by members of the faculty, nor are buildings inside the grounds which are leased to strangers; but the buildings owned by the college, which are located within the inclosure, whether filled with teachers or scholars belonging to and forming part of the true college, the institution of learning, are part of the seat or home of the institution and protected as such.

We come now to the other and broader question. Is Lafayette College entitled to ask exemption from taxation under the Constitution and the Act of 1874? That depends on whether it was founded and endowed and is maintained by public or private charity. It appears by the Act of incorporation, sec. 1, Art. 8, that "persons of every religious denomination shall be capable of being elected trustees," and that no person, either as principal, professor, tutor, or pupil can be refused admission into the college or denied participation in any of its privileges, immunities, or advantages on account of his religious belief.

In sec. 3 it is subjected to visitation by the State government; its books, papers, and all its concerns and transactions may be investigated by the official visitors, and they are to make a detailed report to the governor which he in turn is required to lay before the Legislature. The institution is thus seen to be not a mere sectarian or denominational school but a secular organization under an Act of the Legislature, subject to the visitation and control of the State and open as to the membership of its board of trustees, as to its professorship and as to admission to its classes, to all persons. It is a public institution in the broadest sense of the word.

It has received its land, erected its buildings, provided its library and its scientific apparatus with money given to the trustees, except when the donors have in addition to providing the money, superintended its use in the erection of buildings or in the purchase of school equipments, and presented the completed house or the finished

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machinery or article ready for use. Its permanent fund or endowment was furnished in the same manner. It may be safely affirmed that it was founded and endowed, so far as it has an endowment, by "public or private charity."

How is it maintained? The case stated informs us that the cost of instruction has for several years past been about twenty-five thousand dollars. General expenses, including light, fuel, labor, and similar necessary expenses are put down at fifteen thousand dollars per annum, making a total of forty thousand dollars per annum.

This is paid in the following manner:—

Tuition paid by students, about		$7000
General expenses paid by students, about .		6000
Total received from students . . .		$13,000
From interest on permanent fund .	$5600	
From miscellaneous items	6400	
Deficit made up by gifts	15000	
Total paid by gifts		27,000
		$40,000

The case stated also informs us that fully one-half of the total number of students in attendance at the college since its foundation sixty years ago have not been required to pay tuition because of their poverty, and that at least one hundred of the present inmates are instructed without charge. It is thus seen that the college is substantially maintained by charity. It is not maintained for profit, or with any hope or expectation on the part of the trustees that it can ever be made self-sustaining until its friends shall add by gift to its endowment several hundreds of thousands of dollars. Upon these facts we hold that Lafayette College is a secular not an ecclesiastical institute. That it is subject to the control of the State. That it is open to all shades of religious opinion. So that neither as trustee, teacher, or scholar does eligibility depend on church membership or religious opinion. It is public in its character, in its objects, in its control, and if a charity is a purely public one. As to its charitable character it is clear that it was founded and endowed by charity. This is not questioned, and upon the exhibit made in the case stated it is equally clear that it is substantially maintained by charity. That a small fraction of its annual cost may be paid by tuition fees is not enough to deprive an institution substantially maintained by charity of the protection of the Act of 1874. The true question is on what does this public institution depend for its maintenance? The answer in this case is, almost wholly on the income from its endowments which were a charity, and on the free gifts of its friends.

Thiel College *v.* Mercer County is cited as authority for a different doctrine, but the assessment in that case was made upon farm land, one horse and two cows. They were no part of the college, although owned by it, and the tax was properly sustained. That case was well decided on its facts, and is authority upon the question that passed under judgment, but no further.

The same may be said of the Institution of Science *v.* Delaware County (94 Pa. 163). The cases nearest, in the principles involved, to this case are Donohugh's Appeal (86 Id. 306), and the Fire Insurance Patrol *v.* Boyd (120 Id. 624), in both of which the elements of a public charity are considered.

The judgment of the Common Pleas is affirmed.

Opinion by WILLIAMS, J. H. S. P. N.

July '89, 46. May 23, 1889.

Felpel v. Hershour.

Wages for manual labor—Suits to recover—Set-off—When to be claimed—Act of March 20, 1810.

A suit was brought before a justice to recover from defendant wages for manual labor performed by plaintiff. Defendant did not appear, but after judgment appealed. At the trial it appeared that a suit had been brought previously before another justice by the defendant against the plaintiff for a claim arising out of the same transaction, and *ex contractu*, which action was still pending and undetermined. A nonsuit was entered upon the ground that plaintiff's claim must be set off in the latter action, under the Act of March 20, 1810:

Held, that the nonsuit was properly entered.

The Act of March 20, 1810 (Purd. Dig. 985, pl. 59), embraces a set-off for the wages of manual labor at the time of its passage; it has been so understood ever since, and there is no statute which in terms, in this respect, abridges its effect.

A plea as to pendency of a suit is not in the nature of a plea in abatement, but is essentially a plea in bar of the action under the Act of March 20, 1810.

This latter Act is in no sense inconsistent with any of the special provisions in the Acts respecting the recovery of wages for manual labor; such as the Acts of April 20, 1876; May 14, 1874; March 4, 1887, and March 22, 1877.

Error to the Common Pleas of Lancaster County.

Appeal by Abram Hershour from the judgment of a magistrate, entered against him in the sum of $50.02 at the suit of Henry S. Felpel.

Upon the trial, before PATTERSON, J., it appeared from the testimony of Felpel, the plaintiff, that he had hired with defendant as a farm hand for a year, from the spring of 1888 to 1889, at $12.50 per month; and had left his employment on June 14, 1888, eight months and a half before the expiration of the term for which he had con-

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tracted to serve. On July 21, 1888, Hershour brought suit against Felpel, before a justice of the peace, for the damages he had sustained by this breach of contract on the part of Felpel. There was a hearing in this suit before the justice on July 27, 1888. Felpel appeared at that hearing and offered no defence, put in no offset, and claimed no damages; but three months afterwards, on October 20, 1888, he brought a separate suit to recover the wages he claimed to be due to him.

Judgment having been entered in his favor, defendant, who had not appeared at the hearing, took this appeal.

The Court entered judgment of nonsuit because Felpel, defendant in the first suit brought, had neglected or refused, when sued by Hershour, to set off the demand which he subsequently made against the plaintiff, and was therefore forever debarred from recovering against the party plaintiff by any after-suit.

Whereupon plaintiff took this writ, assigning this action of the Court for error.

Benjamin F. Davis, for plaintiff in error.

Claims for wages for manual labor are under the peculiar protection of the law.

By Act of April 9, 1872, § 1 (P. L. 47), they may be filed as liens upon real estate (see also Act of June 13, 1883 (P. L. 116). By the same Act, and also by Act of April 20, 1876, § 1 (P. L. 43), in *all* cases where judgment shall be rendered for wages of manual labor, the *defendant* shall only be entitled to an appeal after giving bail to secure the debt and costs.

By Act of March 22, 1877, § 1 (P. L. 13), suits for wages of manual labor are placed first on the trial list of civil cases. By Act of June 12, 1878, § 1 (P. L. 207), such claims have a preference over claims for rent.

By Act of May 14, 1874 (P. L. 145), no stay of execution is allowed against such judgments, where the amount does not exceed one hundred dollars.

The Act of March 4, 1887 (P. L. 4), sets forth: "That no exemption of property from attachment, levy, or sale, upon execution, shall be allowed upon judgment for one hundred dollars or less, obtained for wages for manual labor."

These several Acts confer a peculiar jurisdiction upon aldermen and justices of the peace, which they did not previously to the enactment of the same enjoy; and it will be observed that they only operate in favor of claimants or plaintiffs.

In said Acts no reference is made to § 7 of the Act of March 20, 1810, and therefore its provisions do not apply to or govern the same. Said section provides that, "A defendant who shall neglect or refuse in any case to set off his demand, whether founded upon bond, note, penal or single bill, writing obligatory, book-account, or damages of assumption against a plaintiff, which shall not exceed one hundred dollars, before a justice of the peace, shall be and is hereby forever debarred from recovering against the party plaintiff by any after-suit." The Court below granted the nonsuit upon the authority of this Act.

This was certainly error, because that Act of Assembly had only reference to the jurisdiction of justices of the peace at the time of its passage, and it could not control proceedings brought in accordance with an Act passed more than half a century after, in which no reference was made to it.

Chestnut Hill Turnpike Co. *v.* Martin, 2 Jones, 361.
Bosche *v.* Maurer *et al.*, 5 Pa. C. C. R. 215.

In this case, even if the Act of March 20, 1810, applies, the Court erred in entering the nonsuit, because no objection to the carrying on of the suit was made by the defendant in error before the justice.

Groff *v.* Reasler's Adm'rs, 27 Pa. St. 73.

The position of defendant was as if he had entered a plea in abatement.

7 Tr. & H. Pr. 515, 516.
Hinckley *v.* Smith, 4 Watts, 433.

Defendant's claim was in the nature of a tort, and was not cognizable by a justice of the peace.

Zell *v.* Adams, 2 P. & W. 296.
Henion *v.* Morton, 2 Ashmead, 150.

Nor had the justice jurisdiction in a case of consequential damages.

Douglas *v.* Davidson, 1 Phila. 516.

W. U. Hensel and *J. Hay Brown*, for defendant in error.

The Court was right in entering the nonsuit.

Act of March 20, 1810, Purd. Dig. 985, pl. 59.
Herring *v.* Adams, 5 W. & S. 460.

Defendant's claim was founded on a contract, and the plaintiff's claim would have been a proper subject of set-off.

Zell *v.* Arnold, 2 P. & W. 294.
Henion *v.* Morton, 2 Ashmead, 150.
Nickle *v.* Baldwin, 4 W. & S. 291.
Carman *v.* Franklin Ins. Co., 6 Id. 155.
Shoup *v.* Shoup, 15 Pa. 361.
Phillips *v.* Lawrence, 6 W. & S. 150, and many other cases.

October 7, 1889. THE COURT. This suit was brought before an alderman to recover $49.65, being for wages of manual labor performed in the years of 1887 and 1888. The defendant did not appear, but after judgment, entered an appeal in the Common Pleas. At the trial the defendant moved for a compulsory nonsuit, upon the ground that a previous action had been brought by the defendant in this suit, against the present plaintiff before another alderman, for a claim of damages amounting to $50, arising out of the same transaction and *ex contractu*, which action

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was still pending and undetermined, and that the claim now in suit, must be set off in that action under the Act of 1810. A nonsuit was entered, and upon a rule to show cause the Court refused to take it off; this is the error assigned.

In actions brought to recover for the services of manual labor, certain special provisions have from time to time been made by statute for sure and speedy collection, and the wages of labor have been accorded a species of protection which has not been extended to any other kind of claim; for example, when judgment is rendered for the wages of manual labor, the defendant is entitled to an appeal only upon entering bail to secure the debt, interest, and costs (Act of April 20, 1876, P. L. 43); no stay of execution is allowed (Act of May 14, 1874, P. L. 145), nor exemption of property from attachment, levy, and sale where the amount does not exceed $100 (Act of March 4, 1887, P. L. 4); suits therefor are preferred on the trial list (Act of March 22, 1877, P. L. 13), and labor claims have preference over claims for rent (Act of June 12, 1878, P. L. 207). The plaintiff's argument is that if labor claimants are obliged to set off their claims under the Act of 1810, they may be deprived of some of the protection to which by law they are thus entitled, and generally that the provisions of the Act of 1810 are inconsistent with the purpose of the later provisions mentioned.

We cannot see any ground for this contention. The Act of 1810, which is older than any of the special statutes referred to, certainly embraces a set-off for the wages of manual labor at the time of its passage; it has certainly been so understood ever since, and there is no statute which in terms in this respect abridges its effect. The Act of 1810 is in no sense inconsistent with any of the provisions mentioned. It is urged that the Act of April 20, 1876 (P. L. 43), requiring bail for debt, interest, and costs on an appeal, applies only when the *defendant* appeals, and that if the wage claimant is himself defendant in the suit, and is bound to set off his claim of wages, the plaintiff may appeal without giving bail under that Act, and then by a mere trick of an unscrupulous debtor, the labor claimant may be deprived of the security it was the plain purpose of the law to provide. But the difficulty is more apparent than real. A claim of set-off is in the nature of a cross action, and when judgment is entered upon it in the defendant's favor, the relation of the parties is changed; the plaintiff in the suit becomes defendant in the judgment, and that changed relation continues until an appeal is entered, when the case proceeds in the Common Pleas *de novo*. It follows that the bail for an appeal, even in such a case, must be according to the requirements of the Act of April 20, 1876.

The plea as to pendency of the suit is not in the nature of a plea in abatement; it is essentially a plea in bar of the action, for the Act of 1810 expressly provides that if the defendant "shall neglect or refuse to set off his demand," etc., he "shall be and is hereby forever debarred from recovering against the party plaintiff by any other suit."

Upon an examination of the whole case, we are satisfied the nonsuit was properly entered.

The judgment is affirmed.

Opinion by CLARK, J. H. C. O.

July '88, 229. April 22, 1889.

Ferguson v. Rafferty.

Evidence—Parol evidence to vary written contract—Notice — Replevin — Title sufficient to authorize action.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change, or reform the instrument. But in order to be admissible such evidence must be clear, precise, and indubitable. The witnesses must be credible, they must distinctly remember the facts to which they testify, and must narrate the details exactly. Absolute certainty, however, being out of the question, is not essential.

In the present case the evidence of the contemporaneous parol agreement consisted of the testimony of two witnesses present at the time, and was not contradicted expressly by that of the opposing party. The evidence was of such a character as to bring it within the principles above laid down and was held admissible.

A notice read at a sheriff's sale to the effect that the goods to be sold were the property of the claimant, and not of the defendant in the execution, is sufficient to put all purchasers upon notice, even though it does not state the particular kind of title claimed and the facts upon which it was based.

A., who was one of several tenants in common of land, sold the timber thereon, with an agreement that he should be entitled to hold the timber as security for the purchase-money. Said purchase-money not having been paid A. brought replevin for the timber against B., who had purchased the same under an execution issued upon a judgment obtained against the purchaser. It appeared that A. had made a purchase of the shares of the timber owned by two of his co-tenants, and that this sale had been assented to by A.'s mother, who was tenant for life of the whole tract. A. had actual possession of the tract, and was never interfered with or molested in said possession by any of his co-tenants:

Held, that under the circumstances A. was entitled to recover the whole of the timber; and that B. could not set up the title of plaintiff's co-tenants as a defence either in whole or in part.

Error to the Common Pleas of Clearfield County.

Replevin, by Thomas L. Rafferty against John B. Ferguson, for certain pine saw logs.

On the trial, before KREBS, P. J., the facts appeared to be as follows: The plaintiff, Rafferty,

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was tenant in common with his brothers and sisters of a certain tract of land in Penn Township, in which plaintiff's mother, Martha Rafferty, had a life interest. On May 1, 1881, by articles of agreement, one Danver, guardian of Nelson and David Rafferty, agreed to sell to the plaintiff all the pine timber on said tract. Subsequently, on November 19, 1881, plaintiff entered into a written agreement with E. W. Hepburn and W. C. Hoover, for the sale to them of the timber on said tract. Thereafter with the assent of Hepburn and Hoover, Rafferty released them from all obligation under the above contract, and entered into the following agreement with one D. L. Ferguson :—

And now, this 2d day of December, 1882, I, Levi Rafferty, do agree to release E. W. Hepburn and W. C. Hoover, on the within article, and to transfer the same to D. L. Ferguson, and that the said D. L. Ferguson is to pay the balance due on the within agreement as soon as the logs are all delivered in Curry Run. Said logs are to be scaled straight and sound, and instead of six and one-half cents per cubic foot, to be six and 50-100 dollars per thousand feet.

Witness our hands and seals. Done this 2d day of December, 1882. T. L. RAFFERTY, [L. S.]
D. L. FERGUSON, [L. S.]

It appeared that Martha Rafferty, mother of the plaintiff, assented to the sale of the timber by Danver to Rafferty, as above, and that Danver took from Rafferty a judgment-note for $1100, which he entered of record, at once. There was no other evidence relative to the attitude of plaintiff's tenants in common as to above transactions.

The defendant claimed title to the logs by virtue of a sheriff's sale, under an execution issued upon a judgment obtained against D. L. Ferguson. Plaintiff, on the contrary, claimed that he was entitled to the logs as security for the purchase-money due him by D. L. Ferguson, in pursuance of a parol agreement entered into contemporaneously with the execution of the agreement with Ferguson above set forth.

The following notice was read at the sheriff's sale, under which defendant claimed title :—

To R. Newton Shaw, High Sheriff, and to all bidders and execution creditors :—

SIRS: You are hereby notified that the two certain lots of pine sawed logs, to wit, 80,000 feet, more or less, pine sawed logs in the woods on Rafferty's land, in Penn Township, stamped W 4 T, and 155,000 feet, more or less, pine logs in Curry Run, stamped W 4 T, are the property of Thomas L. Rafferty, and not of D. L. Ferguson.

The conditions of the contract not having been complied with, and the purchase-money or stumpage paid as per agreement, the said Thomas L. Rafferty gives notice that he will hold said logs until paid for, and will assert his rights as against the purchase of the same under the said levy and sale.

Clearfield, Pa., February 27, 1883.

T. LEVI RAFFERTY,
By his Attorney, J. F. MCKENRICK.

The further facts of the case and particularly the evidence touching the alleged parol agreement are set out at length in the opinion of the Supreme Court.

The Court admitted evidence under objection by defendant as to the alleged parol agreement. (Fourth and sixth assignments of error.)

The Court in answer to various points of defendant and in the general charge, submitted to the jury the question as to whether the evidence established the existence of the alleged parol agreement. This general proposition was qualified and limited in the manner set forth at length in the opinion of the Supreme Court. (Eighth to thirteenth and twentieth assignments of error.)

Defendant requested the Court to charge, *inter alia*, as follows :—

(2) The notice purporting to have been read at the sheriff's sale of the logs in controversy, by J. F. McKenrick, the attorney of the plaintiff, was not sufficiently explicit and definite as to its nature and character, as would render the logs liable to the claim of the plaintiff, in the hands of John B. Ferguson, the purchaser of the same, at the said sheriff's sale. *Answer.* "We cannot give an unqualified affirmance to that proposition. We think the notice was sufficient to have put an ordinarily prudent man upon inquiry as to what the interest was, if it was read, as to plaintiff's claims." (Seventh assignment of error.)

The defendant also requested the Court to charge in substance that as the plaintiff was only tenant in common with others of the land in question he had no such title to the timber as gave him a right to maintain this action for the whole or any part thereof. These points the Court reserved.

Verdict for the plaintiff for $1725.25. Subsequently the Court overruled the points reserved and entered judgment for the plaintiff on the verdict. Whereupon the defendant took this writ, assigning for error the admission of the above evidence, the answers to defendant's points and the entry of judgment on the points reserved as above.

Frank Fielding (with whom were *S. T. McCormick* and *R. D. Swoope*), for plaintiff in error.

The parol evidence was inadmissible.

Murray *v.* R. R. Co., 7 Out. 42.
Philips *v.* Meily, 10 Id. 536.
Juniata Ass'n *v.* Hetzel, 7 Id. 507.
Sylvius *v.* Kosek, 2 Crum. 67.
Spencer *v.* Colt, 8 Norris, 320.

The notice was not sufficient, as it did not state the nature of plaintiff's claim to the property. Plaintiff has no right to recover as he did not establish a right to exclusive possession.

Rheinheimer *v.* Heningway, 11 Casey, 432.
Mathias *v.* Sellers, 5 Norris, 492.

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J. F. McKenrick (with whom were *A. L. Cole* and *Cyrus Gordon*), for defendant in error.

The parol evidence was rightly admitted.

Walker *v.* France, 2 Amer. 203.
Thomas *v.* Loose, 4 Id. 35.

The evidence was sufficient to establish a right of possession in the plaintiff, and this was sufficient to entitle him to recover.

Mead *v.* Kilday, 2 Watts, 110.
Harlan *v.* Harlan, 3 Harris, 507.
Young *v.* Kimball, 11 Id. 192.
Miller *v.* Warden, *et al.*, 1 Amer. 300.

The title to real estate cannot be tried in replevin.

Snyder *v.* Vaux, 2 Rawle, 425.

October 7, 1889. THE COURT. The rather numerous assignments of error in this case may be considered under a few heads.

First. Those which relate to the admission and effect of parol testimony to change the written contract. These embrace the assignments numbered 4, 6, 8, 9, 10, 11, 12, 13, and 20. The learned Court below, both in admitting the parol testimony and in submitting it to the jury, stated the law with great care and caution, and with entire correctness. It was stated repeatedly in the charge that, in the first instance, the written contract of the parties must be regarded as the whole of their contract, and that it cannot be altered or changed by parol testimony of what occurred at the execution of the writing, except by proof, which the learned Judge thus defines: "We say to you, first, that the written agreement, the law says, is the contract between the parties, and that, when any person seeks to change a contract in writing, he must do it by clear, precise, and indubitable proof. And, by that kind or measure of proof, is meant that the source from which the testimony comes must be credible; the statements of the witnesses must be clear and distinct as to what was said and done, and, altogether, it must be of a character to convince the minds of the jury that the part claimed was omitted either by fraud, accident, or mistake of the parties, or, if not so kept out of the contract, that the party who complains of the omission was induced to sign the contract by the statement or the contemporaneous agreement made at the time the contract was signed. We are not to look for testimony that is beyond all doubt, as that would be requiring a measure of proof that the law does not require." There was more of the same kind of direction, and it was accompanied by a very lucid and perfectly impartial presentment of the testimony on both sides, and concludes by a repetition of the caution that the jury must be convinced that the witnesses stated what actually did occur at the time of the execution of the contract, that they were not mistaken in their testimony, and that the essential part of the contract thus omitted was the inducing cause that led the plaintiff to sign the written contract. It is not necessary to review the numerous cases in which this subject has been discussed and the foregoing principles announced. They are well illustrated in the cases of Walker *v.* France (112 Pa. 203) and Thomas & Sons *v.* Loose, Seaman & Co. (114 Id. 35). In the latter case we said: "Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change, or reform the instrument. It has been often said that such oral agreement must be shown by evidence that is clear, precise, and indubitable; that in it shall be found that the witnesses are credible, that they distinctly remember the facts to which they testify, that they narrate the details exactly, and that their statements are true. Absolute certainty is out of the question."

The law having been defined by the learned Court below with entire accuracy, the only remaining question is, whether there was evidence in the case of a character proper to be submitted to a jury for their action. The evidence consisted of the written contract and the testimony of one witness, D. L. Ferguson, on the one side, and the testimony of two witnesses, T. L. Rafferty and E. W. Hepburn on the other. The written contract contains no reference to the verbal stipulation which, it is alleged by the plaintiff, formed part of the real contract of the parties, and induced the plaintiff to sign it. Rafferty had made an agreement with Hepburn and Hoover for the sale of a quantity of white pine timber on a designated tract of ninety acres. The contract in question here was, in substance, a release by Rafferty to Hepburn and Hoover of their obligation under the original written agreement by him with them, and a transfer of the same to D. L. Ferguson. There was an added modification of the original agreement changing the price to be paid for the logs which were to be cut. There was no stipulation for security to Rafferty, the vendor, in the original contract, and there was none in the written agreement with D. L. Ferguson. But the plaintiff, Rafferty, alleges that he was not willing to make the transfer to Ferguson unless he had security for the payment of the purchase-money, and whether there was an agreement for such security, made verbally, but omitted from the writing, was the question in controversy. The oral testimony on that subject was delivered by Rafferty and Hepburn for the plaintiff, and by D. L. Ferguson for the defendant. Rafferty, being examined, testified, *inter alia*, as follows: Q. Now what did Hepburn and Hoover do with this timber after the sale of it by you to them? A. They came

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to me and wanted to sell it to D. L. Ferguson—they wanted to know if I would release them and take D. L. Ferguson—I told them I did not care if I would be secured on the logs. So we went and wrote the article out. Q. Where was this conversation? A. My recollection is that it was made at 'Ras Hepburn's house. Q. Who was there at the time? A. Bill Hoover, 'Ras Hepburn, Ferguson, and I. Q. What did you do when you met there? A. He wrote out the article. Q. Who wrote it? A. D. L. Ferguson wrote it himself. It was written on the bottom of the old article. Q. You have testified that when Hepburn spoke to you about making this change you stated that you would if you had security? A. Yes, sir. Q. Who was present then at Hepburn's house at that time? A. 'Ras Hepburn, Bill Hoover, and Ferguson. Q. State what was said there about the transfer of this agreement? A. Why, I told them that I would let them have the logs if they would give me security; he said he would let me have the logs as security. Q. Did you then proceed to make a written contract? A. Yes, sir. Q. After he drew it did you sign it? A. Yes, sir. Q. Was there anything said then? A. I asked him where the written security was, and he said the logs was security—that Hepburn and Hoover was witnesses. I asked him to put it in the article, but Ferguson said witnesses was as good as if it was in the article. (Repetition of part of answer.) A. Yes, sir, of course I did not know it then; that is what he told me, that the witnesses was just as good as the article. By the Court: What was the reason that you signed this agreement? A. Why did I sign it? Because they wanted the loosing of it, and I thought if I would give him (Ferguson) the agreement and have the logs for security it would be all right. Q. When you found that this security that you spoke of was not in the contract, why did you sign it? A. He said the logs would be good for security; he told me he would give me security and I signed it. I asked him what the security was, and he said the logs was security; he told me that before, and then afterwards that the logs were security.

Under this testimony it can hardly be said there was any fraud, accident, or mistake, except mistake of law, in omitting the verbal agreement for security from the written contract.

It was omitted in fact, and the plaintiff knew it, and assented to the verbal agreement for security. But it seems quite certain that Rafferty was induced to sign the written contract by means of the verbal agreement, and there is at least ample testimony to justify the jury in finding that such was the fact. It is still necessary, however, to recur to the other evidence in order to determine whether upon the whole it conforms to the legal requirements in such cases. E. W. Hepburn, another and a disinterested witness, was examined, and testified as follows: Q. Did you go and see Levi Rafferty and talk to him before you made this transfer to D. L. Ferguson? A. Yes, sir. Where was this contract of December 12, 1882, made? A. At my place. Q. Who was present at your place at that time? A. Nobody but the four of us, W. C. Hoover, D. L. Ferguson, T. L. Rafferty, and myself. Q. Who wrote that contract? A. D. L. Ferguson. Q. What, if anything, was said there between Ferguson and Rafferty with reference to security for the logs mentioned in that contract? State what occurred there and what was said by the parties in that room. A. There was not a great deal said about it. When Rafferty allowed (insisted) he ought to have some security for the logs—that was either before or after this was written out—I don't know which, but I rather think before it was signed—Mr. Ferguson told him he could hold the logs until he got the money; he allowed he ought to have something in the agreement, and Ferguson allowed that witnesses were as good as a bargain. . . . Q. Was your attention called to this as a witness? A. Yes, sir; he said Mr. Hoover and Mr. Hepburn could witness it. I was sitting between Ferguson and Levi Rafferty.

This testimony is corroborative of that of the plaintiff, and would also justify an inference that the signature of Rafferty was obtained by means of the verbal agreement in regard to the security.

The testimony of Hoover was not taken, and the only remaining evidence as to what occurred at the time of the execution of the written contract is the testimony of D. L. Ferguson, the other party to the contract. He says he was present with the other parties named when the agreement between himself and Rafferty was made, but gives no testimony whatever as to what was said at the time. There is but a single sentence in the whole of his testimony that relates in any manner to what was said by the parties when the contract was signed, and it is in these words: "There was no other contract made except that made in the supplemental agreement." Just what he means by this is not explained. The question to which the above was an answer is not printed, and it cannot be known whether his attention was called to the testimony of Rafferty and Hepburn as to the verbal agreement about security or not. Whether he meant to say there was no other written contract than the supplemental agreement we cannot know, but certain it is that his testimony as it stands means at the utmost nothing more than that in his opinion there was no other contract made than the supplemental agreement. He contradicts nothing that was testified to by Rafferty

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and Hepburn, although he wrote the agreement, was himself a party to it, and was present during the whole of the time of its preparation and execution. Such silence in the face of the opposing testimony is much more than mere negative testimony. It is highly persuasive evidence that the conversation testified to by the other witnesses actually took place just as they stated it. The case then stands with the direct, positive, and uncontradicted evidence of two witnesses to the fact of the contemporaneous verbal agreement, and the non-denial of it by the other party.

The testimony is precise, definite, distinct, positive, the witnesses are not impeached or contradicted in any manner, and the story they tell is highly probable and reasonable. If their testimony is believed it is of an indubitable character in legal effect, and fully warrants the inference that the signature of Rafferty was obtained by means of the verbal agreement. This brings the case within the frequent rulings of this Court on this subject, and justifies the learned Court below in their action in admitting the evidence and their treatment of it in the charge and answers to points. These several assignments of error are not sustained.

There is no merit in the seventh assignment. The notice was at least sufficient to put an intending purchaser upon inquiry, and the whole question as to whether it was read at the sheriff's sale and the defendant had opportunity to hear it, was very fairly treated in the general charge. The notice contained a distinct claim of title to the logs in Rafferty, and a prudent man inquiring of him, as he would be bound to do, would, it must be presumed, have been informed of the particular kind of title claimed and of the facts upon which it was based.

Seventeenth assignment which covers also the eighteenth and nineteenth. These all relate to the right of the plaintiff to maintain his action of replevin in his own name without joining others who appear to be co-tenants in common with him of the land from which the logs were cut. The action was not brought by the plaintiff as one of several tenants in common to recover his undivided portion of the logs, but he asserted his rights to recover and sought to recover the whole of the logs. The defendant claimed title to the whole of the logs under a sheriff's sale of the title of D. L. Ferguson, and D. L. Ferguson's title was derived exclusively from the sale made to him by the plaintiff. The defendant being a purchaser with notice of the plaintiff's claim of title, is in no better position than D. L. Ferguson would have been if he had been the defendant. He at least took the logs and all the title he had to them came directly from the plaintiff. The sale was at least sufficient to pass over the logs to D. L. Ferguson, who actually took possession of the whole of them under his contract of sale with the plaintiff. The latter certainly had title enough to enable D. L. Ferguson, and through him the defendant, to get possession of the logs. In point of fact, neither D. L. Ferguson nor the defendant was ever molested or interfered with in any way, either in the taking or holding possession of the logs, or any of them, by any of the alleged co-tenants in common of the plaintiff, although five or six years had elapsed from the cutting at the time of the trial. Moreover, although Danver, who sold the timber to the plaintiff, was named in the contract of sale as guardian of two of the brothers of James Rafferty, who was the owner of the land from which the logs were cut at the time of his death, he assumed to sell the whole of the timber claiming he had a right to do so. Mrs. Martha Rafferty, who was the mother of James, was tenant for life of the land, and paid the taxes on it, testified that it was timber land, part of which had been cut off before her husband bought it, and that she consented to the sale of the timber by Danver to T. L. Rafferty, the plaintiff. Danver took a judgment-note as trustee from T. L. Rafferty for $1100, the whole of the purchase-money of the timber, and entered it on record at once. None of the co-tenants ever made objection to the sale or set up any title to the timber against either D. L. Ferguson or the defendant. We think it clear from these facts that the plaintiff must be regarded as seeking to recover upon the whole title to the logs, with evidence of consent of the other parties in interest, especially of his mother, who, quite possibly, had a legal right as tenant for life to cut off all the timber, that being the main profit of the land. (Williard *v.* Williard, 56 Penna. 119.) This being so, his right to recover cannot be disposed of upon the assumption that he is simply one of several tenants in common seeking to recover his undivided interest only, and authorities to the effect that no recovery can be had upon such a title do not determine the case. It seems to us quite plain that, as between himself and D. L. Ferguson, or the defendant with notice, he had the right to the possession for the security of the purchase-money, and at least a qualified title to the logs. In such circumstances the authorities are plain, that there may be a recovery. In Harlan *v.* Harlan (15 Penna. 507) we said: "It is well settled as a general principle, that in Pennsylvania replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession." The same doctrine is repeated in Miller *v.* Warden,

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Frew & Co. (111 Penna. 300), and in other cases. The case of Reinheimer *v.* Hemmingway (35 Id. 432) is not in point, as it presents a different question growing out of entirely different facts. The defendant here sets up no adverse title to the logs, whether derived from a stranger or from any of the co-tenants. He literally claims upon the very title which he derived from the plaintiff, and seeks to impeach it for the mere purpose of avoiding payment of the purchase-money, which he certainly cannot do. He never has been evicted from his possession which the plaintiff gave him, nor has his title even been threatened, yet he proposes to keep both the logs and their purchase-money, upon the mere allegation that others are interested in the logs with the plaintiff, although there is satisfactory evidence of their assent to the plaintiff's action and claim of title.

These several assignments of error are not sustained. The remaining assignments are without merit and are dismissed. The case was tried with much care, and an extremely lucid and able charge was delivered to the jury. It has been argued in this Court with great force and ability by the learned counsel on both sides. It seems to us substantial justice has been done, and we are not convinced that any error occurred on the trial.

Judgment affirmed.

Opinion by GREEN, J. L. L., JR.

May, '89, 27, 37. June 5, 1889.

Appeal of the Commonwealth of Pennsylvania.

Appeal of the Lehigh Avenue Railway Company.

Corporations—Stock—Bonds—Power to issue—"Par value of capital stock"—Construction of—Constitutional law—Constitution of Pennsylvania—Article XVI., § 7—Act of May 7, 1887 (P. L. 94).

A railway company was authorized by its charter "to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock." Its authorized capital was $1,000,000, of which ten per cent. only was ever called or paid. The company having resolved to issue its bonds for $250,000, a bill in equity was filed against it by the attorney-general for the Commonwealth to restrain it from so doing:

Held, that the words "par value of the capital stock" used in the charter, must be construed to mean capital actually paid up, and not authorized capital, and that therefore the company had no right to issue bonds to any greater extent than $50,000, being one-half of the actual paid-up capital, and would be restrained accordingly.

In the above case the facts were not such as to raise any question under Article XVI., § 7, of the Constitution of Pennsylvania, prohibiting corporations from issuing stock or bonds except for money, labor done, or property actually received; nor under the Act of May 7, 1887 (P. L. 94), to enforce the above constitutional provision against railroad corporations; inasmuch as it appeared that the company intended to use the money realized by the sale of the bonds to meet obligations incurred in the construction and equipment of its road.

Appeals of the Commonwealth of Pennsylvania, and of the Lehigh Avenue Railway Company from a decree of the Common Pleas of Dauphin County, enjoining the said company from issuing its bonds to a greater amount than fifty thousand dollars.

Bill in equity, wherein the Commonwealth of Pennsylvania was complainant, and the Lehigh Avenue Railway Company defendant. An answer was filed, and the case was heard on bill and answer. The allegations of the bill and answer are set forth at length in the opinion of the Court (SIMONTON, P. J.) as follows:—

"The bill filed by the attorney-general, in the name and on behalf of the Commonwealth of Pennsylvania, avers that defendant was incorporated under a special Act of Assembly, approved December 18, 1873; that on its organization in December, 1873, twelve thousand shares of its capital stock were subscribed for, and five dollars per share were paid thereon; that in February, 1888, eight thousand shares of increased stock were subscribed for, and five dollars per share were paid thereon; that the whole capital stock authorized by the Act of incorporation has thus been subscribed for and issued, and that no more than five dollars per share have been paid on any of said shares, either in money, labor done, or property received, and that the defendant company, is about to issue bonds to the amount of $250,000, in contravention of section 3 of the Act of Assembly entitled 'An Act to enforce against railroad companies the provisions of section 7 of article 16 of the Constitution,' approved May 7, 1887.

"On these averments the Court is asked to restrain defendants from issuing or disposing of any of said bonds, or from evading, by any device, the true intent and meaning of the said Act of Assembly of May 7, 1887; and there is also a prayer for such other and further relief as the nature of the case may require.

"The answer admits the matters of fact stated in the bill, but denies that 'the said issue of bonds will be in contravention of said Act of May 7, 1887.' It also alleges 'that in constructing the said railway the said corporation incurred heavy obligations for material and labor, and the mortgage bonds which it is about to issue are to be issued to meet the obligations incurred as

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aforesaid for the construction of said railway, and for other obligations to be incurred in the equipment of the same.'

"Defendant claims that it is authorized to make and issue said bonds by section 3 of its charter, which is made an exhibit to plaintiff's bill, and is as follows:—

"'Section 3. The said company shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock, at a rate of interest not exceeding seven per centum per annum, and to secure the re-payment of the same and the interest thereon, to give bonds secured by a mortgage of and on the said railway and the corporate rights and franchises guaranteed by this Act, which principal moneys shall be payable at such dates and times as the board of directors may deem advisable.'

"There being no controversy as to facts, the case was heard on bill and answer.

"We do not understand that there are any facts or intentions alleged to exist in this case which would bring it within the terms of the prohibition of section 7, of article 16, of the Constitution, which is, 'that no corporation shall issue stocks or bonds except for money, labor done, or property actually received.' There is no pretence that defendant does not intend to receive full value for the bonds, if issued. We are, therefore, not required to determine whether this provision of the Constitution would under any state of the facts apply to this defendant, incorporated before the Constitution was adopted; that question is not in the case.

"And it is, perhaps, not easy to understand how defendant, if it has not rendered itself obnoxious to the provisions of the Constitution, can be affected by the terms of an Act of Assembly passed to enforce those provisions, and the title to which states no other purpose. We are, therefore, of the opinion that its rights must be limited and determined by the terms of its charter, and not by those of the Act of May 7, 1887. It is authorized by section 3 of its charter, already quoted, 'to borrow money in any sum or sums, not exceeding in amount one-half of the par value of the capital stock.' And, as we conceive, the real question in this case is involved in the proper construction of this provision. Defendant contends that in the phrase 'one-half of the par value of the capital stock,' the words 'capital stock' mean the authorized and not the paid-in capital, and that, therefore, as it has an authorized capital of twenty thousand shares of the par value of fifty dollars each, or one million dollars, it is empowered by its charter to issue bonds in any sum not exceeding one-half that amount, or five hundred thousand dollars, notwithstanding the fact that its paid-up capital is only five dollars per share, or one hundred thousand dollars. While for the Commonwealth it is contended that it can issue bonds only to the amount of one-half its paid-in capital, or fifty thousand dollars.

"The charter of the company defendant contains another section in which the phrase, 'par value of the capital stock,' occurs, as follows:—

"'SECTION 10. That the said company shall pay annually into the treasury of the city of Philadelphia, for the use of said city, whenever the dividends declared by said company shall exceed six per centum per annum on the par value of the capital stock thereof, a tax of six per centum on such excess over six per centum on the par value thus declared.'

"Several cases have occurred in which the question arose between passenger railway companies, whose charters contained a similar provision, and the city of Philadelphia, whether the companies were liable to tax as soon as their dividend exceeded six per centum on their paid-in capital, or not until they exceeded six per centum on their authorized capital. These cases all called for a construction of the words 'capital stock' as thus used in the charters, and they have uniformly been construed to mean paid-in capital stock. The reasons for this construction are thus clearly given by Mr. Justice CLARK, in City of Philadelphia *v.* Ridge Avenue Railway Co. (102 Pa. St. 190), the latest case on the subject: 'By the provisions of the third section of this Act of 1872, the defendant is made liable to pay, annually, to the city of Philadelphia "a tax of six per centum upon so much of any dividend declared, which may exceed six per centum upon the capital stock." The entire authorized capital stock of the company, as we have already said, during the years stated, was $750,000, of which only $420,000 has been paid in. Upon which of these sums is this excess to be computed? The former is the authorized, the latter the actual capital, and either of them is within the letter of the statute. There is nothing in the context to explain this ambiguity, and we must therefore resort to the reason and spirit of the law, its object and purpose, in order that we may learn the intention of the Legislature. Dividends of profits are not estimated or declared upon the basis of the merely authorized capital of a corporation, but upon the basis of the capital actually paid; they are, indeed, only due to capital, and always are or ought to be thus distributed. If the dividends are declared and distributed to the stock paid in, it seems clear that the same fund should be the basis of the defendant's taxation under the statute. The tax imposed was certainly intended to be a percentage upon the profits, and as the profits were realized from the capital invested, the taxation to be uniformly proportionate should be computed upon the same. Six per centum being

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the rate of interest allowed by law, it was doubtless intended that this rate of profit should be first allowed to the stockholders, upon their moneys invested, before any division of profits should be made with the city. It is equally clear that the object and purpose of the statute was to create and secure a revenue to the city of Philadelphia, whose streets the corporation were occupying for the purposes of their charter; but, if the six per centum is to be computed upon the whole authorized capital, and the company may from time to time so increase the capital as to keep the percentage at all times in advance of the dividends, no revenue could at any time accrue to the city, and thus the intention of the Legislature, and this purpose and object of the statute would be defeated; the absurdity of such a construction is, therefore, apparent. We are of opinion, therefore, that the capital stock upon which percentage is to be computed is the capital paid in. Such is the reason and spirit of the law, and it must be so interpreted. The same question has been before this Court, and has been ruled in accordance with the views here expressed. (Citizens' Passenger Railway Co. *v.* City of Philadelphia, 13 Wright, 251, and to the same effect is Second and Third Street Passenger Railway Co. *v.* Same, 1 P. F. Smith, 465; and City of Philadelphia *v.* Philadelphia and Gray's Ferry Railway Co., 2 Id. 177.)'

"This places the construction of section 10 of defendant's charter beyond controversy, unless the fact that the phrase here is 'par value of the capital stock,' while in all the cases cited it was simply 'capital stock,' ought to lead to a different construction. We do not think it ought. The words 'par value' do not affect the reasons for the construction. If 'capital stock' means actual capital, the 'par value' meant must be the 'par value' of the actual capital, and not the par value of 'mere moonshine,' as nominal capital is styled by Justice THOMPSON in Citizens' Passenger Railway Co. *v.* City of Philadelphia (13 Wr. 256).

"But if the phrase 'par value of capital stock' in section 10 of defendant's charter is to be construed par value of actual capital, we see no escape from the conclusion that the same words in section 3 must have a like meaning. The same reasons exist for such a construction in the one case as in the other. It is as much against the policy of the law to permit bonds to be issued upon the security of 'mere moonshine' as it is to allow taxation to be evaded by making it the basis of dividends.

"We, therefore, arrive at the result that the company defendant has authority to issue bonds to the amount of fifty thousand dollars, and no more, and that an injunction must issue to restrain it from issuing any greater amount until the Court is satisfied that it has acquired additional actual capital stock.

"A decree may be prepared in accordance herewith."

A decree was entered accordingly. The Commonwealth thereupon took this appeal, assigning for error the refusal of the Court to enjoin altogether the issue of the bonds. The Lehigh Avenue Railway Company also appealed, assigning for error the decree of the Court restraining them from issuing the bonds, except to the extent of fifty thousand dollars.

William S. Kirkpatrick, attorney-general (with whom was *John F. Sanderson*, assistant attorney-general), for the Commonwealth.

William C. Hannis, for the Lehigh Avenue Railway Company.

October 7, 1889. THE COURT. The Lehigh Avenue Railway Company was incorporated by the Act of December 18, 1873, with an authorized capital of one million dollars, divided into shares of fifty dollars each. The shares have been subscribed for, and the first payment of five dollars per share paid on them, making a total of one hundred thousand dollars actually paid. Upon this amount of money the business of the corporation was entered upon, and nothing further has been collected upon the subscription to the capital stock. In 1888, the company, being in need of more money, decided to issue its bonds secured by a mortgage on its property and franchises for two hundred and fifty thousand dollars. This bill was filed by the attorney-general to restrain the issuing of the proposed bonds on the ground that section 7 of Article XVI. of the Constitution and the Act of May 7, 1887, forbade it. The company denies that the Act of 1887, or the provision of the Constitution which it is intended to carry into execution, is applicable, and alleges that it has the right to issue the bonds under its own charter, the Act of incorporation. Two questions are thus raised: First. Is the railway company authorized by the Act of incorporation to issue the bonds proposed? Second. If so authorized, do the Act of 1887 and the constitutional provision take away the authority so conferred?

The Act of incorporation provides, in section third, that "the said company shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the *par value of the capital stock*." The tenth section provides that "the said company shall pay annually into the treasury of the city of Philadelphia for the use of said city, whenever the dividends declared by said company shall exceed six per centum per annum on the *par value* of the capital stock thereof, a tax of six per centum on such excess." The first question

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presented is, what is the meaning of the words "par value of the capital stock," as used in the Act of incorporation? The company contends that the par value of its stock is one million of dollars, the amount of its authorized capital. The attorney-general maintains that the par value is one hundred thousand dollars, the amount of capital actually contributed, as shown by the company's books, and that the right to issue bonds is limited to one-half that amount by the Act of incorporation. The words, stock and capital stock, may be defined as meaning the fund or property belonging to a firm or corporation, and used to carry on its business. This is contributed by those who embark in the business. The articles of co-partnership, or the charter of the corporation, fix the maximum amount of stock that may be issued, and this may properly be spoken of as the proposed or authorized capital of the company. Where an organization is effected, subscriptions are made to the stock by which the subscribers agree to take and pay for certain sums or shares each. The total amount of stock thus taken constitutes the subscribed capital of the company. Some of these subscriptions may not be paid and may be uncollectible, but when the amount subscribed, or called for upon subscriptions, has been collected so far as collection is practicable, the amount so gathered into the treasury constitutes the actual capital on which the business is undertaken. The amount paid by each subscriber measures his relative interest in the whole. As between himself and the corporation, or his fellow-subscribers or the public, his share of the whole stock is fixed by the proportion which his actual contribution bears to the entire amount contributed by all who are associated in the enterprise. If after the payment of one instalment on his subscription, a subscriber sells and assigns his stock, his assignee stands squarely in the shoes of his assignor, and takes no greater interest than was actually vested in his assignor at the date of the assignment. The general railroad law of 1849 provides that he to whom shares of stock are assigned shall take them "subject to all the liabilities, conditions, and penalties incident thereto, in the same manner as the original subscriber would have been; *provided*, that no certificate shall be transferred so long as the holder thereof is indebted to said company unless the board of directors shall consent thereto; *and provided*, that no such transfer of stock shall have the effect of discharging any liabilities or penalties theretofore incurred by the owner thereof." In accordance with this provision, it was held, in the Pittsburgh and Connelsville Railroad Co. *v.* Clarke & Thaw (29 Pa. 146), that the liability of a subscriber to pay "for the amount of stock subscribed is an indebtedness within the meaning of the Act, although the instalments have not been called in at the time of the transfer. It is *debitum in presenti solvendum in futuro.*" It is clear, therefore, that, as between the assignor and assignee of shares, the assignment passes only the actual interest of the assignor as measured by what he has paid, and that the assignee takes subject to all unpaid instalments whether called at the time of his purchase or not. Does the corporation stand on better ground than its members? It claims the right to issue bonds because of its stock. We must inquire, therefore, first, what is the amount of its stock? And, next, what is the par value of a share of that stock? We think the first of these questions is, in the light of the facts in this case, answered by repeated decisions of this Court. Whether it be for the purpose of adjusting and paying dividends to stockholders, or of regulating the amount of taxes due to municipalities having the right and power to tax, the amount of stock actually paid is the capital stock of the company. (Citizens' Passenger Railway Co. *v.* City of Philadelphia, 49 Penna. 251.) Neither the cost of the road, nor the authorized capital can be made the basis of dividends or of taxation, but these must rest on the amount of capital stock actually paid in. (Second and Third St. Passenger Railway Co. *v.* City of Philadelphia, 51 Penna. 465; Philadelphia *v.* Philadelphia and Gray's Ferry Passenger Railway Co., 52 Id. 177; City of Philadelphia *v.* Ridge Avenue Railway Co., 102 Id. 190.) The company appellant propose to exercise a power, and incur a liability upon the basis of its capital stock, and for this purpose, as for purposes of taxation or payment of dividends, its rights must be measured not by nominal or authorized capital, but by the actual amount of capital paid in. The issuing of certificates of stock to the subscribers does not add to the common stock in the treasury or business of the corporation, nor does it increase the interest of the individual stockholder. He takes his certificate when issued, subject to all the unpaid instalments of the subscription and the terms and conditions on which the subscription was made. Its value to him as between him and the corporation, is what he has paid upon it; no more, no less. That value may be increased or diminished in a commercial sense by the success of the business, the ability of the management, or other similar consideration, and such increase or decrease makes the market value greater or less than the amount he has paid upon it, as the case may be; but as between himself and the corporation or his fellow stockholders, the consideration of market value has no place. He must pay his subscription as calls are made, whether the venture prospers or fails. If the value of the stock is measured by what has been paid upon it, is the

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"*par value*" measured in the same manner when the right of the corporation to do a given act is to be settled? The par value of the stock of this corporation for purposes of taxation or payment of dividends is, as we have already seen, the amount actually paid upon it, or one hundred thousand dollars. This is well settled by the cases we have cited, which held that for purposes enumerated the par value has no necessary relation to either the authorized or the market values, but is fixed by the amount actually paid, and is the equivalent or par of the value of the shares as shown by the stock account. The issuing of certificates does not affect our question. If issued they cannot increase the money in the treasury, or confer any independent right on the stockholder. They simply afford evidence of the extent of his interest in a more convenient form than the books of the company furnish, but leave him subject to all the liabilities resting on him before they came into his hands. We see no good reason for distinguishing this case from the cases cited above, but regard it as substantially ruled by them. The Lehigh Avenue Railway Company has received just one hundred thousand dollars from the subscribers to its stock. So far as the paper-books advise us, this is all it has ever asked for in the more than fifteen years of its corporate life, and all it expects to receive. The other nine hundred thousand dollars of authorized capital are uncalled and unpaid. The par value of all its shares taken together is one hundred thousand dollars, because that is the sum paid upon them, the value they represent. The par value of each share is fixed in like manner. Its value is the equal or par of the corporate capital it represents, which is the amount paid upon it by the subscriber, or applied to it out of the earnings of the corporation. It is argued that nominal value and par value are synonymous terms in the commercial vocabulary, and that the par value of the stock of this company is one million of dollars, because that is the amount of its nominal or authorized capital. If this is so, the par value has not been affected by the payment of calls upon the subscription heretofore and will not be hereafter, though the entire amount subscribed be actually paid to the treasurer. Whether the amount paid in is ten per cent. or fifty, or one hundred per cent. of the authorized capital, the par value must, according to this doctrine, remain the same. This overlooks the meaning of the word value, and the basis on which the idea of value rests. The par value of a treasury note or bank bill is the sum named on its face, because the holder can demand and is entitled to receive that sum for it from the government, or the bank by which it was issued. The same thing is true of notes, bonds, and negotiable instruments of all sorts. The maker cannot deny that he is indebted as he has represented in his note or bond, nor refuse to pay the exact sum he has promised to pay. In these cases the nominal and the par value are, *prima facie*, the same. The par value of a treasury note for one dollar is one dollar, because that sum in coin can be had for it. When it cannot be so exchanged it is said to be below par, because it is not redeemed at a price which is the par, or equal of the promise on its face. But a certificate of stock in a railroad company is not a negotiable instrument in either a legal or commercial sense. It stands in the hands of the subscriber for so much and no more than the amount actually paid upon it. In the hands of his transferee it stands for no more, but is held under the express provisions of the general railroad law, subject to the balance due upon the subscription and all liens, penalties, etc., to which it was subject in the hands of the subscriber. Neither the seller nor the buyer can secure any greater interest as a holder of the stock than the sum actually paid entitled him to. Future calls must be paid as they are demanded, and the possession of the certificate is no defence against them. How, then, is the equivalent the par in value of the stock in the hands of the holder to be ascertained at any given time? Very clearly by the books of the company which show for what value it stands, what value it represents at that time. If but five dollars have been paid on a share, such share is subject to be called on for the remaining forty-five, if, as in this case, the nominal value of the share is fifty dollars, and the par value of such share is a sum which is equal to, or the par of, the value it represents, the five dollars actually paid into the treasury. It is clear that the certificate stands for no more than this to the holder, for he remains liable to be called on for the remaining forty-five. It stands for no more to the corporation because it may compel payment of the sum standing due on the subscription, notwithstanding the certificate. When another call has been made and collected, the capital of the corporation will have been doubled. It will have two dollars to employ in its business where it now has one, and the par value of each share will have advanced to ten dollars, the exact equal or par of what the share represents. When the whole amount subscribed shall have been paid, the capital of the company will be one million of dollars. Its stock will represent its actual capital, and each share will have a par value equal to its nominal value. The authorized or nominal value of the stock has remained the same from the beginning, viz., one million of dollars. The equivalent or par value of the stock has advanced as the calls have been paid, so as always to be the exact equivalent of the value received from the subscriptions made

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to it. The market value has risen or fallen according to the estimate placed by the commercial world on the value of the business in which the corporation is engaged, the ability of its management, and the prosperity of its affairs.

We agree fully with the learned Judge of the Court below, that the case as presented on bill and answer raises no question under the Act of 1887, or that provision of the Constitution which it was intended to enforce. The only question is whether the Act of incorporation on which the company rests its right to make the mortgage and issue the bonds, and which is thus brought to our attention, does confer the authority which it is proposed to exercise. We think it does not. The company may issue its bonds under the Act of incorporation for an amount equal to one-half of the par value of its stock, or fifty thousand dollars, and no more, as the par or equivalent value of the stock is shown by the books of the corporation to be at this time. It appears by the bill and answer that the stock is not paid up; that no profits have been applied to it; and that nothing has been paid upon it except five dollars per share. This is all the corporation has, and for that reason it is all that its stock can represent. Its aggregate value is equal to the aggregate of the sum received, or one hundred thousand dollars, and the value of each share is equal to the sum it stands for to the company and the stockholder, which is five dollars. This is the value, or common stock, of which the certificates are the equal, equivalent, or par.

The industry of the learned gentleman, who represents the appellant, has enabled him to place before us extracts from a large number of Acts of Assembly, in which the words "par value" occur, for the purpose of showing that they have received a legislative construction in accordance with the views presented by him in his argument. But these extracts do not show a uniform use of the words, as will be seen by an examination of some of them. The Act of January 31, 1873 (P. L. 110), provides that "no certificate of stock shall be issued by said association until the full amount of the par value of the same shall be paid in cash." Here the nominal and par values are confused, and the draughtsman evidently regarded them as one and the same. But there could be no par value in the stock in advance of organization, and payment of something upon it, for there was nothing whatever in the hands or treasury of the corporation to be represented by it. The object of the provision was to require payment in full before certificates should issue, so that when issued the par value should be equal to the nominal value. The provision from the Act of March 20, 1873 (P. L. 320), is in these words: "That none of said bonds shall be sold for less than the par value thereof." This is a correct use of the words. The bonds of a corporation have, *prima facie*, an actual value exactly equal to their face or nominal value. The solvency of the obligor is to be presumed, and on that basis, like other negotiable instruments, its value is equal to the par of its face value, so that its par and nominal value are the same. It may go above or fall below its par in value by reason of extrinsic circumstances, but if none such occur its par value is its nominal value. Another example from the Act of April 4, 1873 (P. L. 519), is as follows: "Section 4. If calls are not paid the directors may forfeit and sell the stock, but not for less than par." Here the words are correctly used. Suppose that a stockholder has paid five dollars per share on shares with a nominal value of one hundred dollars each, and that for non-payment of the second call the directors proceed to forfeit and sell his shares. What now is the minimum price which the shares must bring? If the words "par value" are equivalent to face or nominal value, and the nominal value of the share is one hundred dollars, then it is clear that the directors must sell five dollars' worth of stock for one hundred dollars, or not sell at all. But if the words "par value" are understood in their proper legal sense, then this provision merely forbids the sacrifice of the shares of the delinquent for less than their actual cash equivalent, which is the sum paid upon them as shown by the books of the corporation. It must be remembered that we are speaking of the par value of stock that is conceded to be unpaid. The shares that are bought and sold in large blocks in the stock markets are, we presume, paid-up shares. They certainly should be. In that case nominal and par values are the same. It may fairly be presumed, that they would not be listed or dealt in in the market until they had been paid for in full, so that he who sold could confer an indefeasible title on the buyer. But there is no room for presumption in the case in hand. We have the fact on the record, that but one-tenth of the nominal value has been paid. The corporation is the party. It has one hundred thousand dollars in its treasury, and no more, yet it asks us to hold that the par value of the stock is one million of dollars, and permit it to exercise an important power on that basis. This we decline to do. The par value of its shares is measured by the money it has received upon them, and not by the broken promises of those who subscribed for them.

The decree of the Court below is affirmed at the costs of the appellant.

Opinion by WILLIAMS, J.

MITCHELL, J., dissents. L. L., Jr.

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Jan. '89, 74. March 28, 1889.

Strawbridge & Clothier v. Bradford.

Negligence—Contributory negligence—Infants.

A child's capacity is the measure of his responsibility: if he has not the ability to foresee and avoid danger, negligence will not be imputed to him. Whether he has sufficient understanding to comprehend and guard against the particular danger, is, ordinarily, a matter to be considered by the jury, under proper instructions from the Court.

The plaintiff, a boy between thirteen and fourteen years old, was employed as a delivery boy in defendants' store, by the rules of which he was obliged to ride up and down on a freight elevator. While going up in this elevator, on a personal matter, his foot was caught between the elevator and a sill which projected about 8¾ inches from the floor, and his leg was broken, for which he brought suit. There was testimony on the part of the plaintiff that the elevator was not a reasonably safe one for the transportation of boys, and, on the part of the defendants, that similar elevators were in general use. The Court left to the jury the question of defendants' negligence and of plaintiff's contributory negligence, and also whether plaintiff had sufficient intelligence to understand the danger to which he was exposed.

Held, that the questions of negligence involved were matters of fact, and were properly submitted to the jury.

Honor *v.* Albrighton, 93 Pa. 475, distinguished.

Error to the Common Pleas No. 1, of Philadelphia County.

Trespass, by Edward T. Bradford against Justus C. Strawbridge and Isaac H. Clothier, trading as Strawbridge & Clothier, to recover damages for injuries caused, as alleged, by the negligence of defendants.

On the trial, before BIDDLE, J., it appeared that the plaintiff, who was a boy between thirteen and fourteen years old, was employed by the defendants in their dry-goods store to carry special delivery bundles. There were from thirty to one hundred boys employed at this work, and they were obliged, by the rules of the store, to ride up and down stairs on the freight elevator, and were not allowed to use the stairway, except by special permission. A model of the elevator thus used was put in evidence, and with it the following agreement of counsel:—

"It is admitted that this is a correct model of an elevator and shaft, as originally introduced, and built into the old Hood-Bonbright building by the former owners, except that the wire guards on two sides of the elevator platform were added before the accident by the present owners of the building (Messrs. Strawbridge & Clothier). That this south side of the elevator is toward Market Street. That the entrance to it from Market Street, at the ground floor, is by a doorway on that side, but that on all other floors, including basement, the entrances are by doorways on the east side, marked "store side." That in the basement immediately under the Market Street entrance to the elevator is a glass partition, composed of two sashes (represented in the model by a plain glass), by which light is obtained for an accounting-room under the pavement. That the size of the platform is six feet eight inches by six feet eight inches; that the elevator platform when raised to receive goods from the Market Street pavement is within one and five-eighths inches of the sill, and that the sill projects eight and three-quarter inches beyond the south side of the elevator shaft. That the north and west sides of the elevator shaft have no openings. That the ground floor and basement are where marked on model."

While plaintiff was riding up from the basement on the elevator above described, and standing with his back toward the post at the southeast corner, his foot, which was projected over the edge of the platform, was caught between the elevator and the sill of the first floor, and his leg was broken. It appeared that at this time he was going up, not on the business of his employers, but upon a personal matter. Evidence was produced by the defendants to show that similar elevators were in very general use in the city.

The defendants presented the following point: (7) "Under all the evidence, the verdict must be for the defendants." *Refused.*

The Court left it to the jury to say (1) whether the defendants were guilty of negligence on the facts, and (2) whether the boy was guilty of contributory negligence; and also left it to the jury to say, if they found that plaintiff had taken a dangerous position on the elevator, whether he had the age and intelligence to know the danger.

Verdict for plaintiff for $700 and judgment thereon, whereupon defendants took this writ, assigning for error the refusal of their seventh point.

Thomas Leaming, for plaintiff in error.

The test whether machinery is reasonably safe, is whether it is in general use.

Iron Ship, etc., Works. *v.* Nuttall, 119 Pa. 149.

The facts showed contributory negligence, and it was the duty of the Judge to give binding instructions for the defendants.

Barnes *v.* Sowden, 119 Pa. 53.
Hoag *v.* L. S. & M. S. R. Co., 85 Id. 293.
King *v.* Thompson, 87 Id. 365.
Hayman *v.* P. R. R. Co., 118 Id. 508.

The boy was of sufficient age and intelligence to realize the danger, and was therefore guilty of contributory negligence.

Colgan *v.* R'way Co., 4 WEEKLY NOTES, 400.
Nagle *v.* Allegheny R. R. Co., 88 Pa. 35.
Beach on Con. Neg. § 12.

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Phila. City P. R'way Co. *v.* Hassard, 75 Pa. 367.
Honor *v.* Albrighton, 93 Id. 475.
Costello *v.* Judson, 21 Hun, 396.

Rufus E. Shapley (*Ellis Ames Ballard* with him), for defendant in error.

The question of contributory negligence was properly left to the jury.

Nagle *v.* Allegheny R. R., 88 Pa. 35.
Crissy *v.* Hestonville R'y, 75 Id. 83.
R'y, Co. *v.* Gallagher, 108 Id. 524.
Miller *v.* P. R. R., 2 Bannard's S. C. Dig. 57.

October 7, 1889. THE COURT. There was abundant evidence to carry this case to the jury on the question of the alleged negligence of the defendants in failing to provide a reasonably safe elevator for the uses required of the one on which the plaintiff was injured. This elevator was constructed for the purpose of carrying freight; two sides of it were without guards of any description; it ran in an aperture, the sides of which were ten and one-half inches distant from the platform, and into which, at each floor, unbevelled sills projected eight and three-quarter inches.

It was operated by the defendants for the double purpose of transporting their freight and their employés. From thirty to one hundred delivery boys were required to use it in entering and departing from the basement of the building where they were stationed, and in passing from the basement to the upper floors in the performance of the tasks assigned them. A number of persons acquainted with the construction and use of elevators, testified that this was not a reasonably safe one for the transportation of these boys, and this evidence was not answered. An unsuccessful attempt was made by the defendants to show that in establishments like theirs, freight elevators were generally used as this was, but there was no effort to prove that it was proper and safe to so use them. Certainly upon this evidence the Court could not say that the defendants had discharged their whole duty, and were guiltless of negligence in the particular complained of.

It is claimed, however, that the plaintiff's own negligence contributed to his injury and prevents a recovery, and that the Court should have so instructed the jury. But it must be borne in mind that this plaintiff had not attained the age when sufficient capacity to be sensible of danger and to avoid it is presumed. (Nagle *v.* R. R. Co., 88 Pa. 35.) A boy's capacity is the measure of his responsibility, and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him, if he unwittingly exposes himself to it. (R. R. Co. *v.* Hassard, 75 Pa. 367; Crissey *v.* Railway Co., Id. 83.) When an infant who has not reached the age of discretion, is charged with concurrent negligence it becomes important to inquire if he had sufficient understanding to comprehend and guard against the peril he was in, and this matter is ordinarily to be considered by the jury in connection with the other circumstances of the case and under proper instructions from the Court. It is true that in Honor *v.* Albrighton (93 Pa. 475), it was said that "the conduct of the boy presented a case of contributory negligence," but there is nothing in the report of the case to indicate that the question raised here was suggested or considered, and as it was distinctly ruled that the defendants had discharged their whole duty to the plaintiff, and the act which constituted the alleged negligence was that of a fellow-servant, it was unnecessary to inquire into the conduct or ability of the plaintiff as affecting his right to recover. The decision in Miller *v.* R. R. Co. (2 Sup. Ct. Dig. 57), was by a divided Court, and within the rule laid down in Nagle *v.* R. R. Co,, *supra.*

In the present case it was proper and important to consider the plaintiff's own testimony as to his knowledge of the elevator, and the danger to which he was exposed when riding upon it, but this we think was for the jury, in connection with the other evidence.

We are of opinion that the question of the alleged contributory negligence of the plaintiff was not a question of law for the Court, but of fact for the jury, and that it was properly submitted.

Judgment affirmed.

Opinion by McCOLLUM, J. W. M. S., JR.

Jan. '89, 430. May 23, 1889.

Stark's Appeal.

Judgments—Character of—Given as an indemnification—What due upon them—Evidence of, when admissible in collateral proceedings—Auditors' reports—Costs of—By whom to be paid.

Although judgments cannot be attacked collaterally, evidence not intended to impeach their validity, but simply to show that, though given for one purpose, they had been used for a different purpose, is admissible even in a collateral proceeding.

In proceedings before an Auditor appointed to pass upon an account of an assignee for the benefit of creditors, the assignor claimed and offered to prove that certain sums of money arising from the sale of his property under judgments given by him as an indemnification had come into the assignee's hand, and were not accounted for. The assignee denied that these sums had come into his hands as assignee. The Auditor refused to admit the evidence offered by the assignor, on the ground that the judgments could not be attacked collaterally, and put the costs of the audit upon him:

Held, to be error.

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Appeal of Joseph Stark from the decree of the Common Pleas of Lancaster County, dismissing exceptions to the Auditor's report upon the account of John F. Griel, assignee, for the benefit of creditors of the said Joseph Stark, and confirming said report absolutely.

Before the Auditor (George A. Lane, Esq.), it appeared that Joseph Stark, the appellant, was engaged in business near the city of Lancaster. From 1873 on he had been assisted in his business by one Jacob Griel, Sr., who became indorser on several of his notes. On March 31, 1881, Stark executed a judgment bond for $2000 to Jacob Griel, Sr., as collateral security for these and future indorsements. On April 6, 1885, he executed another judgment bond for $4000 to Griel for the same purpose. The appellant claimed that this second judgment bond was *in lieu* of the first bond, which was, however, never satisfied of record. This the accountant denied. In 1875 Jacob Griel, Sr., gave a general power of attorney to his son, John F. Griel, the accountant, who from that time became the general factotum and manager of his father in all business transactions. On July 15, 1885, John F. Griel, attorney-in-fact for Jacob Griel, Sr., issued execution on the collateral judgment of $2000. On this execution Stark's personal effects were sold for $1121.15, and were nearly all purchased by John F. Griel, who, also as execution creditor, became entitled to the sum of $1096.66. On July 29, 1885, Stark made an assignment for the benefit of creditors to John F. Griel, who on September 9, 1885, filed an inventory and appraisement of the real estate of said Stark, amounting to $6100. On February 11, 1886, he issued an alias fi. fa. on the collateral judgment of $2000, and on June 1, 1886, a vend. ex. upon which this real estate was sold. On October 19, 1886, Jacob Griel, Sr., died, and John F. Griel, as executor, proved his will. Subsequently, Joseph Stark, the appellant, cited John F. Griel to file his account as assignee, which he did on October 1, 1887, showing on the debit side $96.50, while the credit side showed that he had paid out $109.27, leaving a balance due the accountant of $12.77.

To this account exceptions were filed, alleging fraud on the part of John F. Griel, and that he had not honestly and properly rendered an account between his assignor and himself. The Court appointed an Auditor to pass upon the exceptions filed. The books, papers, checks, and notes in the possession of John F. Griel, showing the transactions between the parties, were demanded, whereby it was proposed to show that there was not one cent due on the collateral judgments of $2000 and $4000 held by the Griels. This evidence was objected to on the ground that the Auditor had no jurisdiction to inquire into a judgment of the Court, whether collateral or not. The Auditor, being undecided in the matter, asked the Court for instructions; and the Court, LIVINGSTON, P. J., sustained the exceptions of accountant's counsel, and refused to allow the collateral judgments to be inquired into, or to have the amounts due thereon ascertained.

John F. Griel, the assignee, then offered in evidence seven notes and two receipts, aggregating $5775, which he claimed he had paid for Joseph Stark in support of the collateral judgments. On these notes Joseph Stark was the maker; but he claimed that they were accommodation notes for Griel's benefit, and that the money obtained on them was never due or owing by him, and he so desired to show, but was not allowed.

The assignor was then called, and it was offered to prove by him that the assignment, and, in fact, the whole proceedings were fraudulent; that he did not owe the Griels one cent, but, on the contrary, they were largely indebted to him. That the originals of the notes offered in support of the collateral judgments were never due or owing by him, but that they were accommodation paper for the Griels. Stark also desired to call witnesses, namely, the bank officers, to show that the original notes were really the notes of the Griels, and that Stark received no money on them or for them, all of which was overruled by the Auditor on the ground that the collateral judgments could not be questioned, even so far as ascertaining how much, if anything, was due on them.

The Auditor's report was confirmed by the Court, PATTERSON, J., and the exceptions to it dismissed. Whereupon the assignor took this appeal, assigning for error, *inter alia*, the action of the Court in confirming the Auditor in refusing to admit his testimony as above, and in directing him to pay the costs of the audit, including a counsel fee for the accountant.

William H. Roland and *William R. Wilson*, for the appellant.

The Auditor should have compelled the production of the papers in the accountant's hands as evidence for the appellant, of the amount due on the judgments.

Act of June 14, 1836, P. L. 635, P. D. 1652, *pl.* 32.
Act of May 23, 1887, P. L. 160.
Bispham's Equity, § 566.
Campbell *v.* Knowles, 36 Leg. Int. 193.
Dyott's Estate, 2 W. & S. 557.
McCann *v.* Farley, 2 Casey, 173.
Borland's Appeal, 16 Smith, 470.

This was not an attempt to attack a judgment collaterally, but to show that these judgments were given as an indemnity, and that the judgment creditor had not been damnified.

The costs should not have been thrown upon the appellant.

Winton's Appeal, 6 Norris, 77–84.

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Charles R. Kline (*George M. Kline* with him), for appellee.

October 7, 1889. THE COURT. We are of opinion that this decree must be reversed. The appellee, John F. Griel, is not only the assignee for creditors of Joseph Stark, but is also the executor of the last will and testament of Jacob Griel, Sr., deceased. The appellant's contention is that the judgments in question were not given for any absolute debt of Stark to Griel, but were conditional obligations, given to secure Griel from the effect of his indorsements for Stark's benefit, and that in fact there were no such indorsements existing at the time the sheriff's sales were made; that the indorsements exhibited in evidence were upon the accommodation notes of Stark given to Griel and discounted for Griel's benefit; that the sheriff's sales were made by a mutual arrangement or understanding of the parties with a view, as Griel said, to give Stark a new start in business; and that the proceeds of the sales coming into Griel's hands were for Stark's use under this arrangement. This, as we understand the case, is the substance of the offers made before the Auditor, and which he refused. There was no offer to impeach the validity of the judgments; their validity was conceded, but the offer was to show that the judgments were given for one purpose, and that they had been used for a different purpose.

Now, if these offers were justified in the proof, and in all these transactions Jacob Griel, Sr., was represented by John F. Griel, it would seem to us that John F. Griel, as the assignee of Stark, should have charged himself with the proceeds of these sales received by Jacob Griel, Sr. Assuming the facts stated to be true, in what other way could the question of the liability of the estate of Jacob Griel, Sr., deceased, be determined? The solvency of Griel's estate and its liability to Stark for the money thus received being assumed, why should not the assignee charge himself as assignee, and take credit as executor, for the amount conceded to be in his hands? All this is said upon the assumption that the proof is according to the full measure of the offers. Of course when the evidence is taken a wholly different case may appear.

Nor can we understand how, in the absence of any agreement to that effect, Stark can be charged with the payment of the fees of Griel's attorneys. If the understanding between Griel and Stark was as the appellant offered to prove, and Griel had carried it out in good faith, there might have been some ground for reimbursement for necessary fees and expenses attending the trust; but the appellee denies the trust and the fees were incurred in the very act of resisting it.

The decree is reversed, and the record remitted for further proceedings; the appellee to pay the costs of this appeal.

Opinion by CLARK, J. S. H. T.

July '89, 66. May 23, 1889.

Commonwealth v. Shaffer.

Hucksters—Licenses of—Indictment for buying without—Acts of May 18, 1866, *and March* 14, 1867.

The Act of May 18, 1866 (P. L. 1097), providing for the licensing of hucksters in Bedford, Cumberland, Franklin, Fulton, and York counties, fixed the price of a license to a person residing in the county at one-tenth the sum which a non-resident of the counties was required to pay. A citizen of Maryland was indicted for huckstering in York County without a license. On his motion the indictment was quashed, because the discrimination in the said Act against non-residents violated Article 4, § 2, of the Constitution of the United States. On writ of certiorari by the Commonwealth:

Held, that the above restriction having been removed by the supplementary Act of March 14, 1867 (P. L. 459), the indictment was good, and it was error to quash it.

Certiorari to the Quarter Sessions of York County.

Indictment against John Shaffer for huckstering without a license in the county of York in violation of the Act of May 18, 1866 (P. L. 1097).

The defendant having moved to quash the indictment, the indictment was quashed by the Court (LATIMER, J.), on the ground that the above Act violated Article 4, § 2, of the Constitution of the United States. Thereupon the Commonwealth took this writ, assigning for error the action of the Court in quashing the indictment.

Nevin M. Wanner, district attorney (*John W. Bittenger* and *John W. Heller* with him), for the Commonwealth.

E. D. Ziegler (*J. R. Strawbridge* and *Frank Geise* with him), for the defendant in error.

October 7, 1889. THE COURT. The Act of May 18, 1866 (P. L. 1097), declares that "it shall not be lawful for any person or persons to huckster, buy, or barter for, within the limits of the counties of Bedford, Cumberland, Franklin, Fulton, and York, with the intent to sell or dispose of to any person or persons outside of the said counties respectively, butter, eggs, dried fruit, veal, chickens, turkey, geese, ducks, or other poultry, without first taking out an annual license from the treas-

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urers of said counties respectively;" and that any person or persons violating any of its provisions shall be guilty of a misdemeanor. It fixes the price of a license to a person residing in the county at one-tenth the sum which a non-resident is required to pay for the same. The indictment in this case charges that John Shaffer did huckster, buy, and barter for, in the county of York, the produce mentioned in the Act, with the intent to sell and dispose of the same to divers persons outside of said county, and without having taken out a license authorizing him so to do. Shaffer is a non-resident of the county, and a citizen of Maryland. The Court below, being of opinion that the discrimination against non-residents was violative of Article 4, section 2, of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," decided that the Act was unconstitutional, and quashed the indictment founded upon it.

But the feature of the Act on which it and the indictment were condemned, was removed by the supplementary Act of March 14, 1867 (P. L. 459), which repealed so much of the original Act as discriminated against non-residents. It appears that this supplement was overlooked in the argument and consideration of the motion to quash the indictment. The Commonwealth make no complaint of the view taken by the Court of the original Act, and the validity of the Act as amended is not questioned by the defendant. The indictment was good, and it was error to quash it.

Judgment reversed, and record remitted for further proceedings according to law.

Opinion by McCollum, J. C. K. Z.

Common Pleas.

C. P. No. 4. June 12, 1888.

City of Philadelphia to use v. Atmore.

Municipal claims—Costs—City solicitor's fees—Act of March 23, 1866—The city solicitor is not entitled to recover the five per cent. commission provided for by the Act of March 23, 1866 (P. L. 303), unless he has performed the services mentioned in that Act.

Case stated, by which it appeared that a claim for curbing had been filed March 5, 1888, by the city of Philadelphia, to the use of William Kelly, against certain real estate, of which the defendant, Atmore, was the owner. Afterwards, and before any proceedings had been taken other than the filing of the claim, the defendant voluntarily paid the amount of the claim and all charges due thereon, save five per cent. claimed by the city solicitor under the Act of March 23, 1866.

It was agreed that, if the Court should be of opinion that the plaintiff was entitled to recover from the defendant any sum under the said Act of Assembly, then judgment to be entered for such sum, otherwise judgment for defendant. Both parties reserved the right to take a writ of error.

E. Spencer Miller, for plaintiff.

In many cases where the amount of the claim is small, the five per cent. does not reimburse the city for the costs expended, and it was the intention of the Act of 1866 to remedy this by allowing the commission in all cases, so that the deficit in one class might be met by the gain in those cases where recovery was had without expense.

Alexander Simpson, Jr., for defendant.

The Act of 1866 provided "in lieu of and as a sufficient substitute for" advertisement before suit brought, as had been required under prior laws, "that before any scire facias shall be issued on any such claim, it shall be the duty of the city solicitor to cause diligent search to be made by an assistant clerk, for the owners or reputed owners of all real estate, against which there has been heretofore, or may hereafter be filed, any claim in the name of the city, of every kind, and to serve him or her with a written or printed notice, to make payment to the city solicitor within ten days," and further provided, that before any judgment by default should be entered, the Court should be satisfied by affidavit to be filed of record, that such notice had been given the owner, etc., and the commission of five per cent. was expressly given to the city solicitor "*as costs . . . to reimburse him for carrying into effect the provisions of this Act.*"

Costs cannot be taxed for services not performed.

June 15, 1888. The Court. Judgment for defendant on case stated.

E. P. B.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, NOV. 22, 1889.* [No. 30.

Supreme Court.

Jan. '89, 337. May 10, 1889.

Logan v. Neill.

Ejectment—Bona fide purchaser—Notice—Inquiry.

When a purchaser has knowledge of facts sufficient to put him upon inquiry as to his vendor's title, and it appears that there is an adverse claimant to the land in question who had owned it for twenty years, having title thereto derived under certain tax sales, and it does not appear that the purchaser's vendor was ever in possession of the land, but that he at one time held a treasurer's deed for it which had been assigned and became vested in the adverse claimant, but was not recorded until after the deed to the purchaser, and no inquiry had been made of the adverse claimant, but only of his immediate predecessor in the title—under such circumstances the plaintiff, the purchaser, is required to act not only in good faith but with extreme vigilance.

The fact that plaintiff's vendor had been at least passive as to his claim for nearly twenty years, and had no evidence of title in his possession, was enough to make inquiry a duty; and the fact that the adverse claimant had been asserting his claim through all these years, was sufficient to indicate the quarter in which inquiry should have been made.

When inquiry becomes a duty, neglect to make it visits the negligent party with constructive notice of such facts as a proper discharge of the duty would have disclosed.

Error to the Common Pleas of Warren County.

Ejectment, by Samuel T. Neill to recover from S. B. Logan possession of fifty acres of land in Kinzua Township.

The facts of the case are set forth in the findings of BROWN, P. J., before whom the case was tried without a jury:—

"The plaintiff claims fifty acres of land in the southwest corner of tract 41, Kinzua Township. Joseph A. Neill, the brother of the plaintiff, purchased the tract at the treasurer's sale of unseated lands on the 13th of June, 1864. The treasurer's deed is dated June 13, 1864, and was recorded May 29, 1885. June 2, 1866, Joseph A. Neill, by writing on the treasurer's deed, assigned his right and interest to Benjamin Nesmith. The assignment was recorded May 29, 1885. By deed dated March 20, 1885, recorded April 14, 1885, Joseph A. Neill conveyed the tract to the plaintiff in consideration of a credit of $500 on a pre-existing indebtedness, and a declaration of trust to the wife of the grantor for the one-half of the tract, and which declaration in and about two weeks afterward was surrendered to the plaintiff in consideration of the one-half interest in the fifty acres of land in Southwest Township, transferred by the plaintiff to said Joseph A. Neill.

"June 11, 1866, tract No. 41 was sold by the treasurer and deeded to Ozro Nesmith, the sale being for the unseated tax of 1864. The treasurer's deed to Ozro Nesmith was recorded June 6, 1868. March 16, 1885, Ozro Nesmith and wife made a quit-claim deed of their interests to Joseph A. Neill, which deed was recorded March 25, 1885. The consideration recited in the quit-claim is one hundred and eighty-seven dollars, but the real and only consideration was the cancellation by Neill of the surplus-bond given by said Ozro on his purchase at the treasurer's sale of 1866. The plaintiff claims to recover the land in said suit under the treasurer's deed to Joseph A. Neill, dated June 13, 1864, and under the treasurer's deed to Ozro Nesmith, dated June 11, 1866.

"The defendant was in possession as lessee under Uriah G. Hoyt. June 8, 1857, one D. C. Hook and wife made a deed of tract No. 41 to John Geer; October 3, 1857, John Geer assigned the undivided one-half of the same to R. E. Geer, and October 19, 1864, John and R. E. Geer assigned all their right to the before-mentioned Benjamin Nesmith, but it does not appear that Hook and wife, or the Geers, ever had any title or interest in the tract. By deed dated December 22, 1864, recorded June 23, 1865, Benjamin Nesmith conveyed the tract to said Hoyt. It does not appear that Nesmith then had any title, but on the 2d of June, 1866, as before stated, he became the assignee of the right and title of Joseph A. Neill, under the treasurer's deed of June 13, 1864.

"On the 3d of June, 1868, Ozro Nesmith, by assignment on the back of the treasurer's deed of June 11, 1866, transferred all his right and title thereunder to said Uriah G. Hoyt. The treasurer's deed to Ozro, and the assignment to Hoyt, was recorded June 6, 1868. At the time of making the assignment, Ozro was about three months under the age of twenty-one years.

"The facts attending the assignment by Ozro Nesmith to Hoyt were as follows: Hoyt having, as before stated, bought the tract from Benjamin Nesmith, the father of Ozro, came to Warren in 1868 to look after it. When he came to pay the taxes he learned of the treasurer's sale to Ozro. In company with Benjamin he went to see Ozro. He told him he wished to redeem. Benjamin and Ozro figured up the taxes and penalty, amounting to about $40, or a trifle less. Hoyt

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paid the $40, whereupon Ozro executed the assignment eight days before the time of redemption had expired. The assignment from Ozro to Hoyt appears to have been in pursuance of Hoyt's express claim of a right to redeem, and we find that it was intended by the parties as a redemption from the tax sale of 1866. The evidence does not show any claim of a right to redeem by Benjamin Nesmith when he procured the assignment from Joseph A. Neill of the treasurer's deed of June 13, 1864, and from the transaction itself no presumption arises that the assignment was intended as a redemption, and we find as a fact that it was intended as the acquisition of the inchoate title of Neill.

"The plaintiff, when he took the deed of March 20, 1885, from Joseph A. Neill, had no notice, actual or constructive, of the prior assignment made by Joseph A. Neill to Benjamin Nesmith."

CONCLUSIONS OF LAW.

"(1) That the treasurer's sale and deed to Joseph A. Neill, dated June 13, 1864, vested an inchoate title in said Neill, that this title passed to Benjamin Nesmith by virtue of the assignment of June 2, 1866, and became a perfect title by the expiration of the time of redemption; that the title thus acquired by Nesmith inured to the use and benefit of Uriah G. Hoyt, his heirs and assigns, by reason of the deed of general warranty from said Nesmith to said Hoyt of December 22, 1864. [That the plaintiff was a *bona fide* purchaser for value from Joseph A. Neill of the tract of land which includes the land in dispute, and that he became such purchaser by the deed of March 20, 1885, recorded April 14, 1885, and without any notice of the assignment made by said Neill to Benjamin Nesmith on the 2d of June, 1885, and that the plaintiff is entitled to recover the land in said suit.]

"And now, July 23, 1888, unless exceptions be filed to the findings of fact, or conclusions of law, within the time prescribed by law, the prothonotary will enter judgment in favor of the plaintiff and against the defendant for the land described in the writ."

Upon exceptions, the Court found the following additional facts:—

"(14) We now find and place on the record as part of the findings of fact: That the assignment on the back of the treasurer's deed to J. A. Neill was made by said Neill to Benjamin Nesmith in consideration of the payment of an amount that did not exceed the amount of the taxes and costs for which the land was sold, and the penalty of twenty-five per cent., and that the said assignment was executed and delivered with the deed to Benjamin Nesmith, before the expiration of the redemption period, and that said deed and assignment were in the custody of U. G. Hoyt, and produced by him on the trial.

"(15) In addition to the facts before stated in the findings, we now find and place on record as a fact established by the evidence on the hearing, that S. T. Neill, the plaintiff, at the time of the conveyance by J. A. Neill to himself, had actual notice of the conveyance from Benjamin Nesmith to Hoyt, and that he also knew that J. A. Neill had no deed in his possession, and that no deed to him was recorded; that he directed inquiry to be made of Nesmith, but neither made nor requested any inquiry of Hoyt, and that the plaintiff at the time had actual notice of Hoyt's claim to the land, but in this connection we also find that the evidence failed to show that the plaintiff had notice at the time he took the conveyance from J. A. Neill, that Hoyt's claim to the land was based in whole, or in part, on the treasurer's deed to J. A. Neill, and the inquiry directed to be made of Nesmith failed to elicit any information that he claimed the land under J. A. Neill's treasurer's deed."

The plaintiff presented, *inter alia*, the following point:—

(8) Under all the evidence in the case the plaintiff is entitled to recover. *Affirmed.* (Fourth assignment of error.)

The defendant presented, *inter alia*, the following points:—

(2) That by the estoppel of the warranty in the deed from Nesmith to U. G. Hoyt, the defendant's lessor, the title of Neill became vested in said Hoyt. *Answer.* The defendant's second point is affirmed, but the title thus vested in Hoyt is not available against the plaintiff, a *bona fide* purchaser for value of the treasurer's title to Joseph A. Neill, without notice of said Neill's prior assignment to Nesmith. (Sixth assignment of error.)

(3) That under the admitted facts the plaintiff cannot claim as an innocent purchaser for value. *Refused.* (Seventh assignment of error.)

(7) That under all the evidence the plaintiff cannot recover. *Refused.* (Eighth assignment of error.)

Judgment was accordingly entered for plaintiff; whereupon defendant took this writ, assigning for error the answers to the foregoing points, and the portion of the conclusions of law included between brackets.

Charles H. Noyes (*Watson D. Hinckley* with him), for plaintiff in error.

D. I. Ball (*Samuel T. Neill* and *Charles Dinsmoor* with him), for defendant in error.

October 7, 1889. THE COURT. Trial by jury was waived, and the case submitted to the Court under the provisions of the Act of April 22, 1874.

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Plaintiff below claimed under two sales for taxes, one of which was evidenced by treasurer's deed June 13, 1864, to J. A. Neill, who by deed March 20, 1885, recorded April 14, 1885, conveyed to his brother S. T. Neill, plaintiff below. The treasurer's deed was not recorded until May 29, 1885. The other sale was evidenced by treasurer's deed, June 11, 1866, to Ozro Nesmith, who, on March 16, 1885, executed a quit claim to J. A. Neill, who four days thereafter conveyed to his said brother. As to the last-mentioned title, however, the Court found that an assignment, dated June 3, 1868, by Ozro Nesmith to Uriah G. Hoyt, the lessor of defendant below, was intended by the parties as a redemption from the tax sale of June 11, 1866, and that such was its legal effect. That finding virtually eliminates from the case the second tax sale, and restricts the claim of plaintiff below to the first-mentioned tax title.

Defendant relied mainly on the first tax sale and, in support of his title thereunder, gave in evidence the general warranty deed of Benjamin Nesmith and wife, December 22, 1864, recorded June 23, 1865, to his landlord, Uriah G. Hoyt. Also, deed of assignment, J. A. Neill to Benjamin Nesmith, June 2, 1866, indorsed on the first-mentioned treasurer's deed to said Neill, recorded May 29, 1885. The Court rightly held that the treasurer's sale and deed of June 13, 1864, vested an inchoate title in J. A. Neill, which, by virtue of his assignment aforesaid, passed to Benjamin Nesmith, and, by expiration of the time for redemption, became a perfect title; that the title thus acquired by Nesmith inured to the use and benefit of Hoyt, his heirs and assigns, by reason of the general warranty contained in the deed of Nesmith and wife to him. The learned Judge found that the assignment of J. A. Neill indorsed on the first treasurer's deed was duly executed, and, with the deed itself, delivered to Benjamin Nesmith before expiration of the time for redemption; and that said deed and assignment passed into the possession of Hoyt, and were by him produced at the trial. He further found that plaintiff below at the time of the conveyance by his brother, J. A. Neill, to himself, in March, 1885, had actual knowledge of the conveyance from Benjamin Nesmith to Hoyt; and also knew that J. A. Neill had no deed in his possession, and that no deed was then recorded; that he directed inquiry to be made of Benjamin Nesmith, but neither made nor requested any inquiry of Hoyt, who, as he actually knew, at that time, claimed to own the land in controversy. Other facts, of subordinate importance, also found by the learned Judge, appear in the record of his findings.

Notwithstanding the foregoing and other findings of fact and conclusions of law, the learned Judge held that plaintiff below, when he took the deed of March 20, 1885, from his brother, J. A. Neill, had no notice, actual or constructive, of the prior assignment to Benjamin Nesmith indorsed on the treasurer's deed, and therefore he was a *bona fide* purchaser, for value, without notice, and as such entitled to recover. In that we think there was error.

The facts found by the Court below were sufficient to have put the plaintiff on inquiry as to the existence, whereabouts, and condition of the treasurer's deed upon which the title his brother proposed to convey depended. Recognising the propriety of such inquiry, he directed it to be made of Nesmith, but he neither made nor requested any inquiry to be made of Hoyt, notwithstanding he then knew that the latter claimed the land and had a general warranty deed from Nesmith therefor. If inquiry had been made of Hoyt, it doubtless would have developed the fact that he held the treasurer's deed with J. A. Neill's assignment indorsed thereon, and that said Neill had thereby disposed of his interest in the land nearly twenty years before.

It clearly appears that when plaintiff below took the conveyance from his brother, in March, 1885, and for nearly twenty years prior thereto, defendant's lessor, Uriah G. Hoyt, owned the land in dispute. He had a deed for it from Benjamin Nesmith recorded in June, 1865. He had redeemed it from tax sale to Ozro Nesmith in 1866, taking a paper in the form of an assignment on the back of the treasurer's deed, and recording both in June, 1868. He had also in his possession the treasurer's deed to J. A. Neill with his assignment to Benjamin Nesmith indorsed thereon, but that deed was not recorded until May 29, 1885, about six weeks after deed of plaintiff below from his brother was recorded. On the other hand it is equally clear that plaintiff's vendor, J. A. Neill, had no title to the land. It does not appear that he was ever in possession of it, or exercised any acts of ownership over it, by paying taxes or otherwise. There was no conveyance to him on record, nor had he in his possession any writing indicating any title or claim except the quit-claim deed, from Ozro Nesmith, which he obtained with knowledge of Nesmith's former recorded assignment to Hoyt. Under such circumstances and with such knowledge as he is shown to have had, it behooved plaintiff below to act not only in good faith but with extreme vigilance. (Sergeant *v* Ingersoll, 7 Pa. 340, 345.) As was said in that case, "A purchaser without notice must appear to have acted not only in good faith but with extreme vigilance, for equity refuses to protect the careless and the slothful." The fact that J. A. Neill had been at least passive, as to his claim, for nearly twenty years, and had no evidence of

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title in his possession was enough to make inquiry a duty; and the fact that Hoyt had been the active claimant of the land, during all these years, and was still claiming it, was sufficient to indicate the quarter in which inquiry should have been made. When inquiry becomes a duty, neglect to make it visits the negligent party with constructive notice of such facts as a proper discharge of the duty would have disclosed. As has already been stated, if proper inquiry had been made of Hoyt, it would have been discovered that J. A. Neill had no title to convey.

From what has been said it follows that the fourth, sixth, seventh, eighth, and ninth specifications of error are sustained.

Judgment reversed, and now judgment is entered in favor of the defendant below.

Opinion by STERRETT, J. H. S. P. N.

July '88, 5. May 6, 1889.

Appeal of The Consolidated Oil Well Packer Co., Limited.

Equitable jurisdiction—Bill for an account.

Where mutual duties of accounting are imposed upon both parties to a contract, and the accounts are continuing and not single or simple, that circumstance alone is sufficient to bring an action upon the contract within equitable cognisance.

Equity has jurisdiction whether the relation established by the contract be one of partnership or merely one of licensor and licensee.

A partnership bill for discovery and an account is in no sense a bill for specific performance within the technical meaning of that term.

Where various matters of disputed fact arise in the allegations of the parties to a suit respecting ultimate rights as against each other under a contract conferring mutual rights and imposing mutual obligations, the determination of these questions can be adequately obtained only by a proceeding in equity.

Appeal of The Consolidated Oil Well Packer Company, Limited; H. H. Doubleday, Lyman Stewart, J. A. Pincott, and A. C. Harton, partners in The Consolidated Oil Well Packer Company, Limited, from a decree of the Common Pleas of Warren County dismissing a bill in equity for discovery and an account filed by said appellants against The Jarecki Manufacturing Company, Limited.

The matter was referred upon bill, answer, and proofs to James O. Parmlee, Esq., as Examiner and Master, from whose report and the opinion of the Court below upon the exceptions thereto, the facts of the case will sufficiently appear.

The Master found the following facts:—

"(1) On the 1st of March, 1879, H. H. Doubleday, Lyman Stewart, W. L. Hardison, R. R. Armour, and The Jarecki Manufacturing Company, Limited, formed a joint stock company under the laws of Pennsylvania authorizing limited partnerships, under the name of The Consolidated Oil Well Packer Company, Limited, for the purpose of manufacturing and selling oil well packers, and licensing others to manufacture and sell the same. The interests of the original partners are now vested in the plaintiffs in this suit. The capital stock of the association was $50,000, and was paid in full by each member contributing certain letters patent owned or controlled by him, at an agreed valuation, the whole aggregating said amount.

"(2) On the 5th of April, 1879, a contract was entered into between The Consolidated Oil Well Packer Company, Limited, and The Jarecki Manufacturing Company, Limited, which was in substance a license by the former to the latter to manufacture and sell oil well packers at $40 each, out of which the licensee should first deduct $9 for cost of manufacture, and 10 per cent. for expense of selling, and should then from the balance deduct the licensors' bills or requisitions on them for expenses of litigation and advertising, and remit the balance to the licensors, less 27½ per cent. thereof, retained for themselves.

"(3) The licensors substantially complied with their undertakings in said contract, but on account of alleged violations thereof by the licensees, in due form notified them on the 16th of August, 1880, that said license was revoked.

"(4) That defendants refused to acquiesce in this revocation of the license, and still continue to manufacture and sell packers under the patents of The Consolidated Oil Well Packer Company, Limited, but have not accounted to the licensors since September 1st, 1880.

"(5) By the said contract the defendants were granted the exclusive right to manufacture and sell packers in the United States, except that the licensors reserved the right to annually manufacture and sell 10 packers in the State of California.

"(6) Soon after this attempted revocation the licensors began to manufacture and sell packers in the 'oil country,' and abrogated that clause of the license which fixed the price of packers by advertising them for sale at a lower rate without the consent of the licensees.

"(7) The Master finds the said contract or license to be still in force between the parties, with the exception of that clause fixing the price of packers at $40."

The Master recommended a decree—that the defendants account to the plaintiffs for oil well packers manufactured and sold by them since September 1, 1880, under any of the patents

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enumerated in the contract between them of April 5, 1879, upon a certain basis fully set forth in said decree; that plaintiffs and defendants be ordered to submit their books to the Master and the duly authorized solicitors of the opposing party for the proper ascertainment of an account; and that the case be referred to the same or another Master to state an account between the parties in accordance with the principles of this present decree.

Upon exceptions to this report filed by both plaintiffs and defendants, the Court filed the following opinion:—

"On the 5th of April, 1879, The Consolidated Oil Well Packer Company and the defendant entered into a contract in writing by which it was agreed that said company 'fully and exclusively' licensed the defendant to manufacture and sell oil well packers, under certain patents enumerated in the writing, and such as should be thereafter obtained or controlled by it; the defendant, in consideration thereof, agreeing to account and pay to said company upon the terms specified in the contract. The bill asks for an account. It is framed in a double aspect, and asks for alternative relief, namely: If it shall be found that the contract is in force that then the defendant should be held to account for packers sold at the contract price according to the terms agreed upon. If it shall be found that the contract is *not* in force, and that the defendant is a partner with The Consolidated Oil Well Packer Company, that then it be held to account as such partner.

"The Master finds that the contract or license (as it is sometimes called) is 'still in force between the parties, with the exception of that clause fixing the price of packers at $40.'

"We have then to consider only the liability of the defendants to account under the contract, the pleadings, the evidence, and the findings of the Master relating thereto.

"By the 13th paragraph of the contract it is provided that upon failure of defendant to render the accounts and make the payments as agreed, the company (plaintiff) may terminate the license by giving a written notice on the defendant that unless the accounts are rendered and payments made within thirty days the license shall be declared void. Under this clause of the agreement, and averring non-compliance therewith, the plaintiff, on the 17th of July, 1880, did serve such notice and on the expiration of the thirty days, to wit, on the 18th of August, 1880, the plaintiff, again asserting such non-compliance, notified defendant that the license given in the contract of April 5, 1879, 'is hereby terminated and declared void.' It does not appear by the findings of the Master whether the defendant was or was not guilty of the defaults, which, under the contract, justified the plaintiff in terminating the license. From the fact, however, that he finds the contract still in force we think we may infer that there was no such default.

"On the 16th October, 1880, the defendant notified the plaintiff that it did not 'consider the said agreement as terminated, but as still in full force and effect,' and asserts violations of the agreement by the plaintiff, and announces a purpose to hold it responsible for damages.

"We concur with the Master when he says, in his very able and careful report, that had the defendant consented to the termination of the contract it would not be liable to a decree for an account, because, as he finds, there has been a full account to the time when the contract would have been terminated. But we do not think that acquiescence in the plaintiffs' attempted termination of the contract was necessary to exempt defendant from liability to account in this proceeding. The defendant could not have so acquiesced, without impliedly admitting what it was careful to deny, namely, default in respect to the matters on which the plaintiff based the right to declare the contract void.

"Under the finding that the contract of the 5th of April, 1879, is in full force, the plaintiff's right to an account must be determined by the terms of that contract. By its terms and in consideration of the stipulations of the defendant, the plaintiff bound itself to confer on defendant the full and exclusive right to manufacture and sell oil well packers under patents then alleged to be owned by the plaintiff and such as should thereafter be obtained or controlled by it. With this obligation resting on the plaintiff, and on the 18th of August, 1880, as before mentioned, it declared the contract terminated and void, and soon after, as the Master specifically finds, it commenced to manufacture and sell oil well packers in the oil country, and, without the consent of the defendant, abrogated that clause of the license which fixed the prices of packers, by advertising them for sale at a lower rate than the agreed price.

"On the 27th of October, 1880, in a letter to defendant, the plaintiff says: 'In your letter of the 22d, you also object to incurring more expense in bringing suits, etc. Will you be kind enough to inform us by what right or authority you object, seeing that your contract was cancelled in accordance with its own provision in August last.'

"The plaintiff went further and published to the world that the contract with defendant had been annulled, and by publication in the Bradford *Era* of the 28th of October, 1880, says:

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'Our license to The Jarecki Manufacturing Company, Limited, was cancelled in August, 1880. All packers now made or sold by them are unauthorized and illegal, and parties purchasing from them after this date run a great risk in doing so.'

"The main inducement for defendant to enter into the contract was a monopoly of the manufacture and sale of the packers covered by these patents owned and controlled by the plaintiff. It appears to us that the plaintiff, by engaging in the manufacture and sale of packers, pressing them upon the market at an under price, and publishing to the trade that those made and sold by defendant were unauthorized and illegal, has precluded itself from invoking the aid of a court of equity to enforce the contract against the defendant.

"We regard this as in substance a bill for the specific enforcement of a contract in a case where the consideration is entire, and where, by the express findings of the Master, clearly justified by the evidence, the plaintiff has failed to perform his part of the agreement, by acts defeating the advantages and profits for which the defendant stipulated.

"We understand that it is an elementary rule in equity that specific performance is of grace and not of right, and if there be anything inequitable in it, the court will withhold its assistance, and leave the parties to their legal remedies on their agreement.

"The only remaining question is whether the answer of the defendant raises the defence indicated.

"In subdivision 'a,' of the 19th paragraph of the answer, it is averred that the plaintiff utterly failed to maintain for defendant a monopoly of the exclusive right to the manufacture, sale, and use of oil well packers, as it covenanted to do by the agreement. This, we think, is sufficient to let in the evidence of such conduct and acts of the plaintiff as defeated the monopoly for which it had contracted.

"For the reasons stated we sustain the 30th exception to the Master's report filed by defendant, namely: 'The Master erred in not dismissing the bill in this case at the cost of the plaintiff.'

"And now, September 26, 1887, this cause came on to be heard upon exceptions to the report of the Master, and, having been fully argued by counsel, it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs, and without prejudice to the plaintiffs to maintain their actions at law upon the agreement or otherwise."

Whereupon plaintiffs took this appeal, assigning for error, *inter alia*, the action of the Court in dismissing the bill.

Samuel T. Neill (*W. G. Trunkey* with him), for appellants.

J. C. Sturgeon and *S. A. Davenport* (*George P. Griffith* with them), for appellee.

October 7, 1889. THE COURT. We are unable to agree with the learned Court below in the conclusion dismissing the plaintiffs' bill. The defendant's exceptions were all dismissed except those which denied the right to an account. As this ruling practically sustains the findings of the Master upon the matters of fact in dispute, and the Master found that the plaintiffs had substantially performed their stipulations of the contract between the parties, we have difficulty in understanding why the whole substance of the litigation should not be disposed of in this equitable proceeding. Undoubtedly equity has jurisdiction whether the relation established by the contract be one of partnership or merely one of licensor and licensee. Mutual duties of accounting under the contract are imposed upon both parties, and as the accounts are continuing and not single or simple, that circumstance is alone sufficient to bring the case within equitable cognizance. It would scarcely be possible to dispose of such a controversy in a common-law proceeding. Whatever may be the rights of the contending parties under the various allegations and proofs presented upon both sides, it is manifest they are of quite too complicated a character to be dealt with by a jury. The reason given by the Court below for dismissing the bill, as we understand it, is that it is a bill for specific performance, and as the plaintiffs failed to perform their part of the contract they cannot claim performance by the defendant. The bill as we read it is a bill for discovery and for an account, and is in no sense a bill for specific performance within the technical meaning of that term. As a matter of course all partnership bills and all bills for an account seek to obtain the redress which would have been obtained if the contracts of the parties had been performed. But this redress is compensation for non-performance, and not specific performance in the technical sense of doing the particular thing which the contract requires to be done, such as the conveyance of a specially described tract of land, or some unusual or extraordinary character of chattel. We cannot regard this bill as a bill for specific performance in any point of view, and hence cannot apply to it the rule which controlled the Court below in dismissing it. These parties are in litigation respecting their ultimate rights as against each other under a contract conferring mutual rights and imposing mutual obligations. Various matters of disputed fact arise under the allegations of the parties and the determination of those matters is essential to the ascertainment of their respective rights. That

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determination can only be adequately obtained by a proceeding in equity such as this is, and we can see no reason why the case should not proceed to final hearing upon all its merits. The question now before us is scarcely more than a question of jurisdiction to determine the case on its merits.

We think the decree recommended by the Master should have been made, and when that is done, and the further and final proceedings have taken place so that a final decree is reached, the full merits of the controversy will be in proper shape for the action of the Court below and for review in this Court if that shall be desired.

The decree of the Court below is reversed at the cost of the appellees, and the record is remitted for further proceedings in accordance with the decree recommended by the Master.

Opinion by GREEN, J. H. S. P. N.

Jan. '89, 11. May 24, 1889.

Kraber's Exr's v. Union Insurance Co.

Agents—Liability of—Neglect to obey instructions—Evidence.

An agent who neglects to obey the instructions of his principal renders himself liable for any loss occurring to the latter by reason of such neglect.

The construction of correspondence in writing is for the Court, where the letters are not ambiguous.

Where an order to an agent is plain, and there is a reply that it will be attended to, proofs of disobedience to former orders and forbearance by his principal will not relieve the agent from his legal liability for his failure to comply with such order, and proofs of such particular acts will not be admitted in a suit by the principal against the agent to recover for a loss caused by the agent's neglect to obey such order.

Error to the Common Pleas of York County.

Case, by the Union Insurance Company of Philadelphia against Henry Kraber, to recover damages for a loss alleged to have resulted from the negligence of the defendant in the performance of his duties as agent of the plaintiff.

On the trial, before LATIMER, J., the following facts appeared. Kraber was the duly appointed agent of the plaintiff company, and the scope of his agency is shown by the following certificate:—

The Union Insurance Company of Philadelphia, by authority of this commission. Henry Kraber of York, County of York, State of Pennsylvania, is hereby appointed agent of this company, and authorized to receive applications for insurance, money for premiums, and to countersign, issue, and renew policies of insurance signed by the president with the common seal of the said Union Insurance Company attached; subject to the rules and regulations of said company, and such instructions as may from time to time be given by its officers. In witness thereof the said Union Insurance Company have affixed its seal to this commission, and have caused the same to be signed by its president, attested by its secretary in the city of Philadelphia, this first day of September, A. D. 1877.

On June 27, 1881, Kraber as agent of the company issued to Isaac Frazer of Goldsboro, York County, a policy of insurance in the plaintiff's company, on his machinery, lumber, etc., in Goldsboro. The policy contains a provision for its cancellation at the option of the company. Kraber notified the company of the issuing of the policy. The plaintiff company wrote him a letter dated June 30, 1881, as follows:—

"PHILADELPHIA, June 30, 1881.

HENRY KRABER, Esq., York, Penn'a.

Dear Sir: Please relieve us of No. 55122 Isaac Frazer. It is no doubt a good mill but we cannot see any profits in steam saw-mills in this State at the low rate you offer. The minimum rate offered is 4 per cent., and it is none too high. Advise cancellation.

Very truly yours,
C. S. HOLLINSHEAD,
Assistant Secretary."

To this letter Kraber sent the following reply:—

"YORK, PA., July 1, 1881.

CHARLES S. HOLLINSHEAD, Esq., Assistant Secretary Union Insurance Co.

Dear Sir: Yours of yesterday is received desiring to have cancelled risk 55122 Isaac Frazer, will be attended to. But strange Timothy Kirk White can write it, and has now line on it at 2½ per cent., and I could get more than his rate. But saw-mills such as you have in view are four times more risky than this because they have immense boilers and furnace, with hot iron, large pipes going through the mill, and coated, I mean the furnaces and boilers in the mill. I have seen at Williamsport, Lock Haven, etc. This mill is a mere plaything in size to them, and has boiler furnaces outside of the mill in brick buildings, and iron roof, and brick separate stack, saw wet logs, and shingle wood is green. It could not be safer unless immersed in water, as all my other companies carry lines I would like to see yours do the same, don't want to make fish of one, and flesh of another. I was in and through the mill.

Yours respectfully,
HENRY KRABER.

P. S. It is very discouraging to do business with a competition so great and varied. The same party (N. I. F.) has a planing-mill, saw-mill, sash, door, etc., manufactory all combined about 500 yards north, with a dry house above his boiler in the middle of his mills, shavings falling on the boilers as I saw last Monday, and last year. T. K. White—Kauffman & Brown of Harrisburg, have it all some $15,000, at 3 and 3½ per cent. I expect to see it burn every day I pass it.

I would not write it less than 7 per cent., and don't care at that, for if it does not burn it is the greatest wonder of my 30 years' experience; by carbonization and fire heat alone, when properly carbonized is only time wanted, they place doors and shutters in the rooms on wooden stripped floor about eight feet above

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boiler and furnace below—all inclosed in wood-lining. I would not know in what company I would place $1000 on it at rates same as now taken. A year ago I declined to try less than 6 per cent., and left it over to others he has some on it at 3 per cent., now if I cannot place wet log saw-mill, iron boiler house roof, brick stack, at 2½ per cent. I might as well quit the business. Yours, &c.,

HENRY KRABER.

Kraber did nothing after writing this letter, and, eight days thereafter, the mill was burned, and the policy being in force, plaintiff was obliged to pay the loss as adjusted by Kraber. This action was then brought to recover the amount the company was thus obliged to pay by reason of the failure of Kraber to cancel the policy.

Plaintiff, after alleging that in making the adjustment Kraber had acted as the agent of the company and by their directions, and gained defendant's consent to have this go to the jury, subsequently offered to prove, by one Davis, that Kraber admittted to him after the fire that he had received no instructions to act as agent of the company in the adjustment of the loss, and that he only filled out the proofs of loss on Frazer's (the insured's) authority. Objected to because it was in contradiction to previous testimony, and an attempt to interpret the written certificate of agency. Objection overruled. (1st assignment of error.)

Plaintiff further offered to prove that Kraber told Frazer that the company had ordered the policy cancelled. Objected to. Objection overruled. (2d assignment of error.)

The defendant offered to show by the previous correspondence between the parties, such a course of dealing between them as would have excused the agent from immediate compliance with the company's request or advice to cancel the policy in question, and justified him in awaiting a reply to his letter to plaintiff before cancelling the policy. This correspondence would have shown that in a number of previous instances, similar and absolutely positive requests to cancel, had been withdrawn on his protest and explanation, and the policies had been allowed to stand—and in one instance at least, had been renewed after its expiration. In other cases the company had simply tacitly acquiesced, accepting the premium (as in this instance), and allowing the policy to run on. In nearly every instance, also, the objection (like in the present case) was wholly against the rate of premium accepted by the agent, and not against the character of the risk itself. This circumstance is material, as affecting the question of negligence because the objection presented to the agent was not one of hazard, or danger, but one of profits only. The correspondence shows a constant call for more business on the part of the company, from the defendant's agency, and a constantly recurring objection to rates, etc., followed by remonstrances on the agent's part, before final action would be taken by the company, consuming in some instances much more time than elapsed before the destruction of the property in this case. Objected to. Objection sustained and offer rejected. (3d assignment of error.)

The plaintiff requested the Court to charge the jury as follows:—

(1) That it is the duty of an agent to faithfully and promptly execute the orders of his principal and carry out his instructions, and if he fails to do so and risks the property of his principal he thereby renders himself responsible to his principal for all losses and damages which are the natural consequence of this act.

(2) That the letter of plaintiff to defendant, dated June 30, 1881, is to be construed by the Court as well as all other writings in the case; and the said letter is to be construed as containing a plain, positive, and unambiguous order and direction to cancel the policy No. 55122, issued to Isaac Frazer, and to inform and advise plaintiff of its cancellation; and defendant by his letter of July 1, 1881, having acknowledged the receipt of said letter of plaintiff requesting cancellation, and having replied that it would be attended to, it became the duty of the defendant to cancel said policy No. 55122; and having failed to do so for a period of seven or eight days thereafter, the defendant is guilty of negligence and is liable for such damages as the plaintiff sustained in consequence of his failure to cancel said policy.

(3) That, when there is no conflict of testimony, the decision of a question of negligence is for the Court. Therefore, there being no denial or conflict of testimony as to the sending by plaintiff, or the receipt and acknowledgment by the defendant of the notice to cancel policy No. 55122, issued to Isaac Frazer, and no dispute or denial that defendant failed for a period of seven or eight days thereafter to cancel said policy, the defendant was guilty of negligence; and the Court is requested to so charge the jury, and to instruct them to render their verdict for the plaintiff.

(4) That, under the law and evidence in this case, the verdict of the jury must be for the plaintiff.

(5) That the measure of damages is the amount of money that plaintiff was obliged to pay by reason of the loss under policy No. 55122 with interest thereon from the date of payment thereof.

THE COURT. "They are affirmed except the second point, which I answer as follows: The letter of plaintiff to defendant, dated June 30, 1881, is a sufficiently explicit instruction to cancel the policy as to make it the duty of the de-

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fendant to comply promptly, or, if in doubt, to immediately demand further and more specific instruction." (5th and 6th assignments of error.)

The defendant requested the Court to charge the jury as follows:—

(1) That, under the pleadings and evidence in the case, the question whether the defendant was guilty of such negligence as entitled the plaintiff to recover damages against him is a question for the jury. *Answer.* This point is not correct. As the case stands, negligence is a matter for the Court. (7th assignment of error.)

(2) That, if the jury believe from the evidence that the defendant understood the plaintiff's letter of the 30th June, 1881, as giving him any discretion as to the cancellation of the policy No. 55122 after it had taken effect, and that the defendant so understanding and believing in good faith exercised such discretion in his omission so to cancel said policy, the defendant was not guilty of such negligence as will entitle the plaintiff to recover. *Answer.* I cannot affirm this point. If the defendant was in doubt as to the meaning of the letter of June 30th, it was his duty to seek explicit instructions. (8th assignment of error.)

(3) That the evidence in the case shows that the said policy had not taken effect and become obligatory at the time the defendant received plaintiff's letter of the 30th of June, 1881, in which the words "advise cancellation" occur, and, therefore, it was impossible for the defendant to cancel the policy in accordance with the terms of reservation in the policy, and set forth in the plaintiff's narr., and that, therefore, the defendant was not guilty of such negligence under the facts and circumstances stated in this point as would enable the plaintiff to recover. *Answer.* I cannot affirm defendant's third point. The policy could have been cancelled under the clause of policy referred to. (9th assignment of error.)

(5) That there is no sufficient evidence in the case to support the averments in the plaintiff's narr. of its alleged liability to pay the said loss, the payments of the loss by the said plaintiff not having been legally binding upon it, in the absence of the compliance with the terms, stipulations, and conditions of the policy—being paragraphs under the letter "G" on the back of policy, Nos. one to seven in said policy, relating to proofs of loss and methods of adjustment thereof, and that there is no evidence in the case showing a compliance with said conditions of the policy. *Answer.* I cannot affirm defendant's fifth point. Under the pleadings in this case, it was not necessary for the plaintiff in the first instance to prove more than adjustment and payment of the loss, all of which was admitted. (Tenth assignment of error.)

(6) The plaintiff having offered no evidence in the case to show compliance with the terms of the policy No. 55122, which are necessary to be complied with to fix the liability of the plaintiff, the payment of the loss on said policy was as regards the defendant a voluntary payment (the plaintiff having proven that the defendant did not in the adjustment and payment act as their agent), and the plaintiff cannot recover the amount so paid as the measure of damages in this case. *Answer.* I cannot affirm defendant's sixth point. The answer to the next preceding point is a sufficient answer to this one. (Eleventh assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"[On the undisputed facts of this case it is apparent that the loss of this money to the company plaintiff was the proximate result of the defendant's negligence to cancel the policy. The failure to do so was excused by nothing that has been revealed in the case. He had a reasonable time in which to cancel. On the undisputed facts in this case more than a reasonable time had elapsed at the date of the destruction of the insured property."] (Fourth assignment of error.)

"The defendant offered to show by correspondence between himself and the plaintiff that in a number of instances prior to the Frazer case, similar directions to cancel other policies had been sent to him which on his representations and requests, had been subsequently allowed to remain in force; intending thus to show a course of dealing between the company and himself that excused him from prompt compliance with its orders. As between principal and agent I did not think that this could be done, and hence excluded the evidence. If the view I have taken in this case is correct, the defendant is liable to respond in damages to the plaintiff for the loss occasioned by the defendant's negligence, of which the measure is the money paid to Frazer by the plaintiff, with interest from the date of the payment. For that amount your verdict must be for the plaintiff."

Verdict for plaintiff for $669.32 and judgment thereon. Defendant having died, his executors took this writ, specifying for error the rulings on the offers of evidence, the answers to the points, and the portion of the charge, as noted above.

Nevin M. Wanner and *Henry L. Fisher*, for plaintiffs in error.

Any evidence tending fairly towards establishing a course of dealings which would have excused the agent from a prompt compliance with the company's request, was admissible for what it was worth.

Hill *v.* Trust Co., 12 Out. 1.
French *v.* Read, 6 Binney, 308.
Derrickson *v.* Cady, 7 Barr, 27.

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Arnold *v.* P. R. R. Co., 5 Am. 185.
Insurance Co. *v.* Hoover, 18 WEEKLY NOTES, 223.

A principal, after sanctioning particular acts, cannot afterwards repudiate similar acts.

Wharton on Agency, 51.
Wright *v.* Burbank, 64 Pa. 247.
Kelsey *v.* Nat. Bk., 69 Id. 426.
Stevenson *v.* Hoy, 43 Id. 191.

The construction put upon the letters by the Court was too severe under the circumstances.

Wharton on Agency, § 248.

The question of negligence was for the jury.

R. R. Co. *v.* McElwee, 67 Pa. 311.
R. R. Co. *v.* Cowell, 28 Id. 329.

What was a reasonable time in which to cancel the policy, was for the jury to determine.

Porter *v.* Patterson, 15 Pa. 229.

H. E. Niles, of *Stewart, Niles & Neff*, for defendant in error.

An agent cannot depart from positive instruction without making himself responsible.

Parsons on Contracts, *81.
Wharton on Agency, § 247.
Storry on Agency, §§ 189, 190, 192.
Dusar *v.* Perit, 4 Binn. 365.
Wilson *v.* Wilson, 2 Casey, 394.
Schrack *v.* McKnight, 3 Norris, 26.
Porter *v.* Patterson, 3 Harris, 229.
Franklin Ins. Co. *v.* Sears, 21 Fed. Rep. 290.

October 14, 1889. THE COURT: The proposition that an agent is bound to follow the instructions of his principal is too elementary to require discussion. Where an agent is charged with the performance of some particular duty or the conduct of some undertaking, and is left without instructions as to the manner in which his work is to be done, he must exercise his own judgment in the premises with good faith towards his principal. (Porter *v.* Patterson, 15 Pa. 229; Conway *v.* Lewis, 120 Id. 215.)

But when the principal gives instructions they are binding on the agent and he must follow them. He has no legal right to sit in judgment on the wisdom or the expediency of the directions that are given him. His duty as agent is to execute the orders of his principal with reasonable promptness and with fidelity. The plaintiff in the Court below is an insurance company. Kraber was a duly appointed agent with authority to countersign and issue policies of insurance against fire, subject, however, to the approval of the company when his report came to their hands. On the 27th of June, 1881, he executed and delivered to Isaac Frazer a policy of insurance upon his steam saw-mill at a premium of two and one-half per cent., to take effect on the first day of July. He reported this insurance to the company on the 29th of June and on the next day the company sent him the following instructions: "Please relieve us of No. 55122 Isaac Frazer. It is no doubt a good mill, but we cannot see any profits in steam saw-mills in this State at the low rate you offer. The minimum rate offered is four per cent., and it is none too high. Advise cancellation." Kraber replied to this letter on the following day, July 1, in these words: "Yours of yesterday is received desiring to have cancelled risk 55122 Isaac Frazer; will be attended to;" and proceeded in the same letter to complain at some length that the rates insisted on by the company were too high, and that other companies were offering to take the same or similar risks at lower rates. On or before the 8th of the same month the mill was burned. The company finding that their agent had not cancelled the policy as directed paid the amount of the loss as adjusted, viz., five hundred and twelve dollars $\frac{10}{100}$, and brought this action against their agent to recover the amount from him. There are three questions raised here. First. Was the construction of the letter of 30 June, 1881, from the company to Kraber for the court or jury? We agree with the learned Judge of the Court below that the letter is not ambiguous, but is a plain direction to the agent to cancel the policy because the risk had been taken at too low rates, with the general direction that four per cent. was the minimum rate at which such risks could be taken. It is quite clear that Kraber had just as little difficulty in understanding it when it came to his hands for he replied, saying, that their letter "desiring to have cancelled risk 55122 Isaac Frazer, will be attended to." It was not error therefore for the Court to instruct the jury as to the meaning of the direction given by the company in the letter of 30 June, 1881. The next question raised is whether, if the construction of the letter be for the Court, it was correctly interpreted. This is answered in answering the first question. It is because the meaning is plain and the letter free from ambiguity that its construction is for the Court, and the instruction given to the jury follows the plain and obvious meaning of the words employed.

The question mainly relied on by the plaintiffs in error is the third, which is raised by the third assignment. A mass of correspondence between Kraber and the company was offered for the purpose of showing a course of dealing between the parties such as to justify him in disregarding the order to cancel the policy issued to Frazer. The Court below looked into these letters to ascertain their import and then rejected the offer. They relate to other risks placed by the agent in the course of his business. They show an effort on the part of the company to maintain its schedule of rates, and one on the part of Kraber to get below it. They show frequent and earnest remonstrances on behalf of the company and frequent complaints by Kraber on the subject of rates. Sometimes the company yielded a point to their agent, and sometimes they insisted on

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the cancellation of risks taken below their regular rates.

Regarded as a whole the correspondence shows no settled course of dealing, but a constant controversy over the rate at which risks should be carried, and could in no manner enlarge the powers of Kraber or relieve him from his duty to obey the plain directions of his principal.

The Court below was right therefore in rejecting this offer. The correspondence did not sustain the purpose for which it was offered, and its admission could have no other effect than to confuse the jury. The fact that the company received the premium from its agent, after the fire, and after the fact of his failure to cancel the policy came to its knowledge, does not relieve him. His receipt of the premium was the receipt of the company. When he was directed to return the money and cancel the policy he did not do it. His failure to do as he was directed is the ground of his liability, and the loss suffered by his principal furnished the proper measure of damages.

We see no error in the rulings of the Court below, and the judgment is therefore affirmed.

Opinion by WILLIAMS, J. W. M. S., JR.

July '89, 70. May 23, 1889.

New Era Life Ass'n v. Weigle.

Insurance—Misrepresentations by agent as to capital stock of a mutual company—Effect of—Practice—Binding instructions, where evidence is not denied and no request made to submit the question of credibility to the jury.

The solvency of a company proposing to insure is a material consideration to the insured, and a misrepresentation on that subject by the agent, which induced the applicant to pay her money to a worthless company, is such fraud as renders the contract voidable by the insured.

In an action by a receiver of a mutual insurance company against an insured for premiums past due, where the defence was a misrepresentation by the agent such as the above, the plaintiff did not deny that such misrepresentation was made, but rested his case on the point that such a misrepresentation made in regard to a purely mutual company, in the capital stock of which the insured had no interest, was not such as would amount to a fraud or prevent a recovery; and the Court gave a binding instruction to find for the defendant:

Held, that the instruction was correct; it would have been proper to have submitted to the jury the uncontradicted evidence as to the misrepresentation, had it been asked at that time, but it is too late to complain of this when the case comes to the Supreme Court.

Error to the Common Pleas of York County.

Assumpsit, by the New Era Life Association of 1876, for the use of J. M. Wiestling, receiver, against Mary Weigle.

The facts are fully set out in the following charge to the jury:—

"This suit, which you are empanelled to try, is an action brought by the New Era Life Association of 1876, against Mary Weigle, the defendant, to recover from the said Mary Weigle the amounts of five assessments that were made on a policy of insurance in this company, held by her, to pay death losses which occurred during the currency of her policy. It seems, from the papers offered in evidence, that on the 4th day of November, 1878, Mary Weigle, the applicant, signed an application to become a member of the New Era Life Association, the plaintiff in this case, that is, to have a policy issued to her for the sum of three thousand dollars. That application was presented to the company on the 5th day of November, 1878, on which date the application was approved, and the policy which I hold in my hand, bearing date the 5th day of November, 1878, was delivered to Mary Weigle.

"Now, the contract existing between this association and Mary Weigle is evidenced by these two papers, without any regard to any previous bargaining that took place between them. The bargain between them assumed the final shape in which it is presented to this Court and jury in these two papers, and these two papers are the contract between these parties, and by the acceptance of this policy Mrs. Weigle bound herself to a fulfilment of and a compliance with the covenants contained in it, and a portion of that policy I will read to you:—

"'This indenture witnesseth that Mary Weigle, of York, county of York, State of Pennsylvania, has made application for membership in this association, application No. 70, dated the 4th day of November, 1878, and has paid into the treasury the sum of thirty dollars, and covenanted and agreed to pay to said association further the sum of nine dollars on the 5th day of November of each and every year, commencing on the 5th day of November, 1879, and continuing so long as the said Mary Weigle shall live, and further covenanted and agreed to pay this association from time to time such mortuary assessments as may be required to liquidate all *bona fide* benefit claims accruing to members of said association, and these sums must be paid in accordance with the covenants aforesaid, and are payable within thirty days after notice.'

"And then the policy goes on to covenant on behalf of the New Era Life Association for the payment of a sum of money not exceeding three thousand dollars in case of her death.

"Now, during the pendency of that policy, as has been shown to you by a number of the books of the association, assessments were made to pay death-losses. This policy became forfeited in the month of June, 1882, by reason of the failure to pay assessment No. 12.

"It seems to have been the first assessment

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that Mrs. Weigle declined or refused to pay, and six days after her refusal to pay that assessment the policy became forfeited by reason of her refusal. The forfeiture of the policy, however, left her liable to pay assessments which had been properly and legally levied to meet the death-losses that occurred during the time her policy was in force, and from the books of the association, and by parol evidence, it has been shown to you that assessment No. 12 was levied on the 10th of January, 1882, and assessment No. 16 on the 21st of April, 1884, and assessment No. 17 on the 2d of March, 1885, and assessment No. 18 on the 29th of May, 1885. It is a part and condition of this contract that this company shall mail to each of its policy-holders a notice of the amount of the assessment which they claim that he or she shall pay; and the plaintiff in this case has failed to show by any competent legal evidence that a notice of either assessment No. 12, assessment No. 14, or assessment No. 16, was mailed to Mrs. Weigle. They have offered competent legal evidence from which you might infer that a notice of assessment No. 17, and of assessment No. 18 were mailed to her.

"But, in the view that I have taken of the law of this case, it is not material whether those notices were mailed to her or not, and it is entirely immaterial whether those notices were received by her or not to maintain a sufficient defence in the case against the payment of those assessments, and the company have only established a liability on her part to pay the last two that I have mentioned to you.

"The defence on her part against the payment of those assessments is, in effect, that she was induced to sign this application and become a member of this organization by certain false and fraudulent misrepresentations of the condition and character of the company, made to her by the company's agent at the time that he secured her signature to the application.

"She has testified, and J. Leonard Kable, a witness called on her behalf, has testified, that at and before the time that she signed this application, it was represented to her by one Eneas Smith, the then agent of the company, that the New Era Life Association had a paid-up capital of fifty thousand dollars, and she has sworn that she would not have signed that application except for that inducement. There is no evidence in the case to contradict her testimony. J. L. Kable has testified also to the same representations that were made to her, and that she says were made to her.

"Now, if you believe her testimony, and there is nothing in the case to contradict it, it stands uncontradicted, then she was induced by false and fraudulent representations to become a member of this society, for Dr. Malin, an officer of the company, and a director, has testified that while the company had a capital stock of fifty thousand dollars, it was not nearly all paid up at the time that this application for insurance was made, and I tell you that the representations which she says were made to her and induced her to sign the contract are material, and that if they were the inducements, that would avoid any liability on her part to comply with the contract that she entered into, and she is not liable to pay the receiver of the association the assessments Nos. 17 and 18, which she would otherwise be liable to pay, [and therefore, on the case as it stands, your verdict will be for the defendant.]

"Points have been presented to me embodying the views of the law entertained in this case by the plaintiff and the defendant respectively, and I have been requested to charge you in regard to them, and I will read them to you, and give you my answer. The plaintiff has requested me to charge the jury as follows:—

"(1) It appearing by the uncontradicted testimony in the case that the representation which is set up as a bar to the recovery was immaterial, and in no wise affected the financial standing of the company at the time it was made, it was not such a representation as would amount to fraud, or as to prevent a recovery, and the Court is requested to so instruct the jury as a matter of law.

"I answer that this point is not correct." (First assignment of error.)

"Defendant's point: (1) The Court is respectfully requested to charge the jury on behalf of the defendant, and to file its charge in writing, that if the jury believe from the evidence that the defendant was induced by Eneas Smith, its agent, to sign the application for insurance in this case, by representing to her that said company was a first-class company, financially, having a paid-up capital of fifty thousand dollars, and that said representations were false, it was such a fraud on the part of said company's agent as affected the plaintiff's claim in this suit, and the verdict must be for the defendant.

"I say that this point of the defendant is correct." (Second assignment of error.)

Verdict for defendant, and judgment thereon. Plaintiff took this writ, specifying for error 1 and 2, the answers to the points, and 3, that the Court erred in giving binding instructions to find for the defendant.

E. D. Ziegler (*Robert Snodgrass, Frank Geiss*, and *J. R. Strawbridge* with him), for plaintiff in error.

The capital stock of this mutual company could not in any event be required to respond for losses upon mutual policies.

Seitzinger v. New Era Life Ass'n, 15 Weekly Notes, 348.

From the plaintiff's standpoint, as indicated by his first point, the question of materiality, as applied to the special case then trying, was a question of law, and if this point had been affirmed there would have been nothing for the jury to pass upon, but when the Court refused this point without qualification, then the entire defence was resolved into a question of fact which was for the jury alone.

Henry L. Fisher (*A. N. Green* with him), for defendant in error.

The company having accepted, the policy is affected with any fraud on the part of the person obtaining it.

Jones *v.* Bldg. Ass'n, 13 Norris, 215.
Mundorff *v.* Wickersham, 13 Smith, 87.

There was nothing for a jury to pass upon. There was no denial of the misrepresentation.

October 7, 1889. THE COURT. The rights and obligations of insurer and insured are reciprocal. Each is bound to deal fairly and honestly with the other in the procurement of the contract for insurance, and any concealment or misrepresentation material to the risk on either side may properly be urged as ground of relief from the contract thus unfairly and fraudulently obtained. The application and policy now before us bristle with the requirements laid upon the applicant. A full disclosure of every circumstance material to the risk is required in writing, and an express covenant that all the statements so made are true is added, which contains among many other provisions the following: "I hereby covenant and agree that the above answers are true; that a misstatement or concealment of any fact touching my health or material to the question of longevity," etc., shall render the policy null and void. The other side of the negotiations, the misstatements and concealments of facts "touching the health or material to the longevity" of the insurance company are not provided for. There is no express covenant that the representations of the experienced and persuasive solicitor shall be true. The insured is largely at his mercy, for he has ordinarily no other means of information in regard to the company, the contract, and its value to himself or his family, than that which the interested agent affords him. He represents the company in the negotiations and his statements are as material to the validity of the contract as are those of the insured. Fraud and falsehood on either side, which induce the making of the contract, afford a ground of relief to the injured party whether such party be insurer or insured. In the case now before us the parties to the contract are an insurance company without capital, a mere shell, and a woman desirous to make some provision for her only son.

The representative of the company persuades her, as she testifies, to take a policy upon her life on the mutual side of the company by telling her that it was in good financial standing in the business world and had a paid up capital of fifty thousand dollars. This paid up capital she was made to understand would in some way provide for the mortuary assessment to be made on the holders of policies on the mutual plan, so that after the payment of her premium and first year's dues amounting together to thirty-nine dollars she would have little or nothing to pay. Neither the agent nor any one else contradicts her in the statement of the representations made to her but she is sustained by her employer who testifies that he heard the assurance of the agent made to her more than once that the company was in good standing and had a paid up capital of fifty thousand dollars.

Two questions are now raised by the plaintiff in error:—

First: Did the representations relied on relate to a material subject? Next, did the Court err in not sending the case to the jury?

We agree with the learned Judge of the Court below that solvency of the company proposing to insure was a consideration material to the insured, and that a misrepresentation upon that subject by the agent which induced the applicant to pay her money to a worthless company for a policy that did not insure, was a fraud which rendered the contract voidable by her. If Mrs. Weigle had understood that the company was without capital, without financial standing, and without ability to meet its contracts, she would not have paid her money for a policy in it; but her action was induced as she states by the representations made by the agent and believed by her in regard to the paid-up capital and financial standing of the company. The representations related to a material subject, and were a material part of the contract. (Fire Ins. Co. *v.* Humble, 100 Pa. 495.)

But ought not this uncontradicted testimony to have been submitted to the jury? If this had been asked in the Court below, it would have been proper to submit the question of credibility to the jury, but it does not appear to have been asked. If not asked there, it cannot be complained of here. The point submited to the Court by the plaintiff below shows that the reliance of counsel rested on the question of the materiality of the representations set up rather than on the credibility of the witnesses by whom they were proved. The point is as follows:—

"It appearing by the uncontradicted testimony in the case that the representation which is set up as a bar to the recovery is immaterial and in no wise affected the financial standing of the company at the time it was made it was not such a misrepresentation as would amount to a fraud or

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prevent recovery, and the Court is requested to so instruct the jury as a matter of law." This is in effect a concession of the fact. The issue raised is over its materiality only. Granting the fact to be as alleged by the defendant below the point asks a binding instruction that it is an immaterial one, and not such "as would amount to a fraud or prevent recovery." It is now too late to complain that the facts should have gone to the jury for determination when no such suggestion or request was made at the proper time or place. It would be unfair to the Court and to the defendant to sustain this assignment of error upon this record.

Judgment affirmed.

Opinion by WILLIAMS, J. W. M. S., JR.

Jan. '88, 80. February 19, 1889.

Philadelphia and Reading R. R. Co. v. Huber.

Negligence — Defective machinery — Employé's knowledge of defects — Evidence.

In an action to recover damages for the death of an employé of a railroad company occasioned by reason of a defective brake, where the evidence shows that the employé had but two or three minutes to uncouple cars and then apply the brake, and there is no testimony that he had ever seen the brake before, he cannot be held guilty of contributory negligence. It would be subjecting him to a too rigid measure of responsibility to say, as a matter of law, that in so very short an interval, and with his attention necessarily given to the uncoupling of the cars and also to the regulation of their movement, he was bound to acquire a knowledge of the defect in the brake and to abstain from its use.

Where the evidence of one witness shows that when defendant was last seen, before the accident, he was pulling on the defective brake, and other witnesses testify that they saw him standing on the end of the car where the brake was, it is enough to carry the case to the jury, and to sustain a verdict for the plaintiff.

Where there is testimony that the railroad company enforced a daily inspection of cars at the place of the accident, and if this had been through the defect in the brake would have been discovered, and there is no evidence that the deceased ever saw or handled the brake until the time of the accident, it would not be proper to visit him with the consequences of a knowledge of the defect and a voluntary use of the brake notwithstanding such knowledge.

Error to the Common Pleas of Schuylkill County.

Case, by Sarah Huber, in her own right and as next friend of her minor child, Maria Edna Huber, against the Philadelphia and Reading R. R. Co., to recover damages for the death of Frederick A. Huber, husband of said Sarah Huber and father of the said Maria Edna Huber.

The facts necessary to an understanding of the case appear in the following portion of the charge to the jury by GREEN, J., and the opinion of the Supreme Court, *infra*.

"This is an action brought against the Philadelphia and Reading R. R. Co. for the purpose of recovering damages by reason of the loss of a man's life upon an allegation that this loss of life was occasioned by the negligence of the company, and that is the question to be tried before you. There are not a great many disputed facts in the case; the testimony of a large number of witnesses has been taken, but there are very few discrepancies or contradictions in the testimony. The facts in the case in the main appear to be that Frederick A. Huber was in the employ of the Philadelphia and Reading R. R. Co. for a period of about nine years altogether, but for a period of about four years in the capacity of brakeman; that when he lost his life, on the 3d of April, 1884, he was acting as a brakeman upon what is called the shifting crew of the engine used at the weigh-scales at Pinegrove, where they weigh the cars, and, I presume, make up the trains. The fact of his having lost his life, and the main facts as to the manner in which he lost his life, are entirely uncontradicted.

"It appears that he was engaged at the time in braking cars for the purpose of having them put upon the weigh-scales in order to be weighed. There was a train of three cars—that is, two double or eight-wheel cars, as they are called, and one four-wheeled car in the train. The four-wheeled car was in front and there was a brakeman to that car. He himself got on the train in between the four-wheeled car and the eight-wheeled car, and either soon after he got on, or at the time he got on, uncoupled the cars. There were also two brakemen upon the car in the rear. The train was moved by an engine upon a side track by means of a rope attached from the engine to the rear car. The purpose was to weigh the four-wheeled car first. The whole train was moved towards the weigh-scale, and then it became necessary to brake, or to stop, or, at least, to retard the motion of the two rear cars, in order that the front car might go upon the scales and be weighed separately. After the front car had been detached and had gone on toward the weigh-scales, then Frederick Huber was left upon the front end of the front car of the two remaining cars. Whilst in that position it is claimed that it became his duty to brake the car; that in braking the car the brake, on account of its imperfect, defective character, slipped, and that this occasioned a fall of this man from the car whilst the cars were in considerable motion; that he fell down in front of the car; that he endeavored to

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get away so as to escape danger, but that it was impossible for him to do so, and then the front wheel passed over his body, or the two wheels of the front truck passed over his body, almost severing his body in two. The cars, or at least the front truck was thrown from the track, and the third wheel of the car rested upon his body. Of course, from the nature of this accident, death was almost instantaneous. The body was taken out and he breathed perhaps a few minutes and then died. The question arising in this case is whether this defendant is liable in damages for this loss of life."

The defendant submitted, *inter alia*, the following points:—

(2) If the brake was in a defective condition from an external, apparent fault, one that could be seen by the eye, produced by time and use, not brought to the knowledge of the railroad company, the defendant, the railroad company, would not be guilty of negligence. *Answer.* This point we decline to affirm. We think the defendant was bound to exercise reasonable care in making repairs, so as to keep it in suitable condition, and so as to ascertain whether the same remained in suitable condition. (First assignment of error.)

(4) There is no direct or competent evidence that the defective condition of the brake was the cause of the deceased, Frederick A. Huber, falling from the car, and therefore the plaintiffs cannot recover. *Answer.* This we refer to the jury as a matter of fact, and decline to affirm the point. (Second assignment of error.)

(5) The evidence in the case is abundant, both by the witnesses for the plaintiffs and the defendant, and is uncontradicted, that the deceased, Frederick A. Huber, had means to know that the brake on the car was in an unsafe condition to use, and his using it with that knowledge was contributory negligence, and although the jury believe that the defendant did know or ought to have known that the brake was in an unsafe condition, and continued it on the car, the plaintiffs cannot recover. *Answer.* This we refer to the jury as a matter of fact. If the deceased used the brake, knowing it was in an unsafe and dangerous condition, he took the risk and cannot recover. (Third assignment of error.)

(7) That under all the evidence in this case the plaintiffs cannot recover. *Answer.* This point we decline to affirm, but leave the matter to be ascertained by you under the law as we have laid it down to you, and under the evidence in the case. We submit the case to you without further remark. (Fourth assignment of error.)

Verdict for plaintiffs for $4000 and judgment thereon, whereupon defendant took this writ, assigning for error the answers to the above points.

John F. Whalen and *James Ellis*, for plaintiff in error.

D. C. Henning, for defendants in error.

October 7, 1889. THE COURT. If there had been proof on the trial that Huber was acquainted with the condition of the brake on the car upon which the accident occurred, by having been on it and used the brake at times prior to the accident, it would not have been possible to sustain the verdict. All of the witnesses, and almost the whole of them were witnesses for the plaintiff, who testified in regard to the brake, said it was manifestly defective and several of them said it was unsafe and dangerous to use it.

They also said the defect could be seen at once upon looking at it from above or attempting to handle it, and any brakeman who was certainly acquainted with it or had had sufficient opportunity to become acquainted with it, and then used it would have been guilty of contributory negligence if an injury had resulted from its use. But in this case there is no evidence showing that Huber had ever seen the car or the brake before the time of the accident, and whatever knowledge he had of it must have been acquired during the brief period he was on the car before he fell off. It was his duty to brake cars at this particular place and hundred of cars were brought there every day for inspection and weighing.

The whole time occupied in shifting a car on the scales was very short indeed and the brakeman was obliged to be actively engaged from the moment he boarded the car until it was weighed. In this particular instance the deceased was engaged in braking a little train consisting of one single and two double cars loaded with coal. He was on the front of the first double car, the single car being ahead. He had uncoupled the single car and, as the testimony indicates, had hold of the brake at the front end of the car he was on. In this situation he fell and was run over by the car and killed. No one saw him in the act of falling but he was at his post and had one arm around the lever, and was holding or working the brake, the moment before he fell. He was seen in that attitude at that time.

The whole time from the commencement of the movement of the cars towards the scales to the occurrence of the accident was but two or three minutes, and in that very brief space, and whilst engaged with the uncoupling of the cars and their movement, he had to become acquainted with the brake and either use it or abstain from using it because of its unsafe condition. There was evidence that it could be used with safety if only a moderate application of the brake was made, but that the lever by which the brake was worked had a tendency to slip up off of the shaft if a strong

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pressure of the brakes on the car wheels was required. We think it would be subjecting the brakeman to a too rigid measure of responsibility to say, as a matter of law that, in so very short an interval, and with his attention necessarily given to the uncoupling of the cars, and also to the regulation of their movement, he was bound to acquire a knowledge of the defect in the brake and to abstain from its use. The defect consisted of a too large opening in the lever for the head of the brake shaft to enter, so that the lever would slip without holding the shaft when a hard pressure was applied. There was evidence that the shaft could be held if only a moderate pressure was applied. The learned Court below very fairly and correctly left it to the jury to say whether the deceased knew of the unsafe condition of the brake, and used it notwithstanding such knowledge, and charged them that if he did, there could be no recovery. While the evidence is without contradiction that the brake was defective, and the defect could be discovered as soon as an attempt was made to use it, yet considering the exceedingly limited opportunity which the brakeman had of becoming acquainted with it, it was proper to leave that question to the jury for decision. It is entirely possible and is consistent with the testimony, that the first pressure applied was moderate and that it was only when this was increased that the dangerous character of the defect became manifest, but that at the same instant the lever slipped and the brakeman lost his hold and fell.

The only other serious question in the cause was whether there was sufficient testimony to leave to the jury the question whether the deceased fell from the car in consequence of the defect in the brake. There is not direct and positive testimony to this effect. No person saw him fall while in the act of handling the brake, but that might be because no person saw the actual falling. But the evidence of at least one witness, Zimmerman, proved that he was seen with one arm around the brake-lever, and was pulling on the brake, immediately before he fell. Other witnesses saw him standing on the end of the car where the brake was, also just before the accident, but do not speak of seeing him have hold of the brake. We think the testimony of Zimmerman was enough to carry the case to the jury and to sustain the verdict. The testimony of the other witnesses who saw the deceased at his post immediately before he fell is corroborative in its character, and as several of them describe how a fall might very easily result from the slipping of the lever in the effort to work the brake, it is scarcely permissible for a Court to say that a jury might not infer that the accident occurred in that way.

Nor can it be said that this was a case in which the employé was better acquainted with the defect than the employer and should have given information of it and abstained from using it. The evidence fails entirely to show such a state of facts. If it had shown them we would not hesitate to apply the rule of contributory negligence. But here the testimony was very abundant that the company enforced a system of daily inspection of all cars at the place of this accident, and if this had been thorough, the defect in this brake should have been discovered. As to the deceased there is no evidence that he ever handled, or ever saw this brake until he attempted to use it on this occasion. In such circumstances it would not be proper to visit him with the consequences of a knowledge of the defect and a voluntary use of the brake notwithstanding such knowledge. The question of Huber's knowledge of the condition of the brake and of the manner in which he used it, whether negligently or otherwise, was very carefully and correctly left to the jury, and by the verdict it has been found that he was not negligent. We cannot say from a reading of all the testimony that it so conclusively appears he was negligent as to convict the Court of error in submitting that question to the jury. It is one thing for a number of witnesses to say in Court, with the brake before them and ample opportunity to examine the condition of the lever at the place where the shaft entered it, that the opening for the shaft in the lever was too large, and that the lever might slip off the shaft when it was used to apply the brakes, but it is quite a different thing for a brakeman who jumps on the car which is immediately started to be shifted, who must at once uncouple the car in front of him and then regulate the movement of the car he is on by applying the brakes, to stop to examine the condition of the machinery of the brake before he uses it without his attention being called to any defect. In point of fact the car had almost reached its destination on the scales when Huber fell off. So that it would seem he did use the brake successfully for much the largest part of the distance. It is not for a Court to say as matter of law in such circumstances that the brakeman was necessarily guilty of negligence in not discovering the defect in the machinery of the brake and ceasing to use it. That was the proper function of the jury.

Judgment affirmed.

Opinion by GREEN, J. H. S. P. N.

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WEEKLY NOTES OF CASES.

VOL. XXIV.] *FRIDAY, NOV. 29, 1889.* [No. 31.

Supreme Court.

July '88, 151. March 27, 1889.

Brownfield v. Hughes.

Master and servant—Risk of employment—When and when not assumed by an employé.

While as a general rule an employé who continues to use a machine which he knows to be dangerous takes upon himself the risk of any accident that may result therefrom, yet this rule is inapplicable in a case where the risk was not such as to threaten immediate injury, and the employé had notified his employer that the machine was defective, and relying upon his employer's promise to remedy it, had continued in his employment and had received an injury without fault of his own.

In an action by an employé against his employer to recover damages for personal injuries, the employé testified that he ran defendant's engine; that being small in stature this was attended with danger; that he so informed defendant, who promised to erect a platform for him to stand upon; that the platform was not erected and that he received his injuries while reaching up to the crank-pin to test its temperature. Other witnesses testified as to the necessity of the platform. The defendant denied having promised to erect it and produced witnesses who testified that the engine had been properly set up and that it would have been dangerous to use such a platform. Under this evidence:

Held, (1) that the employé was not guilty of contributory negligence in continuing to run the engine without the platform, and (2) that the questions whether the failure to erect the platform had been the proximate cause of the injury, and whether the defendant had been guilty of negligence in not erecting the platform, were properly submitted to the jury.

Error to the Common Pleas No. 1, of Philadelphia County.

Case for personal injuries, by Thomas Hughes against Robert L. Brownfield and H. P. Lummis, trading as Brownfield & Co. Subsequently the name of H. P. Lummis, as party defendant, was stricken from the record.

At the trial the facts appeared to be as follows: In the winter of 1885–6 the defendant erected a factory for the cleaning of peanuts and employed the plaintiff as engineer. The plaintiff in running the engine was required frequently to feel the crank-pin and other parts of the engine to test their temperature. There was a guard-rail about three-and-half feet high erected at the side of the engine for the purpose of preventing persons coming in contact with it. While feeling the crank-pin one day when it was at its highest point five feet from the floor, the plaintiff's arm struck on the guard-rail throwing his hand in between the crank-pin and the brasses, and cutting off the fingers and crushing the hand. The plaintiff was only five feet four inches tall and testified that the engine was dangerous for him to work at, by reason of its height as well in respect to feeling the crank-pin, as the main journal, and the other brasses, and that owing to each course of bricks in the foundation receding, he was forced to lean over about eight or nine inches from the perpendicular, and therefore had not the same control over his movements as he would have had if the engine had been lower and the foundation perpendicular. He said further, that an engine such as this one, should be so set up as to bring the brasses about even with the body, and that if he had a platform about eighteen inches high, built around the engine for him to stand on, it would have brought him up to the required height for taking the temperature of the crank-pin, and prevented his arm from coming into contact with the guard-rail. He further testified, that some time before the accident happened, he called the attention of defendant and his superintendent, Mr. Lummis, to the defects in the construction of the engine, and requested that such a platform be built for him to stand upon; that both defendant and the superintendent promised to have the platform erected if plaintiff would continue to run the engine.

The plaintiff produced other witnesses, experienced engineers, who testified as to the necessity of almost constantly feeling the crank-pin and other parts of the engine; that this engine was set too high for safety to a man of plaintiff's height, and that an engine should be so built as to bring the brasses about abreast of the engineer's body.

The defendant denied having promised to erect such a platform, and produced witnesses who testified that the engine had been set up properly by competent mechanics, and that to put such a platform around it would have rendered it dangerous.

The Court charged the jury, *inter alia*, as follows:—

"If you find that the defendants were negligent in not putting up a platform for the plaintiff, and that, by reason of their not putting up that platform, this accident fell upon him, then you can only find for the plaintiff upon finding the fact that he did call the attention of the defendants to that defect, and asked them to repair it, and that they did not repair it, and that, by reason of their not doing that, he lost the use of his right hand." (First assignment of error.)

"You will take this case and decide it accord-

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ing as you believe, under this evidence, to whom right and justice appertains. If the contention of the plaintiff is sustained, in your belief, considering all the evidence, considering it fairly upon one side and the other, and reviewing it fairly upon one side and the other, that this injury fell upon him by reason of the neglect of the defendants to put that platform alongside of that engine, after they had been notified and called upon to do it, and after, as he says, they promised to do it; and if that was the direct cause of the injury, as it fell upon him, and it was the neglect of the defendants which caused that injury, that would entitle him to recover a verdict at your hands." (Second assignment of error.)

Defendant submitted the following points:—

(1) If the plaintiff continued to run the engine after he considered it dangerous and suffered an injury thereby, he cannot now recover for such injury.

(2) The continuance of the plaintiff in the performance of his duties, as engineer, after he deemed the engine unsafe, was at his own risk and peril.

Answer. "I have already said to the jury that, if the plaintiff knew the service about the engine was dangerous, and he said nothing to the defendants of it, and did not call upon them to remove the cause of danger, he cannot recover; and I have already said that, if the cause of danger already existed, and the jury find, under the evidence, that he called upon the defendants to remove it, and they did not do so, and, by reason of the want of that platform, this injury fell upon the plaintiff, then he is entitled to recover. It depends upon how you find the fact of the notice of the plaintiff to the defendants, as to the want of that platform, and whether he did so notify them of the want of the platform, and they failed to supply the platform around the engine." (Third and fourth assignments of error.)

(3) If the jury believe, from the evidence, that the defendants employed competent mechanics to set up the engine, and this was done with reasonable care and skill, so that an engineer, with ordinary care and skill, could perform his duties without injury to himself, the plaintiff cannot recover in this case.

Answer. "That proposition, as an abstract proposition, is undoubtedly well stated and correctly stated; but it all depends upon the other question to which I have referred—as to whether the plaintiff, as he said he did, discovered that he could not safely run this engine without a platform, and notified the defendants to repair the want of that platform, or to put the platform there; and, if they did not (as it is admitted they did not) put the platform up at his call, then, under such circumstances, they would still be responsible. The general principle of law is that if one, having work to do, a piece of machinery to construct, a house to build, or anything of that kind, employs competent mechanics to do it, and by reason of some cause, over which he has no control, injury falls upon some person who happens to be in the neighborhood, he, having done what the law imposes upon him as the measure of his obligation, and having employed competent persons to do the work, is not responsible; but this case does not rest upon abstract application of this principle. It is carried further, under the contention of the plaintiff—that is, that, after going into the employment of the defendants, and having found how difficult it was to run this engine, with safety, without a platform, he notified the defendants of the necessity of the platform, and the defendants did not repair that want, or put the platform there, if it was wanted." (Fifth assignment of error.)

(7) There is no evidence in this case that the omission to erect the platform was the proximate cause of the injury. *Answer.* I decline to affirm that, leaving that to the jury. (Sixth assignment of error.)

(8) Under the evidence in this case the verdict must be for the defendant. *Answer.* Of course I decline that. (Seventh assignment of error.)

Verdict for the plaintiff for $1000, and judgment thereon; whereupon the defendant took this writ, assigning for error the portions of the charge and answers to points, above set forth.

M. Hampton Todd, for the plaintiff in error.

D. Webster Dougherty, for the defendant in error.

October 7, 1889. THE COURT. This case was submitted to the jury in a voluminous charge of eighteen printed pages, wherein their attention was called to the facts which it was claimed the evidence tended to establish, as well as the principles of law applicable thereto. The jury, by their verdict, found that the injury complained of resulted from defendant's neglect of duty, and that plaintiff below was not guilty of contributory negligence. It would be a waste of time to review either the evidence or the principles of law applicable to the case. The facts which the former tended to prove have been settled by the verdict, and, as to the latter, they have been so well settled by repeated decisions of this Court, that decision of them is unnecessary.

There is no complaint as to the admission or rejection of evidence, but it is claimed the evidence was insufficient. The last specification of error is to the refusal of the Court below to instruct the jury that, under the evidence, their verdict "must be for defendant." From a careful perusal of the testimony submitted to us, we

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think the Court was clearly right in refusing to so instruct the jury. The evidence, which was somewhat conflicting, was quite sufficient to carry the case to the jury on the questions of negligence and contributory negligence involved in the issue.

Nor was there any error in the refusal of the Court to charge, as further requested by the defendant below, viz: "There is no evidence in this case that the omission to erect the platform was the proximate cause of the injury." The facts upon which that question depended, were solely for the determination of the jury, and were properly submitted to them. In his fifth and sixth points, defendant below requested the learned Judge to charge as follows on the subject of proximate cause: "The burden is on the plaintiff to show a negligent act of the defendant which was the proximate cause of the injury, and failing to do so, the verdict should be for defendant;" and, "unless the omission to have a platform erected around the engine was the proximate cause of the injury, the plaintiff cannot recover." Both of these propositions were affirmed, and the jury must have found that the omission to have the platform erected around the engine was, in fact, the proximate cause of the injury. In view of the fact that there was abundant evidence of such omission on the part of defendant, it would have been error to withdraw the question from the jury. The sixth and seventh specifications are not sustained.

The subjects of complaint in the first and second specifications, respectively, are portions of the general charge. We fail to discover any error in either of these excerpts, especially when they are considered, as they should be, in connection with other parts of the general charge.

The learned Judge's answer to the points recited in the third and fourth specifications of error, when considered in connection with what he said on the same subject in the body of his charge, is substantially correct. As a general rule, it is true that an employé, who continues to use a machine which he knows to be dangerous, takes upon himself the risk of any accident that may result therefrom; but that principle has its qualifications, one of which is, that if the employé, in pursuance of the promise of his employer to remedy the defect, and the risk be not such as to threaten immediate danger, continue in his employment and be injured, without fault on his part, the employer may be liable. That exception to the general rule is recognized in several cases, among which is Patterson *v.* Railroad Co. (76 Pa. 394), in which it is said: "But when the servant in obedience to the requirement of the master incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution, the rule is different. In such case the master is liable for a resulting accident." The facts of the present case, we think, fairly bring it within that exception to the general rule.

The fifth specification of error is not sustained. The answer therein complained of is free from error. There appears to be nothing in the record that requires a reversal of the judgment.

Judgment affirmed.

Opinion by STERRETT, J. C. K. Z.

Jan. '89, 370. April 15, 1889.

Lehigh and Wilkes-Barre Coal Co. v. Hayes.

Negligence—Employer's responsibility for character of machinery—Evidence.

In an action to recover damages for a person's death, occasioned by the negligence of defendant in furnishing defective machinery, where the evidence does not disclose negligence on the part of the defendant, so far as the character of the machinery and its appliances is concerned, there is nothing upon which to support a verdict for the plaintiff.

Where no evidence is given to show that it was customary among coal operators to give warning that a draw of coal was to be made, the defendant, a coal operator, cannot be charged with negligence in not giving such warning to the employés in his works.

If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employé, it is all that can be required of the employer. He is not bound to furnish his workmen with the safest machinery, nor to provide the best method for its operation.

Error to the Common Pleas of Luzerne County.

Case, by James Hayes and Ann his wife, against The Lehigh and Wilkes-Barre Coal Company, to recover damages for the death of their son, James Hayes, Jr.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*, and in the following extract from the charge of WOODWARD, J.:—

"It seems that on the 7th of February, 1887, James Hayes, Jr., was working at the Stanton shaft, owned and operated by the Lehigh & Wilkes-Barre Coal Company. He was thirteen years old, and had worked in and about this breaker for two years. His ordinary employment there had been that of picking slate, but on the day of his death he was engaged with two other boys in what is known as the buckwheat coal-shute. His business was to shovel coal there to keep the telegraph courses clear of coal, and thus prevent the shute from blocking or choking up.

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Richard Williams testifies that he heard a shout or call from Hayes to look out, and then saw Hayes going down with the coal in the shute; that he ran to him and tried to hand him a shovel to help him out. He did not succeed. It appears that, at this time, the trap or slide at the bottom of the shute had been opened, and that the coal was being drawn from the shute into a car stationed on a railroad track at its foot. The boy having disappeared, the alarm was given, the drawing off of the coal was stopped, and all the men there went to work to rescue the boy, and after half an hour his body was found in the shute, where he had been smothered to death. It is not claimed that any warning, or notice, or signal was given to the boys who were shovelling coal in this shute that it was about to be drawn. It would seem from the evidence that Hayes had asked one of his companions to tell Mills, the boss, to have the shute drawn; but it does not appear that this message was communicated to Mills, or that anything was done in pursuance of it. Nor is it claimed or alleged in this case, that in this coal region at collieries where the mining of the coal is done substantially as it was done at the Stanton shaft, has it been usual or customary to have any appliance or arrangement for giving notice to the workmen employed, as these boys were, of the drawing of the shute. Mr. Williams, a very intelligent man, occupying the responsible position of inspector of mines of this district, states that in sixty-two openings in his jurisdiction, no such system of signalling or giving notice exists, to his knowledge, in any case. He states, however, that such an instrumentality or arrangement might be used at such collieries—that it would be practicable to employ it, and that several similar accidents to this one having occurred in his district, in one of which a human life was lost, he had advised the employers not to draw their shutes without giving some notice to the parties employed in this way, and that they had promised to act in accordance with his suggestion."

The defendant presented, *inter alia*, the following points:—

(2) That under the testimony in the case, machinery and appliances in use by the defendant were such as were in ordinary use, and they cannot be held responsible because they failed to use some other or different kind. *Answer.* The first proposition contained in this point we affirm. The conclusion or last proposition we decline to affirm. (First assignment of error.)

(3) That the defendant was not bound to use the newest, safest, or best machinery, or appliances, and he is not liable for negligence for not having a device for signalling before coal was drawn from the pockets. *Answer.* The first proposition contained in this point we affirm; the last proposition or conclusion we decline to affirm. (Second assignment of error.)

(4) The defendants under the evidence, were not bound to give notice by signalling or otherwise, to persons in the coal shutes before drawing coal, there being nothing to show that such was the usual or ordinary mode of conducting this business. *Answer.* This point we decline to affirm, and for further answer refer to our general charge. (Third assignment of error.)

(8) That upon the plaintiff's testimony it appears that the deceased sent out orders to have the coal drawn from the pocket just before the drawing took place, and therefore a want of notice to him that coal was to be drawn, was not negligence on the part of the company that will enable the plaintiff to recover in this action. *Answer.* We say to you, gentlemen, that that point assumes a fact which is not established in the case; namely, that the notice which the boy desired to send was ever communicated to the party to whom it was directed. We do not think that the facts in the case as shown by the evidence justify the point, and we decline to affirm it. (Fourth assignment of error.)

(5) That there is nothing in the evidence to show that the employment in which the deceased was engaged was unusually hazardous, or in any way more dangerous than such employment always had been, and that in accepting the employment he took the attendant necessary risks, and that therefore the plaintiff cannot recover in this action. *Answer.* We cannot affirm that point; because the testimony of the father is that the employment of his son was as a slate-picker. (Sixth assignment of error.)

(6) That under the evidence there is nothing to show that the defendants have been guilty of negligence resulting in the injury complained of, and therefore the plaintiff cannot recover. *Answer.* We decline to affirm that point, and refer to our general charge, in which we have said that it is a question for the jury. (Seventh assignment of error.)

(1) That under all the evidence, plaintiff is not entitled to recover in this action, and that the verdict must be for the defendant. *Answer.* We decline to affirm that point. (Eighth assignment of error.)

Verdict for plaintiffs for $1500, and judgment thereon; whereupon defendant took this writ assigning for error, *inter alia*, the answers of the Court to the above points.

Andrew H. McClintock and *Henry W. Palmer*, for plaintiff in error.

William S. McLean (*William R. Gibbons* with him), for defendants in error.

October 7, 1889. THE COURT. Upon the trial of this cause no evidence was given by the

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plaintiff to show that the defendant's breaker and the machinery used in crushing and screening coal was in any manner defectively built, or that it was not built in the same manner and with the same appliances as are used in all similar structures. The single act of negligence in this regard alleged against the defendant was that it had no appliance and used no means or method by which warning could be given to persons working in the pocket that a draw was about to be made. No evidence was given to show that it was customary among coal operators to give any such warning in the conduct of their collieries. It follows that there was no proof that the defendant neglected any of the precautions which were usually observed in carrying on the business of crushing, screening, and shipping coal. But the defendant did give testimony of importance upon this subject. G. M. Williams, the mine inspector for the district in which this colliery was situated, testified that there were sixty-two collieries or openings altogether in the district, and that this breaker with its shutes and pockets was constructed in the usual, ordinary way in which such breakers are constructed in that region. He also said he did not know that there was in use in any of the collieries of the district any signalling apparatus to indicate when coal is about to be drawn out of a shute to be lowered into a car.

Joseph Tyrell, another witness, whose business was building breakers, and who built this one, testified that the breaker was built in the usual way in which breakers are built in that region, and that he knew of no breaker in that region in which, prior to this accident, any apparatus or device was used to signal before coal was drawn from the shutes into cars. There was affirmative testimony therefore that this breaker was built in the usual way in which all breakers were built in that district, and that there was no custom or use, known to the witnesses, of having appliances of any kind to signal the drawing of coal from the shutes. Against this there was no opposing testimony whatever. The rule in regard to the obligation of the employer respecting the character of the tools and appliances furnished by him has been repeatedly stated in the recent decisions of this Court. Thus in P. & C. R. R. Co. *v.* Sentmeyer (92 Pa. 276), we said that when the employer furnishes his employés "with tools and appliances which though not the best possible, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents." In Payne *v.* Reese (100 Pa. 301), we said: "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character and such as can, with reasonable care, be used without danger to the employé, it is all that can be required from the employer; this is the limit of his responsibility and the sum total of his duty." In Allison Mnfg. Co. *v.* McCormick (118 Pa. 519), we said: "The general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis in order to settle by experiment what remote and possible hazard may be incurred by their use."

In Ship Building Works *v.* Nuttall (119 Pa. 149), we held that the employer was under no obligation to give warning to his employé of the dangerous character of a circular saw or to provide it with a spreader to prevent accidents. As to the spreader we said: "The testimony shows that such an attachment is not in general use, and that there is no general agreement among mill-owners or practical sawyers that it is a desirable or useful attachment. Is it not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test the saw of the defendant is such an one as the company had a right to use because it is such as is commonly used by mill-owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader."

Applying these principles to the facts of the present case we fail to discover any evidence of negligence on the part of the defendant so far as the character of the breaker and its appliances are concerned, and hence we can find nothing upon which to support a verdict for the plaintiff. It was argued that the defendant should have given a warning to the deceased that the coal was about to be drawn, but in view of the fact that the plaintiff gave evidence tending to show that the boy sent out word that they should draw the coal, he being at that time in the shute, the necessity for any such warning does not appear. It was a matter of no consequence so far as he was concerned whether his message was communicated to the parties outside or not. He at least was bound to avoid a danger which he must have had knowledge was likely to occur immediately. We think a verdict for the defendant should have been directed upon all the testimony. We sustain the first, second, third, seventh, and eighth assignments.

Judgment reversed.

Opinion by GREEN, J. H. S. P. N.

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July '88, 156. April 16, 1889.

Delaware, Lackawanna and Western R. R. Co. v. Jones.

Negligence—Contributory negligence—When a question for the jury—Damages for loss of wife where no particular pecuniary loss is shown.

Negligence is the absence of care according to the circumstances, and what constitutes such absence of care is a question for the jury, when the facts developed at the trial do not fall within a fixed standard, or show a case where the measure of duty has been defined by law.

In an action by a husband for damages for the death of his wife, where the evidence shows that the deceased had been a healthy, vigorous woman, it is not necessary that the plaintiff should show any particular pecuniary loss, but the jury is entitled to infer that she was an ordinarily useful wife, and to fix the damages accordingly.

Error to the Common Pleas of Luzerne County.

Case, by Edward Jones against the Delaware, Lackawanna and Western Railroad Company, to recover damages for the death of his wife, caused, as alleged, by the negligence of the defendant company.

The facts as they appeared at the trial, before Rice, P. J., were substantially as follows: On April 26, 1886, plaintiff's wife alighted from a train of defendant company at Grand Tunnel, the station for Nanticoke, to which latter place she was going. The station was on the west side of the track, and Nanticoke lies directly east of the station, separated from it by the Susquehanna River, over which there was a bridge. The public road, leading from Nanticoke to the station, crossed the track at about one hundred and eighty feet north of the northerly end of the platform. The ground between the station and bridge was open, and a short cut had been made by travellers in a diagonal line to the bridge, and this path seems to have been recognized by the defendant, as they had fashioned the platform and steps to meet it. On the morning in question, the train was delayed by reason of a hot box, and the deceased, who is described as having been a large, healthy woman of about sixty-six years of age, attempted to cross the track by this path, as others had done, and in doing so her dress was caught by the engine, which had started, and she was thrown down on the track and received severe injuries from which she subsequently died. A number of witnesses testified that no warning was given of the starting of the train, which was within a few feet of the path. Plaintiff showed that the deceased had been a healthy, vigorous woman before the accident.

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) The evidence of the plaintiff does not show that he suffered any pecuniary loss by the death of his wife, and therefore there is nothing in the case to warrant the jury in finding that the plaintiff suffered substantial damages or loss, and the verdict, if for the plaintiff, should be in a nominal sum. *Answer.* We answer that point in the negative. (First assignment of error.)

(3) That from the plaintiff's testimony it appears that the deceased crossed the track in the daytime, so near the front of the engine that her clothing was caught by the cow-catcher, or wheels, and that such an attempt no prudent person would make. She was therefore guilty of negligence which contributed to the accident, and the plaintiff cannot recover. *Answer.* This is answered in the negative. (Second assignment of error.)

(4) That the plaintiff's evidence shows that crossing at the point where the accident occurred was plainly dangerous, and therefore the deceased took upon herself the risks attending it, and the plaintiff is not entitled to recover. *Answer.* This is answered in the negative. (Third assignment of error.)

(5) That it appears from the plaintiff's evidence that the train from which the deceased alighted was bound north and the deceased knew it, that it stopped, and the stop was only at an intermediate station; the deceased was therefore guilty of negligence in crossing immediately in front of the engine, which might start at any moment, and the plaintiff cannot recover. *Answer.* We answer this point in the negative. Of course, in answering these points in the negative, we do not say that you are not to consider the evidence which is referred to in the points; we simply say that the facts are for your consideration, and it is not for the Court to declare, as matter of law, that these constitute contributory negligence. (Fourth assignment of error.)

(7) That under all the evidence the plaintiff cannot recover. *Answer.* We answer that point in the negative. (Fifth assignment of error.)

The Court left to the jury the questions of negligence and contributory negligence.

Verdict for plaintiff for $3000, and judgment thereon. Defendant took this writ, assigning for error the answers to the points as above noted.

Andrew H. McClintock and *Henry W. Palmer*, for plaintiff in error.

John S. Harding (*Garrick M. Harding* with him), for defendant in error.

October 7, 1889. The Court. This was clearly a case for the jury on the controlling questions of fact, whether the death of Mrs. Jones

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was the result of the railroad company's negligence, and if so, whether her own negligence contributed thereto. These and cognate questions of fact were fairly submitted to the jury in a clear and impartial charge, in which the principles of law applicable to every feature of the case are accurately stated. The jury as the evidence fully warranted them in doing, found in favor of the plaintiff below, and against the defendant company. It follows that the learned Judge was right in refusing to charge as requested by the company defendant below, that "under all the evidence the plaintiff cannot recover," and also in refusing to affirm its 3d, 4th, and 5th points, wherein he was in substance requested to withdraw the case from the jury on the ground that the deceased was guilty of contributory negligence. In answering those points in the negative he very properly added; "Of course we do not say that you are not to consider the evidence which is referred to in the points; we simply say that the facts are for your consideration, and it is not for the Court to declare as matter of law, that these constitute contributory negligence." It would be well if all trial Judges were thus careful not to usurp the province of the jury, and undertake to pass upon questions of fact. Negligence is the absence of care according to the circumstances; and what constitutes negligence when the standard shifts not according to any certain rule, depends upon the facts and circumstances developed at the trial, and cannot be determined by the Court, but must be submitted to the jury (Turnpike Co. *v.* Railroad Co., 54 Pa. 345; Railroad Co. *v.* Stinger, 78 Id. 219; Penna. R. R. Co. *v.* Coon, 111 Id. 430; Schum *v* Penna. R. R. Co., 107 Id. 8; Taylor *v.* Railroad Co., 113 Id. 162; Lee *v.* Woolsey, 109 Id. 124; Longenecker *v.* Penna. R. R. Co., 105 Id. 329; Neslie *v.* Passenger R'y Co., 113 Id. 300). There is a constant tendency to ignore the time honored rule recognized in these and many of the earlier cases.

When the facts of a case are admitted or undisputed, it is of course the duty of the Court to pronounce the law arising thereon. The 2d to 6th specifications inclusive, are not sustained.

The first and only remaining specification presents a different question. The subject of complaint is the refusal of the learned Judge to affirm the following point submitted by defendant below: "The evidence of plaintiff does not show that he suffered any pecuniary loss by the death of his wife, and therefore there is nothing in the case to warrant the jury in finding that plaintiff suffered substantial damages or loss, and the verdict, if for the plaintiff, should be in a nominal sum."

Evidence was introduced by plaintiff below to prove that the deceased, Mrs. Jones, was his wife, that she was sixty-six years of age, and had always been a healthy woman, etc., presuming that in the absence of any rebutting evidence the jury might, and doubtless would, infer that she was an ordinarily industrious and useful wife, capable of discharging properly the duties of her position, and consequently her death was a pecuniary loss to him. Plaintiff below did not undertake to prove that she possessed any specially, or exceptionally good qualities, as with propriety he might have done if the subject of his loss had been a horse or other animal. Nor was it either necessary or proper that he should do so. The Court was clearly right in refusing to charge as requested.

Judgment affirmed.

Opinion by STERRETT, J. W. M. S., JR.

May '88, 42, 43. June 6, 1889.

Baltimore and Cumberland Valley Railroad Extension Company v. Duke. Same v. Seiple et ux.

Railroad companies—Liability of, on erecting embankment in street—Defence to, compliance with a borough ordinance—Amendments—Statute of Limitations—Practice as to—Acts of November 27, 1713, *April* 17, 1866, *and November* 4, 1852.

In an action by a property owner against a railroad company for damages caused by the erection of an embankment in the street upon which plaintiff's property abutted, when there is no evidence that the grade of the said street had been fixed by a borough ordinance, it is no defence to show that the railroad company in occupying said street had been compelled by the borough council to conform to a certain grade; that the road, as constructed, conformed to such grade; that the borough had the power to fix the grades of its streets, and that the road in front of plaintiff's property had been constructed under the direction and supervision of a committee of the borough council.

The Act of April 17, 1866 (P. L. 106), limiting the time in which actions may be brought against railroad companies for damages, for right of way, etc., having been abrogated by the Constitution of 1874, § 21, article 3, and the Act of November 27, 1713 (1 Sm. 76), having no application to a proceeding for the assessment of damages occasioned by the construction of a railroad, it is not error in such a proceeding, begun by mistake in the name of the husband, to allow an amendment five years after the proceedings were begun, making the wife the party plaintiff, such amendment being authorized by the Act of November 4, 1852 (P. L. 574), and not introducing a new cause of action, or depriving the company of a meritorious defence or substantial right.

The question whether a claim is barred by a Statute of Limitations applicable to it, is ordinarily for the jury, upon the evidence and under instructions from the Court, and, therefore, when the sole objection to a proposed amendment is that it will deprive the oppo-

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site party of a defence, under the Statute of Limitations, it is proper practice to allow the amendment, and leave the party to a prayer for instructions as to its effect upon his rights under the statute when the evidence is closed.

Writs of error to the Common Pleas of Franklin County.

These were, in the Court below, appeals taken by the Baltimore and Cumberland Valley Railroad Extension Company from the report of viewers appointed to assess damages alleged to have been occasioned by the construction of a railroad by said company. The viewers had awarded to Benjamin Duke $495, and to Adam Seiple $250.

At the trial of the case wherein Duke was the plaintiff, it appeared that the damages complained of had been caused by the construction of the said railroad at grade throughout Water Street, in the borough of Chambersburg, and in front of plaintiff's property, making an embankment there, by reason of which his property was lessened in value.

The defendant made the following offer of evidence:—

"Defendant's counsel proposes to show that the town council of the borough of Chambersburg established the grade of Water Street, prior to the location of the railroad upon Water Street, and that they required the railroad company to conform to that grade in the construction of its road; and that in conformity to that grade the railroad track was laid.

"Defendant's counsel offer in evidence the minute book of the proceedings of the town council of the borough of Chambersburg, and especially minute of the meeting of September 23, 1880, in which the town council ordained and granted 'unto the Baltimore and Cumberland Valley Railroad Extension Company the right of way, liberty, and privilege to construct and operate its railroad from the southern terminus of Water Street in the said borough, through, over, upon, and along the said street northward to the northern terminus of said street; provided, that the said company in constructing its said railroad, sidings, and switches, shall, in its cuttings and fillings in and upon said Water Street conform to the grade shown by the profile hereto attached and made part of this ordinance.' To be followed with evidence of a contract to that effect entered into between the borough and the company, in conformity with this ordinance and resolution of council, dated September 27, 1880; and further, to be followed by proof that the railroad constructed its road throughout Water Street in strict conformity to the grade thus established and given by this ordinance to it, and that the grade of the said railroad on the embankment opposite the property of the plaintiff in this case is fixed at that grade thus established by the town council.

"For the purpose of showing that the railroad was thus constructed at grade throughout Water Street, and that therefore the plaintiff is not entitled to any damages under the proceedings in this case."

Objected to, (1) because the evidence does not tend to show in any way that the borough established any grade for Water Street; and (2) because it is irrelevant and immaterial.

"This to be followed by the Acts of incorporation and supplements thereto of the borough of Chambersburg, as fully authorized to ordain and fix the width and grade of streets; and further, that the work on Water Street opposite the property of the plaintiff in this case was done under the direction and supervision of a committee of the town council."

THE COURT. "The offer here is not to show that prior to the year 1874, when the new Constitution was adopted, or at any time prior to December, 1880, the grade of Water Street had been fixed by the town council; but it is to show that in December, 1880, when this railroad was projected, the town council granted a right of way to the railroad on Water Street, upon condition that they would conform to a certain grade in the making of their railroad. The town council, if they themselves had passed a resolution fixing the grade of the street, and had undertaken to raise the street to that grade, would have been bound to answer to the property-holders for the damages. The town council did not do that. They granted liberty to the railroad company to do it; and the railroad company, having done it, must themselves answer for damages, if there be any, to the property-holders, and not the town council. The objection is sustained; the evidence is rejected." Exception.

Verdict for Duke for $450, and judgment thereon; whereupon defendant took this writ, assigning for error the rejection of the above evidence.

At the trial of the case wherein Adam Seiple was plaintiff, the plaintiff stating that the suit had been brought in the name of Adam Seiple, whereas it appeared that the title to the property was in his wife's name, made the following motion:—

"And now to wit, May 3, 1888, plaintiff's counsel move to amend the record in the case so that the party plaintiff shall be Adam Seiple, and Barbara his wife, in right of said Barbara."

Objected to "that it is a proposition to substitute a new party to the record, after the limitation has expired for any proceedings by a new party; that the railroad company defendant was incorporated June 25, 1880, and commenced the location and construction of its road that fall and

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winter, and finished the road and commenced the operation of it on the 5th of September, 1881, with its cars. The Act of April 17, 1866, provides that 'no suit or action shall be brought against any railroad company incorporated by the laws of this Commonwealth for damages for right of way, or use and occupation of any land by said company for the use of their railroad, unless such suit or action shall be commenced within five years after the said lands shall have been entered upon for the purpose of constructing said road, and within three years after said road shall be in operation: *Provided*, That any person who would be sooner barred by this Act shall not be thereby barred after two years from the date hereof.'"

THE COURT. Did you say that the amendment is to place the title in the wife?

Mr. Stewart. We find that the legal title to the property is not in Adam Seiple, but in Barbara Seiple his wife.

THE COURT. Do you claim that the equitable title is in Adam Seiple?

Mr. Stewart. We claim that the equitable title is in Adam Seiple. His money bought the property: and, so far as creditors are concerned, it is his property.

Plaintiff's counsel offered the original petition of Adam Seiple for the appointment of viewers in this case with the order of Court thereon—petition filed May 15, 1883, and setting forth that Adam Seiple, the petitioner, is the owner of the lot of ground about which we are now inquiring.

THE COURT. "I think the objection must be overruled, and that the amendment must be allowed.

"First. In the petition for the appointment of viewers to assess the damages of Adam Seiple, he is represented as the owner of the premises, and asked damages for the whole injury thereto, and did not set forth his title as husband and tenant by curtesy. The proceedings therefore were for the assessment of damages in gross for the whole injury, as if the exclusive title and ownership were in Adam Seiple. Now, if there were no question of the Statute of Limitations barring the right of Barbara Seiple his wife, I think this amendment ought to be allowed, because it is not changing the cause of action, but it is simply adding the name of an additional party in interest. The husband had an interest in the land as tenant by curtesy *in quo hac*, and was the proper petitioner; and it is a case therefore of amending the record by adding another joint party.

"With respect to the Statute of Limitations the Act of 1713, called the Statute of Limitations commonly, does not apply, as decided in the case of the Delaware Railroad Company *v.* Burson (11 P. F. Smith, 369); but I incline to think that the statute of 1866 limiting actions against railroad companies for land damages, is applicable in a case of this kind. I incline to think therefore that Barbara Seiple would be precluded from bringing an action or instituting any proceedings for the recovery of damages now after the lapse of seven years from the building of the road. But whether that be so or not, if the proceeding on the part of the husband was for the whole damage, and the wife's name was omitted by mistake, the fact that she would be barred by the Statute of Limitations in bringing a new action, is not conclusive of the Court's right to allow an amendment to the record. I think the purposes of justice require it. I think the omission of the wife was by mistake, and that it is not introducing a new cause of action to simply amend the record by adding the name of the party. The amendment is allowed." Exception.

The defendant at the trial made the same offer of evidence as in the preceding case. The offer was objected to, the objection sustained, and the evidence rejected. Exception.

Verdict for plaintiff for $225 and judgment thereon. Whereupon the defendant took this writ assigning as error the allowance of the above amendment and the rejection of the said offer of evidence.

The cases were argued together in the Supreme Court.

F. M. Kimmell, *Thad. M. Mahon*, and *David Wills*, for the plaintiff in error.

Rowe & Stewart and *O. C. Bowers*, for the defendants in error.

RAILROAD EXTENSION CO. *v.* DUKE.

October 7, 1889. THE COURT. The offer of the ordinance of September 23, 1880, was properly rejected. It was not relevant or material to the issue made by the pleadings. It was alleged by the plaintiff that the railroad company in constructing its road upon Water Street, in the borough of Chambersburg, made embankments in the street in front of his lots, by reason of which he sustained damage, and this allegation was denied by the company. The ordinance did not fix the grade of Water Street, nor attempt to do so. It merely granted to the railroad company the right to use the street for its road, provided it conformed to a certain grade. It was the grade of the railroad to which the proviso referred. In this case the grade of the railroad did not conform to the *actual* grade of the street. We need not discuss the question of the liability of a railroad company for damages where it locates its road in conformity with the paper grade of a street, before an actual change of grade is effected by the city or borough authorities. It will be time enough to consider this question when it fairly arises.

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We think the reasons given by the learned Judge for excluding the evidence are a sufficient vindication of his ruling.

The judgment is affirmed.

RAILROAD EXTENSION CO. *v.* SEIPLE.

October 7, 1889. THE COURT. It is not necessary to inquire whether the Act of April 17, 1866 (P. L. 106), was broad enough to include this litigation, as that Act was abrogated by section 21, Article III., of the Constitution of 1874. (*In re* Grape Street, 103 Pa. 121.) As the Statute of Limitations of November 27, 1713, has no application to a proceeding for the assessment of damages occasioned by the construction of a railroad, it follows that Mrs. Seiple's right of action against the railroad company was not barred when the amendment was allowed. (D., L. & W. R. R. Co. *v.* Burson, 61 Pa. St. 369; Hannum *v.* Borough of West Chester, 63 Id. St. 475.) The objection to the amendment rested upon a supposed bar of Mrs. Seiple's right by the Act of April 17, 1866, and it was not well taken. The amendment was properly allowed. It was authorized by the Act of November 4, 1852 (P. L. 574), and did not introduce a new cause of action or deprive the company of a meritorious defence or substantial right. We may add that the question whether a claim is barred by a Statute of Limitations applicable to it is ordinarily for the jury upon the evidence and under instructions from the Court. If the Act of 1866 was in force and included this cause of action, it would be for the jury to ascertain from evidence when the entry for construction was made, and when the road was in operation. These questions are not for the Court on a motion to amend. When the sole objection to a proposed amendment is that it will deprive the opposite party of a defence under the Statute of Limitations, it is proper practice to allow the amendment, and leave the party to a prayer for instructions as to its effect upon his rights under the Statute of Limitations when the evidence is closed. (Kaul *v.* Lawrence, 73 Pa. 410.)

For the reasons briefly stated in Railroad Co. *v.* Duke, just decided, no error was committed by the Court in rejecting the offer of the borough ordinance of September 23, 1880.

Judgment affirmed.

Opinions by McCOLLUM, J. C. K. Z.

Jan. '89, 301. May 9, 1889.

Stoddard to use, etc. v. Emery.

Covenants—Parol modifications of—Remedy for breach of—Implied covenants—Exclusion of by express covenants—Breach of implied covenants—Who may sue upon.

When a parol agreement changing or adding to a previously executed sealed contract is subsequently made, the whole becomes parol, and the remedy for a breach thereof is assumpsit and not covenant.

The insertion in an instrument of an express covenant as to any matter excludes the existence of any implied covenant touching such matter.

A. made an oil lease to B. By the terms of the lease B. covenanted to dig one well at once, and if it proved a paying one to sink another, no special time being mentioned for doing so. B. dug the first well, and subsequently, prior to the sinking of the second, A. sold the land and his interest in the lease to C. In an action of covenant by A. to use of C. against B, on the ground of unreasonable delay in sinking the second well, and a failure to dig any further ones, the plaintiff offered to prove a statement made by B. at the time of the execution of the lease to the effect that he would sink a sufficient number of wells to take out the oil in the land, and also the custom as to the number of wells per acre usually dug in such a business:

Held, that such evidence was not admissible to overrule the express terms of the lease, and that there was no implied covenant in the lease to sink more than the two wells stipulated:

Held, also, that were such parol agreement proved, an action of covenant would not lie for the breach thereof.

It appeared in the above case that there was no breach of the lease prior to the sale by A. to C.:

Held, therefore, that there was no right of action in A., and that C. could only recover for breaches occurring subsequent to the sale in an action brought in his own name.

Error to the Common Pleas of McKean County.

Covenant, by Truman M. Stoddard, to the use of Heman Janes, against L. Emery, Jr.

On the trial, before MORRISON, J., the following facts appeared: In 1876, L. Emery, Jr. leased from Truman M. Stoddard and wife a tract of land owned by them, for oil purposes, the lessors reserving the agricultural right to the land. The covenants contained in the lease relevant to this case were as follows, viz:—

That "Lewis Emery, Jr., should deliver to Truman Stoddard one-eighth of the oil. That Lewis Emery, Jr., should commence operations for mining purposes within ten days from the execution of the lease, that he should complete a well within four months from the date of said lease, and if not finished, he should pay fifty cents a day for each day of delay after the expiration of the four months, and if a well is not completed within eight months, then the lease to be void and end. A second well to be drilled upon the farm, if the first well is large enough to justify it."

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Emery went into possession, and in the same year caused a well to be drilled upon the farm, which proved to be a good producing oil well. On January 7, 1878, Stoddard and wife contracted to sell the said land and their interest in the said lease to Heman Janes, and on April 6, 1878, in compliance with said agreement, they conveyed the land and all of their interest in the same to the said Janes, and delivered possession thereof to him. Subsequently the defendant, Emery, drilled a second well upon the land. This action was brought upon the lease by Janes in the name of Stoddard to his use, for a breach of the contract of said lease, in that Emery, the defendant, had unreasonably delayed the sinking the second well, and did not drill more wells than the two above set forth, and for the damages sustained by reason of the non-performance of the said contract.

Stoddard testified, *inter alia*, as follows: Q. What did Mr. Emery say that he would do, or how he would operate this land if you would give him a lease of it? A. I wouldn't be able to state the whole conversation that was given while we were there. Mr. Emery told me if I would give him the lease, he would go on and operate it, and that he would put down wells to offset the wells that were down; put down wells to protect the lines. Q. Were there any wells down then? A. The one on the Tibbits farm was down then. Q. What did he say, that he would go on and operate and drill the wells so as to take out the oil? A. He said he would go on and develop the land, as I recollect it. Q. Did he say anything about putting down a sufficient number of wells to take out the oil? A. I don't recollect that he said that. He said that he would go and put down wells to protect the lines, to offset other wells that would be drilled. Q. To offset the wells that would be drilled on adjoining lands? A. Yes, sir. Q. What was done then as to drawing up a lease? A. The lease was drawn up after that conversation. Q. At the same time? A. Yes, sir.

Plaintiff also offered to prove the custom in the business as to the time when the second well should have been drilled, to be followed by evidence that wells drilled upon contiguous tracts of land by defendant and others resulted in withdrawing the oil from the plaintiff's land, whereby he lost his share of the same by the omission of the defendant to perform his covenants. The Court refused to admit this evidence, except for the purpose of showing an unreasonable delay in putting down the second well, between the date of the lease and January 7, 1878, holding that the drilling of the two wells was a compliance on the part of the defendant with his contract. (First and second assignments of error.)

The plaintiff offered to prove, that "there should have been drilled on this lease, at intervals of time of not more than four months apart, on the outer lines of the lot, a well to each five acres of the land, so that the lessee could have had the income contemplated by the contract; and in order to comply with the usages of the business, and to draw out the oil for the use of the lessor for his share, and to save it from being taken out through wells drilled on contiguous land; this obligation being on the lessee by reason of the implied covenants in the lease to operate the farm in the usual manner." Objected to. Objection sustained. (Third assignment of error.)

The Court charged the jury, *inter alia*, as follows: "They have sworn one witness on the question, but haven't made out any covenant, we think, under the law, which was left out of the lease, sufficient to recover upon it, and if they have, under our view of the law, they have shown no damage to Mr. Stoddard, the legal plaintiff, up to the time he parted with his title, on the 7th of January, 1878. And, as we understand the law, the damages sustained after that, if there was any sustained, cannot be recovered in this action. We have so ruled in the case, and we ruled it because that is our understanding of the law. We may be in error, and if we are, the Supreme Court will correct us, and the case can be tried hereafter in accordance with their view of it. The record is in such shape that if the plaintiff has been wronged by this ruling, he can remedy it. But it leaves nothing for the jury to do but to bring in a verdict for the defendant, there being no evidence, as we understand it, of any damages sustained by Stoddard, by reason of the breach of the covenants of this lease before he parted with his title to the land." (Fourth assignment of error.)

Verdict for the defendant and judgment thereon. Whereupon the plaintiff took this writ, assigning for error the rejection of the offers of evidence, the ruling of the Court that the lessee had complied with the covenants of his lease, and the portion of the charge above cited.

Byron D. Hamlin (*W. B. Chapman* and *John B. Chapman* with him), for plaintiff in error.

This action is brought on the implied covenants of the lease, that the land should be worked in a workman-like manner, in accordance with the custom of the business.

1 Saunders's Pl. & Ev., p. 853.
Watson *v.* O'Hern, 6 Watts, 362.
Lyon *v.* Miller, 24 Pa. 392.
Kash's Appeal, 93 Id. 434.
Penn. Iron Co. *v.* Diller, 113 Id. 635.

Neglecting so to work the lease was a waste, for which the lessee was liable.

Taylor's Landlord and Tenant, §§ 688–9.
Billmeyer *v.* Wagner, 91 Pa. 92.
McGrew *v.* Stone, 53 Id. 436.
Scott *v.* Hunter, 46 Id. 192.
3 Parson on Contracts, 179.

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2 Sharswood & Budd's Leading Cases, 90.
1 Addison on Torts, § 321.

Covenants running with the land are the subjects of a suit by an assignee.

Dailey v. Beck, 4 Clark, 58.
Fisher v. Lewis, 1 Id. 431.
McClure v. Gamble, 27 Pa. 290.
Peters v. Bowman, 98 U. S. 59.
Funk v. Voneida, 11 S. & R. 114.
Mine Hill R. R. v. Lippincott, 86 Pa. 468.

G. L. Roberts and *M. F. Elliott* (*J. W. Lee*, *D. H. Jack*, and *F. W. Hastings* with them), for defendant in error.

The law will not raise an implied covenant where there is an express one, and the latter may restrain and qualify the former if of the same nature.

Jackson & Gross, L. & T. p. 487, 520.
Taylor's Landlord and Tenant, 6th ed., p. 195.
Christine v. Whitehill, 16 S. & R. 98.

If there be any implied covenant, the action should have been brought in the assignee's name.

Jackson & Gross, on L. & T. p. 489.
Spencer's Case, 1 Sm. L. C. *115.

Had the plaintiff succeeded in proving the parol covenant which he alleged was omitted from the written instrument, the result would have been the establishment of a parol agreement on which the action of covenant would not lie.

Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 429.
McManus & Henry v. Cassidy, 66 Id. 260.
Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646.
Ward v. Vance, 93 Pa. 499.

There was no proof of damage prior to the assignment, therefore the assignee was the only proper party to bring this suit.

Jackson & Gross, L. & T. p. 524.
Wallace v. Harmstad, 44 Pa. 492.
Henwood v. Cheeseman 3 S. & R. 499.
Spencer v. Phillips, 91 Pa. 60.

October 7, 1889. THE COURT. There was no evidence to sustain the allegation of an omitted parol agreement left out of the written lease by fraud or mistake, and if there had been it is at least very doubtful whether any recovery could be had upon such an agreement or stipulation in an action of covenant. It is perfectly well settled that when a parol agreement changing or adding to a previously executed sealed contract is subsequently made, the whole becomes parol, and the remedy is assumpsit, and not covenant. Vicary v. Moore (2 Watts, 451), and a number of cases which have followed it are examples of this kind.

The proposition that there was an implied covenant to bore wells every four months, or as often as it was customary to put down additional wells, in the absence of any express contract is altogether untenable. The parties provided by the express terms of their contract how many wells should be put down, and that provision of the contract determines the question. When the number is expressed there is no room for any implication that there should be some other number. Had there been nothing said in the contract on the subject there would of course have arisen an implication that the property should be developed reasonably, and evidence of a custom of reasonable development by boring a given number of wells in a certain space of time would have been competent, and perhaps controlling. But that doctrine has no application in a case when the parties have expressly agreed in the contract how many wells shall be bored.

We agree with the learned Court below that there was no breach of the lease prior to the sale of the reversion by Stoddard in January 1878, and that being so there was no right of action by Stoddard. If there were any breaches after the purchase of Janes, there would be no right of action in Stoddard, and there could be no recovery in an action brought in his name. The second proposition discussed by counsel for plaintiff in error is of no relevancy because the only kind of breaches for which recovery is there claimed is breaches of implied covenants occurring before the sale. But we have already held there were no such implied covenants, and hence there could be no recovery for an alleged breach of them.

Judgment affirmed.

Opinion by GREEN, J. S. H. T.

Jan. '89, 341, 261. May 24, 1889.

In re Opening of First Street.
County of Lancaster v. Frey.
County of Lancaster v. Kendig.

Damages for opening streets—Acts of May 3, 1850, *April* 13, 1854, *and April* 18, 1873, *relating to the opening of streets in Lancaster City—Construction of.*

The Courts have power to correct a clerical error in an Act of Assembly, when, as it appears on the statute book, it involves a manifest absurdity and the error is plain and obvious.

The Act of April 13, 1873 (P. L. 811), which prescribes the method of opening and laying out streets in the city of Lancaster, declares that damages shall be paid in the manner directed by existing laws. The existing law in regard to damages is the Act of April 13, 1854 (P. L. 352), by the second section of which all sums awarded for damages are to be paid out of the county treasury, except damages for the removal or injury to buildings, which are to be separately assessed and paid out of the city treasury. The third section of this Act provides as follows: "That the commissioners of Lancaster County shall open an account with the city of Lancaster, showing the amount contributed by said city within the past two years, towards opening roads and erecting and repairing bridges in said county, and the amount drawn from the county

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treasury within the same period for opening streets or alleys in said city, to which account shall be charged or credited, from time to time hereafter, the sums contributed or received by said city for said purposes, and any damages that may be incurred by the opening and extending of streets and alleys, while the balance on said account is against the city, shall be payable out of the treasury of said *county*, and be reimbursable out of the county treasury only when the balance shall be in favor of said city, and to the extent of such balance:"

***Held*, (1) that the word "county" in italics, as quoted in section 3 above, is manifestly a clerical mistake for "city;" to say that damages should be paid out of the county treasury, and be reimbursable out of the county treasury, involves an absurdity, and the Court, undoubtedly, has power to correct such a mistake.**

(2) Under the second section of the Act of 1854, the primary oligation to pay damages (except for injury to buildings) rests upon the county, and the property owner has a right to proceed against the county to recover the damages awarded him by viewers, and the county can, afterwards, in a proper case resort to the city; it would be clearly improper to make the property holder first discover how the accounts between the city and county stood before he could proceed to recover the damages awarded him.

Writs of certiorari to the Quarter Sessions of Lancaster County.

Rules, by Jacob L. Frey and Wm. E. Kendig upon the commissioners of Lancaster County, to show cause why the county should not be compelled to pay them the damages awarded them for land taken in the opening of First Street in Lancaster City.

The petition of Frey set out that the viewers had awarded him $750, to be paid by the county, and that no appeal had been taken from that assessment; that he had demanded payment of said damages from the county commissioners, and they had refused to pay the same. He therefore prayed for a writ commanding the said commissioners to pay him said sum and interest. The petition of Kendig was practically in the same form.

The answer of the commissioners represented that the writs should not issue for the following reasons:—

"That the viewers appointed by the Court of Quarter Sessions of Lancaster County, to assess the damages caused by the opening and laying out of First Street, in Lancaster City, were ordered and had power only 'to assess and report the damages, if any, done to persons owning land on both sides of said street;' and 'where there are buildings on the land they are called upon to view, to assess the damages to the land and the damages to the building separately, and return in their report to the Court the damages done to each specifically and separately.'

"That the said viewers had no power or authority under the law, the rules of Court, or the directions of the order issued to them to inquire or report as to who was to pay the damages found by them to have been caused, and that so much of their report as orders the payment of any damages by the county of Lancaster was in excess of their authority, and was surplusage and void.

"That the confirmation of the report of said viewers by the Court of Quarter Sessions of Lancaster County was only of so much of their report as they had authority to make, and is conclusive only as to the amount of damages to be paid, and is in no sense a judgment of the Court as to who is liable for the payment.

"That your Honors have never determined who is liable to pay the said Jacob L. Frey the damages suffered by him, and that this question is now for the first time brought before the Court.

"That at the time the land of Jacob L. Frey was taken, and the said damages assessed, the county of Lancaster was under the law liable for the payment of damages for land taken for streets in Lancaster, only when the balance in the account provided for in the third section of the Act of April 13, 1854, was in favor of the city of Lancaster, and to the extent of such balance; and that otherwise, the city of Lancaster was liable for such damages.

"That the city of Lancaster knew and recognized this to be the law, as is evidenced by the fact that during a period of eighteen years, or thereabout, when the balance in said account was in favor of said city, the city regularly demanded settlement with the county, and was paid large sums of money by the county.

"That at the time the damages aforesaid were assessed, and ever since then, the state of the accounts provided for in the third section of the Act of April 13, 1854, was such that the balance has been against the city of Lancaster, and that the said balance at this time against the city of Lancaster and in favor of the county of Lancaster exceeds the sum of $100,000."

The Acts of Assembly referred to in the answers of the commissioners are set out in the opinion of the Supreme Court, *infra*.

The Court, PATTERSON, J., entered an order directing the county commissioners to pay to Frey and Kendig the amounts claimed by them.

The county of Lancaster thereupon took these writs, assigning for error, *inter alia*, the following:—

(1) The Court erred in not deciding that the 118th word in the third section of the Act of April 13, 1854 (P. L. 352), is a clerical error, and should be read "city" instead of "county."

(2) The Court erred in not deciding that the county of Lancaster is not liable for the payment of land damages in the city of Lancaster, when the balance of the account required to be kept by the third section of the Act of April 13, 1854, is against the city of Lancaster.

(3) The Court erred in not deciding that "any damages that may be incurred by the opening and extending of streets and alleys, while the

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balance of said account is against the city, shall be payable out of the treasury of said city" in the first instance.

William F. Beyer and *A. F. Hostetter* (with them *George A. Lane*, county solicitor), for appellant.

George Nauman, for Frey, appellee.

Murriott Brosius, for Kendig, appellee.

COUNTY OF LANCASTER *v.* FREY.

October 7, 1889. THE COURT. The question in this case turns upon the true and proper construction of the Act of April 13, 1854 (P. L. 352), entitled "An Act relative to the opening of streets in the city of Lancaster."

Prior to the year 1850 the city of Lancaster would seem to have been subject to the provisions of the general road law of the State, and damages arising from the opening of streets therein were payable out of the county treasury. By the 8th section of the Act of May 8, 1850 (P. L. 751), however, it was provided:—

"That no damages whatsoever, which shall hereafter occur to any person by reason of laying out any road, street, alley, or way in the city or any of the boroughs of the county of Lancaster shall be paid out of the county treasury, but the same shall be paid by such city or borough, or by the persons whose property is benefited by the opening of such streets, roads, alleys, or ways." This Act remained in force until April 13, 1854, the date of the passage of the first above mentioned, when the 8th section of the Act of May 8, 1850, was expressly repealed, and from thenceforth damages for the opening of streets have been assessed and paid under the provisions of the Act of 1854. By the Act of April 18, 1873 (P. L. 811), provision is made for the manner of laying out, opening, and grading of the streets in the city of Lancaster, but as it is provided therein that the damages accruing to the property owners "shall be paid by the said city of Lancaster and the county of Lancaster in the manner and in the proportions directed by existing laws," the rule regulating the extent of the liability of each is not thereby changed.

It is conceded that, by force of the second section of the Act of 1854, all sums awarded for damages for the opening of streets in the city of Lancaster are to be paid out of the county treasury, with the exception of such damages as may accrue from the removal of or injury to "any house, out-house, stable, or other building," which are to be separately assessed and paid out of the city treasury. The second section as thus construed is a complete adjustment of the rule of responsibility attaching to the city and the county, for the opening of streets within the city. The third section is not a part of the second, but is built upon it; the proceedings are by the express terms of the Act, "under the general road laws of the Commonwealth," and it is provided that the damages, except those for the removal of or injury to any house, etc., shall be paid after being confirmed out of the county treasury. In the third section it is assumed that under the second the county will expend county funds in payment of damages as therein provided, and the policy of the third section is that the city shall not thus withdraw from the county funds more than she contributes to it, that is to say, the city is responsible to the county that the amount thus expended in its behalf shall not exceed the amount contributed by the city to the county funds, for opening roads, etc. It is therefore provided:—

"That the commissioners of Lancaster County shall open an account with the city of Lancaster, showing the amount contributed by said city, within the past two years, towards opening roads and erecting and repairing bridges in said county, and the amount drawn from the county treasury, within the same period, for opening streets or alleys in said city; to which amount shall be charged or credited, from time to time hereafter, the sums contributed or received by said city for said purposes; and any damages that may be incurred by the opening and extending of streets and alleys, while the balance on said amount is against the city, shall be payable out of the treasury of said county, and be reimbursable out of the county treasury, only when the balance shall be in favor of said city, and to the extent of such balance."

It is perfectly manifest that the word "county," the one hundred and eighteenth word in the third section, is a mere clerical error in the transcribing of the Act. That the damages should be paid out of the treasury of the county and be reimbursable out of the county treasury, etc., is a manifest misuse of words; no such thing could have been in the mind of the Legislature, for the proposition involves an absurdity. The obvious meaning and purpose of the Act is plain from the context; it needs no argument to show that the word "county" was mistakingly written for "city;" it is a mistake apparent on the face of the Act, which may be rectified by the context. In making this correction we are not to be understood as correcting the Act of the Legislature. We are enabled to carry out the intention of the Legislature from the plain and obvious meaning of the context, in which the real purpose or intention of the Legislature is manifest. It falls within the province of the Courts to correct a merely clerical error, even in an Act of Assembly, when as it is written it involves a manifest absurdity, and the error is plain and obvious. The cases in which this power has been exercised are collected in Endlich on the Interpretation of Statutes, section 319, and it is unnecessary to refer to them in detail. The power is undoubted, but it can only be exercised when the error is so manifest, upon an inspection of the Act, as to pre-

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clude all manner of doubt, and when the correction will relieve the sense of the statute from an actual absurdity, and carry out the clear purpose of the Legislature. There can be no doubt upon an inspection of this statute that the word "county," already referred to, should read "city;" the section is senseless and absurd as it is written, whilst the purpose of the Legislature is perfectly obvious and certain, that the ultimate obligation was intended in the event stated to rest on the city. It is certainly true that the enrolment of an Act of Assembly in the office of the secretary of the Commonwealth after its passage, and after it has received the approval of the governor, is the highest evidence of its authenticity as a law, and to this rule we firmly adhere; but it is not unworthy of mention that in the original bill as it passed the Senate and House of Representatives it has been shown that the one hundred and eighteenth word of the third section was in fact "city" instead of "county," and the statute, after its passage, was so published in the newspapers of Lancaster County. We mention this fact, not because it has any legal significance whatever, but because it is part of the admitted history of the case.

But this obligation of the city was to the county, upon which, by the second section, the primary obligation to pay was imposed. By that section it is expressly provided that after the damages have been assessed, the said amount shall be paid, after being confirmed by the Court, out of the county treasury; this is followed by the provision that if any house or building shall be removed a separate estimate or assessment shall be made, and that amount, after confirmation shall be paid out of the city treasury. If the county were to be primarily liable to the property holder when the balance of the account was against the county, and the city when the balance was against the city, the property holder, having no control over or even knowledge of, the condition of the account or of the existing liabilities of the county or city respectively, would, or might be, subjected to the greatest uncertainty as to the party against which he might proceed; for whilst he was in an appropriate proceeding at law endeavoring to adjust his claim against one, the balance on his account might be found, upon the result of proceedings already pending in other cases, to have been against the other. Not only so, but the property holder would be held in each case to establish the correctness of an account, over which he had no control and as to which he could have no means of proof. Certainly no such thing was in the mind of the Legislature; the proceedings were under the general road laws of the Commonwealth and the damages, with the exception stated in the proviso, were, upon confirmation, to be paid out of the county treasury. Hence, it was provided that the county commissioners should open an account with the city of Lancaster, showing the amount contributed by the city to the county treasurer towards opening roads, etc., on the one side, and the amount withdrawn from the county treasurer for opening streets, etc., in the city, on the other side; and whilst the balance on that account was against the city, the damages incurred in the opening of streets in the city should be payable out of the treasury of the city—payable to the county, of course, who is primarily liable to the property holder. Thus the true condition of the account is made a matter between the parties interested in it.

We are of opinion that the question of the liability of the city, in each case, can only be raised in a proceeding between the county and the city; that the property holder must resort to the county treasury, and the county must, in a proper case, resort to the city; and further, that the city upon payment of any such claim is reimbursable out of the county treasury, when the balance is in favor of the city to the extent of such balance.

Upon the grounds stated the proceedings of the Quarter Sessions are affirmed.

COUNTY OF LANCASTER *v.* KENDIG.

October 7, 1889. THE COURT. For the reasons stated, *In re* Assessment of Damages to Jacob L. Frey, for the opening of First Street, in the city of Lancaster argued at this term, this

Judgment is affirmed.

Opinions by CLARK, J. W. M. S., JR.

July '89, 83. May 24, 1889.

In re Opening of Broad Street.
County of Lancaster v. Clark.

Certiorari to the Quarter Sessions of Lancaster County.

This case arose under circumstances similar in all respects to the preceding cases of County of Lancaster *v.* Frey, and Same *v.* Kendig, the only practical difference being that the damages arose from the opening of Broad Street instead of First Street.

The case was submitted without oral argument

George A. Lane, county solicitor, *A. F. Hostetter*, and *William F. Beyer*, for appellant.

William T. Brown, solicitor for the city of Lancaster, and *A. S. Johns*, for appellee.

October 7, 1889. THE COURT. For reasons given in our opinion filed, in the Matter of the Assessment of Damages to Jacob L. Frey, in the opening of First Street in the city of Lancaster, the proceedings of the Quarter Sessions are affirmed.

Opinion by CLARK, J. W. M. S., JR.

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FORMS FOR TAKING APPEALS

Under the Act of May 9, 1889.

PREPARED BY HON. M. ARNOLD.

On an appeal from a judgment at law which formerly would have been called a writ of error, the præcipe would be:

JOHN DOE *vs.* RICHARD ROE.	Appeal by defendant (or plaintiff) from the judgment of the Court of Common Pleas No. — of the County of Philadelphia. —— Term, 18—, No. —.

Issue a writ of certiorari in above case, returnable the first Monday of January, 1890.

JOHN JONES,
Attorney for defendant (or plaintiff).

Here add an affidavit that the appeal is not intended for delay.

On an appeal from a decree in equity the præcipe would be:

JOHN DOE *vs.* RICHARD ROE.	Appeal by defendant (or plaintiff) from the decree of the Court of Common Pleas No. — of the County of Philadelphia. —— Term, 18—, No. —.

Issue a writ of certiorari, etc. etc. [as above].

JOHN JONES,
Solicitor for defendant (or plaintiff).

Add affidavit that the appeal is not intended for delay.

On an appeal from the Orphans' Court:

Estate of JOHN DOE, deceased.	Appeal of RICHARD ROE from the decree of the Orphans' Court of the County of Philadelphia. (Add term and number in Court below.)

Issue a writ of certiorari, etc. etc. [as above].

JOHN JONES,
Attorney for Appellant.

Add affidavit as above.

On an appeal in criminal cases.

THE COMMONWEALTH OF PENNSYLVANIA. *vs.* RICHARD ROE.	Appeal by defendant from the judgment of the Court of Oyer and Terminer of the County of Philadelphia. (Add term and number.)

Issue a writ of certiorari, etc. etc. [as above].

JOHN JONES,
Attorney for defendant.

Add the affidavit required.

On an appeal in road cases:

In re Opening of FIRST Street.	Appeal of RICHARD ROE from the decree of the Court of Quarter Sessions of the County of Philadelphia. (Add term and number.)

Issue writ of certiorari, etc.

Add affidavit.

In cases in which the appeal is taken and perfected in the Court below, which may be done under the Act of May 9, 1889, and the affidavit taken and recognizance entered into before the prothonotary or clerk of the Court below, under the Act of April 25, 1850, § 29, the form of the appeal would be:

In the Court of Common Pleas No. — of the County of —— of —— Term, 18—, No. —.

JOHN DOE *vs.* RICHARD ROE.	

RICHARD ROE, the defendant in the above case, hereby appeals to the Supreme Court from the judgment (or decree) of this Court in the above case.

JOHN JONES,
Attorney for defendant.

Add affidavit.

In all cases the Docket Entries should follow the præcipe. Thus on an appeal in equity:

JOHN DOE *vs.* RICHARD ROE.	Appeal by defendant (or plaintiff) from the decree of the Court of Common Pleas No. — of the County of Philadelphia. Certiorari exit October 1, 1889. Returnable 1st Monday of January, 1890. Record filed January 6, 1890.

If the record is made up in the county Court and filed in the Supreme Court without a writ of certiorari, the entries relating to the certiorari will be omitted.

Some remarks on the Act of 1889 may not be out of place here. The writ of error has been abolished, and the writ of certiorari substituted in its place. It was said at an early day that a certiorari is a writ of error in everything but form (Cook *v.* Reinhart, 1 Rawle, 321; Welker *v.* Welker, 3 Penrose & Watts, 24; Young's Petition, 9 Pa. 216). "Either writ has been used for the same purpose" (Commonwealth *v.* Wallace, 114 Pa. 405). Both were used in Holland *v.* White (120 Pa. 228); and in Boyer's Appeal (24 WEEKLY NOTES, 300), where there was a writ of error as well as an appeal, Chief Justice PAXSON said, "We need not say which was the proper remedy as both lead to the same result."

In legislation the words, writ of error and appeal, are used interchangeably, and sometimes together, showing that the name of the writ, so far as its effect is concerned, is mere caprice. Pleadings in error have become obsolete, the assignments of error having taken their place. In feigned issues sent by the Orphans' Court to the Common Pleas for trial, a writ of error to the Common Pleas can be taken under the Act of April 10, 1848, or the exceptions to the rulings or charge of the Court on the trial may be heard on appeal from the final judgment or decree, as allowed by the Act of February 12, 1869. An appeal is the appellate

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remedy in a divorce case under the Divorce Act of 1815, although there may be a jury trial in the case. The refusal of a Court to open a judgment entered by warrant of attorney may now be reviewed in the Supreme Court by appeal (Act of April 4, 1877), although the Supreme Court formerly reviewed such cases and struck off the judgment by writ of error. (Knox *v.* Flack, 22 Pa. 337.) In cases referred under the Act of May 13, 1874, there may be a writ of error or appeal (Act of May 4, 1889). Enough has been said to show that it is of little importance whether the writ is called a writ of error or certiorari, or the proceeding an appeal, or writ of error, or certiorari, so long as it brings the record up to the Supreme Court. Adopting one name for all appellate proceedings makes no change in substance, while it avoids disputes about names of writs which sometimes obscure the merits of the controversy. In Brooks *v.* Brooks (S. C. January Term, 1888) the respondent took a writ of error in divorce, which was quashed because it should have been an appeal; then she took an appeal, which brought up the same record, and it was quashed because it was not taken within a year after the decree. The merits of her appeal were never considered.

In practice there will not be any change. In appeals in cases at law before a jury, or for defects apparent on the record the Supreme Court will not weigh the evidence, but will simply pass upon its admissibility. In appeals in equity or under statutes, the Supreme Court will examine the evidence as heretofore.

The attention of the profession is called to the 3d section of the Act which takes away all exemptions from the Acts of limitation on the time for taking appeals. The limitation is two years after judgment, as fixed by the Act of April 1, 1874, the exemptions of married women, minors, and others being taken away by the Act of 1889. When a lawsuit has been commenced it may be prosecuted to judgment, and when judgment has been pronounced it binds all persons alike, unless appealed from within two years.

Common Pleas.

C. P. of Beaver Co. October 3, 1889.

Citizens' Natural Gas Co. v. Shenango Natural Gas Co.

Equitable jurisdiction—Injunction—Multifariousness—Master's report—Requisites of.

Courts of equity, having jurisdiction in the case of executory contract for sale of realty, may grant all necessary incidental relief, including injunction to keep the property *in statu quo*. And an injunction may usually issue to prevent illegal interference with flowing gas wells used to supply the public.

Multifariousness must be taken advantage of by demurrer, plea, or answer; it is too late to object at the hearing. Unrelated matters may be adjudicated in the same suit, if the parties are willing, and no confusion or inconsistency is produced thereby in the proceedings or decree.

The rule of law preventing plaintiff from using set-off, or cross demand, is not applicable to proceedings in equity.

A master's report should usually consist of five parts: (1) A history of the case, wherein the issues should be set out and defined. (2) Findings of fact in short paragraphs. (3) Findings of law set out in same way. (4) Form of decree. (5) Arguments, illustrations, and authorities, sustaining all that has gone before.

Sur exceptions to Master's report.

The facts sufficiently appear in the opinion, *infra*.

Thomson & Martin, for plaintiff.

W. F. McCook and *Buchanan & Laird*, for defendant.

October 21, 1889. THE COURT. The facts necessary to a general understanding of this case are as follows: The Shenango Natural Gas Company, the defendant, by a written contract dated October 30, 1888, a copy whereof is attached to the plaintiff's bill, and marked "Exhibit B," agreed to sell to the Citizens' Natural Gas Company, the plaintiff here, certain producing gas leaseholds, together with some pipe-lines and casing used upon the same, or in connection therewith. In consideration therefor the plaintiff agreed to pay the defendant a certain sum of money, by instalments, and also to furnish a quantity of gas pipe. The contract provides that the title to and possession of the leaseholds, wells, etc., should remain in the defendant until the plaintiff had fully complied with its part of the agreement, but the plaintiff was given a license to at once commence taking the gas from the wells. This license could only be revoked by the defendant in case the plaintiff violated its agreement to furnish the property and the instalments of money already mentioned. It needs no argument, therefore, to show that the license, so called, was in fact, and in the contemplation of the parties, a substantial right. The plaintiff paid the first instalment of purchase-money on the day the contract was signed, and after more than two weeks' delay, which the bill alleges was wrongfully caused by the defendant, began to take the gas from the wells. Two more of the instalments were paid and some pipe delivered subsequently, and then the plaintiff refused to do anything further, alleging that through the delay above mentioned and other breaches of the contract by the defendant, as well as owing to the defendant's violation of

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another somewhat similar but entirely independent contract, of an earlier date, relating to other gas wells (see "Exhibit A"), it, the plaintiff, had been damaged in an amount more than sufficient to cover all that was still owing to the defendant. The bill also avers that a certain mortgage for $250,000 stands unreleased against the leaseholds, agreed to be conveyed by the contract of October 30, 1888, and that the existence thereof was concealed from the plaintiff.

The defendant was not inclined to accept payment in damages, and on January 26, 1889, undertook to revoke the "license" above referred to, and forcibly cut off the plaintiff's connections, not only with the three wells agreed to be conveyed by the executory contract of October 30, 1888, but also with the six wells sold to the plaintiff by the earlier and fully executed contract. The plaintiff, alleging that it was likely to be irreparably injured, at once asked for an injunction to prevent further interferenec with its lines, and also prayed for a decree of specific performance of the second contract and for general relief. The injunction was granted and afterwards continued until further order or final hearing.

Let us now look briefly at the law of the case.

The jurisdiction of a Court of equity to entertain a bill for the specific performance of an executory contract, for the sale of realty and to grant all incidental relief that may be necessary, is undoubted. The clearly illegal, and, as admitted by the answer, frequent interferences of the defendant with the six wells actually owned by the plaintiff and in its possession, was so likely to result in irreparable injury as to constitute, in itself, if there were danger of its repetition, a separate and sufficient ground of jurisdiction. At the time the Court took cognizance of the cause, the plaintiff seems to have had no notice or knowledge that the defendant's servants were exceeding their instructions in cutting off the plaintiff's connections with the wells last mentioned; hence the plaintiff was justified in asking for instant protection against what the defendant does not attempt to deny were inexcusable trespasses. The explanation, as to the interference with these wells, was not offered, so far as the Court can see, until the filing of the answer, four days after the injunction issued. That the plaintiff was entitled to the immediate protection of a Court of equity will be apparent to any one who reflects for a moment on the danger and damage that may result to manufacturers and others from even a ten-minutes' suspension of the gas flow, and who will consider the situation of a gas company, with reference to its customers, in that event. For such injuries, it is plain that the law cannot furnish adequate remedies or redress.

As to the wells, which are the subject-matter of the contract, marked "Exhibit B," there seemed to be a *bona fide* dispute between the parties as to how much, if any, of the withheld consideration could, at the time the suit was brought, be legally and equitably exacted by the defendant. The cutting off of the wells might destroy them, and, while working great harm to the plaintiff, could not in any manner benefit the defendant, it being considered that their pressure is too low to enable the latter to convey the gas to the market it supplies. The injunction was, therefore, in accordance with well-established precedents, made applicable to these wells also, until the litigation should be determined, or until further order.

We come now to the Master's report, and a consideration, so far as may be necessary at this time, of the exceptions filed thereto.

The plaintiff, in its bill, claims, *inter alia*, the right to set off damages caused by the defendant's alleged breaches of contract "A." The Master holds, that such a claim cannot be allowed, for two reasons: First, because a plaintiff cannot use a set-off; and second, because contracts "A" and "B" are entirely distinct and unconnected. He, therefore, fails to report the facts relating to this branch of the case. His second reason would sustain the legal conclusion reached, did the pleadings raise the question he decides. The introduction of the claim for breaches of contract "A" made the bill multifarious. The defendant might have objected by demurrer or plea, or in its answer. It did none of these things, but joined issue on the fact of the existence of such a claim, and afterwards united in the taking of a great mass of testimony respecting the same. As the case stands at present, the defect must be considered as waived. It is too late to object at the hearing. (Persch *v.* Quiggle, 57 Pa. St. 247; Oliver *et al. v.* Piatt, 3 Howard, 332; 1 Daniel's Chan. (3d Am. ed.) 352.) It is true that the Court may, and in an extreme case sometimes will, on its own motion, raise the objection; but this is rarely done, especially where the trouble and expense resulting from the multifariousness might have been saved by a demurrer or an objection in the answer. (1 Daniel's Chan. 352 and notes.) Where a Court of equity has jurisdiction over the main subject of controversy, and there is involved in the case an adjustment of liabilities, I know of nothing which absolutely prevents the use of even a distinct and unrelated matter as a set-off, or counter-claim, provided the parties are willing, and no confusion or inconsistency will be necessarily introduced into the proceedings or the decree. Where the parties join issue on the fact, as was done here, the willingness of both to have it adjudicated is made a matter of record by themselves. From what has been said, it does not follow, however, that even at this late day the defendant

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cannot be allowed, on proper terms, to narrow the issues of fact by amending its answer.

The first reason assigned by the Master for refusing to consider the claim under discussion, namely, that the plaintiff is not entitled to the benefit of a set-off, is true, as a general proposition, in Courts of law, but was never applicable to proceedings in equity, from which the legal doctrine of set-off was borrowed. As is remarked in 1 Pomeroy's Equity, § 175, "the modes of procedure in a Court of equity have never been thus restricted. Its decree is not confined to a single adjudication for or against the defendant, but, as a preliminary and leading up to the final award in favor of either party, or even in the very final award itself, being thus partially in favor of both litigants, it may make any adjustment, admit any limitations, and determine upon any cross-demands and subordinate claims, which complete justice, done to the parties, shall require."

The report must be recommitted to the Master to find the facts relating to the alleged breach of contract "A" and the damage, if any, caused to the plaintiff thereby. Although well written and indicative of learning and research, the report is open to some further criticism. The findings of fact might be more full and precise. Moreover, in its form and arrangement, the report, although an improvement on the practice, in these respects, long prevailing in this and many other Courts, does not fully comply with the requirements of modern equity practice and the suggestions of our Supreme Court.

A Master's report, where the case is at all complicated, should be divided into five parts.

First. It should give a clear and succinct history of the case as gathered from the pleadings and the evidence. The issues, both of law and fact, should be herein recited and defined. If by agreement the parties have let any matter put at issue by the pleadings drop out of the case, this should be stated. In brief, everything necessary to a full and proper understanding of the controversy, should be set forth.

Second. The findings of facts should next follow. These ought to appear in separate numbered paragraphs, each of which should relate to a particular issue raised by the pleadings. They should be clear, distinct, and adequate, and without admixture of comment or argument. To illustrate, there should be in the present case a brief, direct, and distinct finding as to whether the delay complained of by the plaintiff in getting the use of the gas from the wells mentioned in contract "B," was caused by the defendant, and, if so, whether the plaintiff suffered damage, and how much, if any. As a rule the findings of fact should cover every issue of fact created by the pleadings. An issue deemed immaterial or irrelevant by the Master, might not be so considered by this Court or by the Supreme Court. The Master never can enlarge, nor usually, without the consent of both sides, narrow or ignore the issues formally and deliberately framed by the parties and referred to him by the Court. It must be kept in mind that the issues are limited and defined by the pleadings, which should be carefully examined to ascertain just what is admitted and denied. In proceedings before an Auditor there are often no pleadings nor anything analogous thereto to guide him. Matters of controversy informally presented, and sometimes unheard of until after his appointment largely suggest and prescribe his powers and duties. Not so in an equity suit. There the matters in dispute, whether of law or fact, are fully set out and defined by the pleadings before the case goes to the Master, unless it is referred to him for some limited and special purpose.

Third. The findings of law come next in order. These should also be full and adequate, embracing and covering every question involved in the case, and should be contained in brief numbered paragraphs, each one relating as far as possible to a different subject. They should not have tacked to them arguments or citations of authorities.

Fourth. The form of the decree recommended should be set forth.

Fifth. Here the Master may, and often should, sustain all that has gone before, by arguments, illustrations, and authorities.

And now, to wit, October 21, 1889, the case is referred back to the Master with instructions to prepare a report in accordance with this opinion.

Opinion by WICKHAM, P. J.

U. S. District Court—Admiralty.

Peter Wright & Sons v. The Adirondack.

The master has no authority to create a lien on the ship for advances made to the master to pay inland railway charges on cargo engaged for the ship—Such advances are a lien on the cargo to the extent of the freight paid on the same—Money obtained for such purposes cannot be treated as a necessary disbursement for the vessel.

Sur exceptions to libel.

The libel was filed praying an attachment of the steamship for advances made to the master,

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on an order of the master, dated New York, December 14, 1886, for £493.7—advanced to the order of Patton, Vickers & Co., payable ten days after arrival at port of destination, "for inland charges on cargo of my vessel at this port, for the payment of which I hereby pledge my vessel and freight, and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of charges received for account of my said vessel."

An amendment to the libel set forth that the amount of those charges were the inland railway freights to New York, in a through bill of lading to London, containing a through freight to destination, the land carriers exacting the railroad's proportion before delivery to the ship. The order was indorsed to the libellants.

The exceptions filed were:—

(1) To the master's authority to pledge the ship for advances made to pay inland railway freights on cargo.

(2) That the contract to advance such funds for inland railway charges was not maritime.

Morton P. Henry, for exceptions.

The draft was not negotiable, and the purchasers stood in no better position than the payees.

Palmer *v.* Pratt, 2 Bing. 185.
Coolidge *v.* Ruggles, 15 Mass. 387.

Unless the authority of the master extended to create a lien for such advances, the form of the order pledging the ship will not avail the original lenders or the purchasers from them.

The Woodland, 103 U. S. 104.

The master's authority to borrow funds is not in question—it is as to his authority to create a maritime lien for the repayment of such advances. A maritime lien is created by the law maritime alone, and not by the act of the parties.

The Scotia, 35 F. R. 907.

In the Paola R. (32 F. R. 174), followed by this Court in the distribution of the proceeds of the bark Alexander, the U. S. C. C. of Louisiana refused to follow The Wivanhoe (26 F. R. 927), and held that no lien was created for a charge of compressing cotton intended for the cargo of a ship.

The parties advancing money to pay inland freights are substituted to the lien of the railroad on the cargo. It cannot be transferred or changed into a lien on the ship itself.

J. Rodman Paul and *A. Sydney Biddle*, for libellants.

The jurisdiction of the Court extends to the inland part of the freight, when included in the bill of lading for ocean carriage.

Monteith *v.* Kirkpatrick, 3 Blatch. 279.

Where the transaction, as a whole, is maritime, matters incidental and appendant will be enforced by the Admiralty, although the incidents, if standing alone, would not.

Davison *v.* Seal Skins, 2 Paine, 324.
The Hiram A. Dixon, 33 F. R. 297.

A contract to furnish fishing-nets to a vessel not launched was enforced in the Admiralty.

The stevedores' claim is almost generally supported as a maritime one, although formerly refused.

The Gilbert Knapp, 37 F. R. 209.
Maury *v.* Culiford, 10 F. R. 388.

As to the lien they cited the cases of The Wivanhoe (26 F. R. 927), in which a maritime lien for compressing cotton on ship's account was supported in the District Court of Virginia.

The Hardy, 1 Dillon, 460.
The Pacific, 1 Blatch. 569.
The Canton, 1 Sprague, 437.
The Medora, 2 Wood & M. 114.

THE COURT. I have no doubt that the exceptions should be sustained. If I dismiss the libel at this time, however, the libellants will be without remedy by appeal; and as the respondents are able to enter security, I will require them to do so, on being indemnified by the libellants against the expense of obtaining such security.

There are expressions in certain opinions of the Courts which might justify an inference that the Admiralty has jurisdiction over the subject of inland freights, when included in through bills of lading; while I would hesitate to agree with these expressions I am not required to pass upon their accuracy at this time. I do not see how a master can create a lien on his ship to secure the payment of such freights. Money obtained for this purpose cannot be treated as a necessary disbursement for the ship.

The inland freight is a lien on the cargo which can be detained for its payment and transferred to any one who may advance money on that account. There is no occasion whatever, therefore, to charge the ship with it.

If the master may create a lien for such purpose where will we find a limit for his authority? If he may charge the ship with advances for freight on cargo carried across the continent by rail, on the ground of supposed necessity, why may he not also charge it, if the cargo be cotton, grain or iron, with the cost of raising and harvesting the cotton and grain, and manufacturing the iron, on the same ground?

Oral opinion by BUTLER, J.

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INDEX

OF

ALL THE CASES REPORTED IN THIS VOLUME.

BY

HENRY BUDD, Esq.

ABATEMENT. Where an estate is left, in trust for the widow of testator for life and, after her death, to pay certain pecuniary legacies and to divide the residue among certain residuary legatees; upon the election of the widow to take against the will, the pecuniary legacies will not abate, but the time of payment will not be accelerated. (O. C.) Vance's Estate, 172.

ACCELERATION. A widow's election to take against a will, by which she is given a life estate in practically all of the testator's estate, will not accelerate the payment of pecuniary legacies, payable at her death, where there are residuary legatees who are disappointed by the election of the widow. (O. C.) Vance's Estate, 172.

ACCORD AND SATISFACTION. Neither the agreement to accept nor the actual acceptance of a smaller sum in satisfaction of a larger one, presently due, is a discharge of the debt even by way of accord and satisfaction. Martin *v.* Frantz, 325.

ACCOUNT. Where mutual duties of accounting are imposed upon both parties to a contract and the accounts are continuing and not single or simple, a bill in equity will lie to compel an accounting, although the relations between the parties to the contract be merely that of licensor and licensee. Appeal of the Consolidated Oil Well Packer Co. Limited, 544.

ACKNOWLEDGMENT. An acknowledgment made before a justice of the peace by the subscribing witness reciting that he had seen the covenantor sign, seal and deliver an agreement under seal for the sale of standing timber, is sufficient to entitle the agreement to be recorded and render the record admissible in evidence. Shiffer *v.* Broadhead, 44.

ACTS OF ASSEMBLY.

1713, November 27.	Limitation of Actions, 563.
1806, March 21.	Statutory Remedies, 29.
1810, March 20.	Costs, 304.
1810, March 20.	Set-off, 523.
1824, March 27.	Cutting Timber, 229.
1833, April 8.	Intestate Act, 158.
1834, February 24.	Life tenant of personal estate, 316.
1834, April 15.	County Auditors, 29.
1834, April 15.	Taxation, 302.
1836, June 13.	Domestic Attachment, 92.
1836, June 13.	Road Laws, 97, 327.
1836, June 13.	Bridges, 373.

ACTS OF ASSEMBLY—*Continued.*

1836, June 13.	Foreign Attachment, 380.
1836, June 16.	Mechanic's Lien, 38, 119.
1836, June 16.	Referee, 370.
1840, October 13.	Bill of Review, 305.
1842, July 12.	Warrant of Arrest, 358.
1843, April 13.	Bridges, 373.
1844, May 6.	Lapsed Legacies, 55.
1848, March 27.	Pennsylvania Railroad, 409.
1848, April 11.	Wills, 363.
1849, January 24.	Sheriff's sale of life estate, 353.
1849, April 9.	Exemption, 84.
1850, May 3.	Lancaster, Road Law, 568.
1851, April 14.	Widow's Exemption, 121.
1852, November 4.	Amendment, 563.
1854, April 6.	Bridges, 373.
1854, April 13.	Lancaster, Road Law, 568.
1854, May 8.	Divorce, 31.
1854, May 8.	Road Law, 491.
1855, May 4.	Collateral Inheritance Tax, 473.
1855, May 4.	Husband taking against wife's will, 363.
1855, May 5.	Adoption of children, 158.
1858, April 21.	Road Law, 491.
1864, April 27.	Partition, 42.
1866, March 23.	Municipal Claims, 79, 540.
1866, April 17.	Limitation of Actions, 563.
1866, May 18.	Hucksters, 539.
1867, March 14.	Hucksters, 539.
1868, April 2.	Fees, 29.
1868, August 1.	Mechanics' Liens, 38, 119.
1869, March 17.	Attachment, 51, 111, 278.
1869, May 4.	Timber cutting by tenants in common, 229.
1870, February 18.	County Solicitor, 401.
1870, April 28.	Widening of Chestnut Street, 418.
1871, May 17.	Possession by particular tenant, of personalty, on entry of security, 86.
1871, June 22.	Referees in Luzerne County, 44.
1872, April 3.	Liquor License in Allegheny County, 184.
1873, April 18.	Road Law, 568.
1874, April 22.	Submission of cases to court without jury, 107.

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ACTS OF ASSEMBLY—*Continued.*

1874, April 29.	Corporations, 425.
1874, May 14.	Road Law, 97.
1874, May 14.	Referees, 107, 342.
1874, May 14.	Exemption of charity from taxation, 521.
1874, May 14.	Wages, 523.
1874, May 19.	Orphans' Court, 419.
1874, May 19.	Practice, 103.
1874, May 23.	Municipalities, 48, 451.
1874, June 2.	Partnership Associations Limited, 113, 249, 437.
1874, June 13.	Eminent Domain, 418.
1876, April 11.	Municipalities, 48, 451.
1876, April 20.	Claim for Wages, 523.
1876, May 1.	Paving, 252, 423.
1876, May 1.	Partnership Associations Limited, 249.
1876, May 5.	Bridges, 373.
1877, March 22.	Claim for Wages, 523.
1877, April 4.	Appeals, 227.
1878, June 12.	Fees, 29.
1878, June 12.	Wages, 523.
1879, April 22.	County Auditors, 60.
1879, June 7.	Taxation, 187, 189.
1879, June 11.	Mechanic's Lien, 372.
1881, June 2.	County Auditors, 60.
1883, June 27.	Insurance, 516.
1885, June 24.	Ejectment, 43.
1885, June 30.	Taxation, 191, 194, 302.
1887, March 2.	Wages, 523.
1887, April 13.	Orphans' Court, 419.
1887, May 6.	Road Law, 460.
1887, May 6.	Collateral Inheritance Tax, 260, 273, 473.
1887, May 7.	Railroads, 530.
1887, May 13.	Liquor Law, 48, 177, 181, 184.
1887, May 17.	Municipalities, 48, 252, 451.
1887, May 19.	Road Law, 97.
1887, May 19.	Costs, 117.
1887, May 23.	Evidence, 404, 406.
1887, May 24.	Cities, 423.
1887, May 24.	Liquor Law, 145, 177, 181, 303.
1887, May 25.	Procedure, 129, 304, 333.
1887, June 3.	Married Persons Property Act, 452.
1887, June 15.	Gettysburg Battlefield Commission, 292.
1889, May 9.	Appeals, 97.
1889, May 10.	Foreign Attachment, 380.

A Court can correct a clerical error in an Act of Assembly when the error is so manifest, upon an inspection of the Act, as to preclude all manner of doubt and when the correction will relieve the statute from an absurdity and carry out the legislative intent. *In re* Opening of First Street, 568.

ADEMPTION. A legacy to the guardian of minor children of the testator, to be expended at his direction in the education of the minors, is not necessarily ademed by the facts that at the time of the testator's death the children had attained their majority, and that the testator had in his lifetime expended money upon their education. (O. C.) Bird's Estate, 320.

ADMINISTRATOR. The personal representative of a decedent is the only person who can bring the action to recover for negligence in causing the death of said decedent, given by the New Jersey Act of March 3, 1848, even when the action is brought in Pennsylvania, where, under a similar Act, the personal

ADMINISTRATOR—*Continued.*

representative would not be a proper party. Usher *v.* West Jersey R. R. Co., 57.

An administrator who makes an over payment to a distributee cannot recover the same, in the absence of a promise to repay. Miller *v.* Hulme, 131.

An administrator who deposits money in a bank on a written contract that he shall receive the same with interest on return of the certificate of deposit is liable personally for the money, if it be lost by the failure of the bank. Baer's Appeal, 299.

An administrator who obtains leave to bid at his own sale of the decedent's realty is not thereby released from the obligation of seeing that the best possible price is obtained; where, therefore, leave is obtained by him to bid at a certain price and he purchases at such price, and the sale is confirmed, and he immediately afterward sells the land at an advance, he will be surcharged with the amount of the advance. (O. C.) Hacker's Estate, 318.

An administrator who buys up claims against his decedent's estate will be held to have done so for the benefit of the estate, but where in the case of an insolvent estate the sum paid by him does not exceed the dividend to which the creditors, whose claims have been extinguished, would have been entitled, he should be awarded the whole amount paid by him and not a mere *pro rata* dividend. Id.

See EXECUTOR.

ADMIRALTY. A master cannot create a lien upon his vessel for advances made to him to pay inland railway charges on a cargo engaged for the ship. (U. S. D. C.) Wright *v.* The Adirondack, 575.

Advances to pay inland railway charges on a ship's cargo are a lien upon the cargo but not on the vessel itself. Id.

Exceptions were filed to a libel, and the Court was of opinion they should be sustained: *held*, however, that as a dismissal of the bill would deprive the libellants of an appeal, security should be entered by respondent, on receiving indemnity against the expense of procuring security. Id.

ADOPTED CHILD. An adopted child has all the rights of inheritance to its adopted parent that a child born to such parent has; therefore, where a person dies intestate leaving a widow and an adopted child, the widow will take but one-third of the decedent's estate and the child the other two-thirds. (O. C.) Rowan's Estate, 158.

AFFIDAVIT OF DEFENCE. An affidavit which on its face shows that it tells part only of the story of the transaction on which the case is based is bad. (C. P.) Neal *v.* Vollrath, 124.

While swearing to a conclusion of law as a positive averment of fact is a practice to be reprobated, yet where it is done, and there is nothing upon the record to show that the averment is erroneous, the affidavit will be sufficient to prevent judgment. City of Erie *v.* Brady, 252.

An affidavit of defence on behalf of a corporation purported to be made by a stockholder simply, a supplemental averred that the affiant was the business manager of the company: *held*, the defect in the original affidavit was cured. Erie Boot & Shoe Co. *v.* Eichenlaub, 332.

A defendant is not bound to set out all his defences in his affidavit, and is not to be held to have waived any omitted defence. National Fire Ins. Co. *v.* Brown, 518.

AGENT. See PRINCIPAL AND AGENT.

ALIBI. See CRIMINAL LAW. Rudy *v.* Commonwealth, 502.

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ALLEGHENY COUNTY. The county treasurer has no authority to grant liquor licenses in Allegheny County since the passage of the Act of May 24, 1887. Commonwealth *ex rel.* Kaiser *v.* Hill, 184.

ALTERATION. The interlineation of the word "before" in a contract providing that an order should be subject to countermand by a certain date is an immaterial alteration, and will not vitiate the contract. Express Publishing Co. *v.* Aldine Press, 165.

ALTERATION OF SHERIFF'S RETURN. See SHERIFF. Dixon *v.* White Sewing Machine Co., 433.

AMENDMENT. A declaration in a feigned issue on a sheriff's interpleader may be amended by the insertion of a list of articles omitted in the declaration, as originally filed. Battles *v.* Sliney, 71.

A declaration setting forth that a permanent injury had been done to the minor child of the plaintiff by the negligence of the defendant, whereby the plaintiff lost the services of the said child, may be amended by adding a count for the death of the child from the same cause. City of Bradford *v.* Downs, 153.

Where an affidavit upon which a foreign attachment has issued is insufficient, it is not amendable. (C. P.) Shumway *v.* Webster, 336.

In an action by executors or administrators after issue joined, it is too late for the defendant to move to amend the record by adding as a plaintiff a co-executor or co-administrator not joined. Conrow v. Conrow, 339.

A mechanic's lien may be amended by apportioning the claim, more than six months after filing, if such amendment be conducive to justice and a fair trial on the merits. (C. P.) Florey *v.* Haverford College, 372.

Where a proceeding for the assessment of damages for taking or injuring land has been begun in the name of a husband, and it appears that the title to the land injured is in his wife, an amendment adding her name is proper. Railroad Extension Co. *v.* Seiple, 563.

It is not a valid objection to an amendment that its allowance will deprive the opposite party of a defence under the Statute of Limitations, as the effect of the amendment upon such right can be considered after the evidence has closed. Id.

Alteration of sheriff's return. See SHERIFF. Dixon *v.* White Sewing Machine Co., 433.

APPEAL. No appeal lies by counsel in his own right from a refusal of the Court to allow the plaintiff in partition a reasonable counsel fee; such fee is allowed by the Act of April 27, 1864, only in relief of the plaintiff. Pereyra's Appeal, 42.

An appeal is not the correct remedy where an execution has been erroneously set aside; the proper remedy is by writ of error. Feagley *v.* Norbeck, 227.

An appeal does not lie from the action of a Court dismissing exceptions to the report of a referee, under the Act of June 16, 1836; the remedy is by writ of error. Harris's Appeal, 370.

See COLLATERAL INHERITANCE TAX. Commonwealth's Appeal, 473.

APPEARANCE. A general appearance will not render a writ which is essentially illegal, legal, as where a writ is issued and made returnable at a time not authorized by law. Williamson *v.* McCormick, 51.

APPLICATION OF PAYMENT. See PAYMENT. First National Bank *v.* Fair, 391.

ARREST OF JUDGMENT. See PRACTICE. (C. P.) Specht *v.* Penna. R. R. Co., 317.

ARREST, WARRANT OF. See WARRANT OF ARREST. Cooper *v.* Hart & Co., 358.

ASSIGNEE of mortgage, notice to. See MORTGAGE. Morgan's Appeal, 167.

ASSIGNMENT. Trade-mark as a subject of. See TRADE-MARK. Laughman's Appeal, 465.

ASSUMPSIT. Assumpsit will lie between partners when the partnership is in a single and finished transaction. See PARTNERSHIP. Kutz *v.* Dreibelbis, 67.

Assumpsit will lie by the true owner of money against one who has received the same from one who has stolen it, where such bailee, after notification of the true ownership, pays over the money as directed by the thief. Hindmarch *v.* Hoffman, 239.

ATTACHMENT. An attachment, under the Act of March 17, 1869, must be made returnable on the first return-day after its issue; if made returnable to any other return-day, the writ will be quashed, as illegally issued, notwithstanding the defendant may have entered a general appearance. Williamson *v.* McCormick, 51.

An affidavit to sustain an attachment under the Act of 1836, must aver an intent, on the part of the debtor, to defraud and not merely the creditor's belief that such intent existed. (C. P.) Simons, Bros. & Co. *v.* Hickman, 92.

An affidavit, which alleges that part of the debt, which it is sought to recover, was fraudulently contracted, will not sustain an attachment under the Act of 1869. (C. P.) Wright *v.* Ewen, Kerlin & Co., 111.

A confession of judgment in the firm-name, by one partner to partnership creditors, is not a fraudulent assignment of the firm property within the Act of 1869. Id.

An attachment proceeding under the Act of March 17, 1869, is a personal action in which a lien is secured in advancement of judgment, as a security whose efficacy depends on the recovery of a final personal judgment. Miller *v.* Rohrer, 278.

Where a personal action is begun to recover certain money and, before judgment is obtained, an attachment under the Act of 1869 is issued for the same cause, a judgment obtained on the first action before the trial in the attachment proceeding, is a bar to a recovery in said proceeding. Id.

A. and B. issued attachment executions against C., and agreed to share the proceeds; on the same day A. assigned to B. all of his interest in his judgment against C. as collateral for a debt due by him to B., subject, however, to a prior assignment of a proportion of said judgment to L. B. received the proceeds, which were attached in his hands by a creditor of A.: *held*, (1) B. could retain the amount of the debt of A. to him, although neither the assignment nor the agreement specially mentioned the debt of A. to B., (2) that B. was a trustee for L., and could retain on her account the amount due to her by A., although L. had simply intervened in the attachment proceedings but had filed no plea. First National Bank *v.* Ladd, 340.

ATTORNEY-AT-LAW. An attorney-at-law has no general power to bind his client by a promise to refund an amount which has been received by him as a distributee of an estate in excess of the sum properly payable to him. Miller *v.* Hulme, 131.

BAILMENT. A bailee of money who, after receiving notice that the money had been stolen by his bailor, pays over the money in accordance with the latter's directions is liable to the true owner. Hindmarch *v.* Hoffman, 239.

Where goods have been bailed the interest of the bailor may be taken and sold on execution against

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BAILMENT—*Continued.*
him, but the possession of the bailee may not be disturbed. Dixon *v.* White Sewing Machine Co., 433.

BANK. The failure of a bank in which public moneys have been deposited by their legal custodian, does not absolve the latter from responsibility to the public for such funds. Nason *v.* Directors of Poor of Erie County, 60.

In an action by a bank upon a promissory note, it is no defence for the maker to show that the note was given to retire paper which had been discounted by the bank for a certain firm, in excess of the amount allowed by law. Allen *v.* First National Bank, 211.

In an action by a bank against the maker of a promissory note, the defendant offered to show that B., who was cashier of the bank, and also a member of the firm of B. & C., informed him that the bank had discounted paper of B. & C., in excess of the amount allowed by law, and that if the defendant would sign a note to replace a like amount of B. & C.'s paper, he would not be held liable on the note (the object of the proceeding being to satisfy the bank examiner), and that the note in suit was a renewal of the note first given: *held*, that the offer did not show a defence. Id.

BILL OF LADING. See COMMON CARRIER. Penna. R. R. Co. *v.* American Oil Works, 88.

BILL OF REVIEW. An account settled and confirmed can only be reviewed for error of law apparent upon the record, or for new matter which has arisen since the decree, or, *ex gratia*, where new proof has been discovered which could not possibly have been used when the decree was made. Priestley's Appeal, 305.

Laches on the part of the petitioner will prevent granting of review. See LACHES. Id.

BOROUGH. A drain across the property of the plaintiff, for a certain purpose only, was so used for another purpose by the drain owner that it became a nuisance, whereupon the plaintiff disconnected it from his premises; as a result, the filth, which was formerly cast upon the premises, was forced upon the street: *held*, the borough authorities had no right to reconnect the drain and to compel the plaintiff to submit to the nuisance. See NUISANCE. Crosland *v.* Borough of Pottsville, 329.

BRIDGES. Relative duties of counties and townships with reference to bridges. See Commissioners of Erie County *v.* Commonwealth, 373.

CAPIAS AD SATISFACIENDUM. See PRACTICE, TRUSTEE. Harris *v.* Sheldon, 370.

CASES REVERSED, FOLLOWED, COMMENTED UPON, AND DISTINGUISHED.
Allison *v.* Commonwealth, 99 Pa. St. 17, followed. 13.
Armstrong's Appeal, 18 P. F. Sm. 409, distinguished. 319.
Ayars's Appeal, 122 Pa. St. 266, followed. 451.
Baily *v.* Commonwealth, 20 WEEKLY NOTES, 221, followed. 60.
Chester County *v.* Barber, 97 Pa. St. 455, followed. 401.
City of Reading *v.* Savage, 23 WEEKLY NOTES, 332, followed. 451.
Commonwealth *v.* Lehigh Valley R. R. Co., 22 WEEKLY NOTES, 525, followed. 189.
Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119, followed. 187.
Gast *v.* Porter, 13 Pa. St. 533, commented upon. 4.
Gross's Estate, 10 Barr, 360, followed. 55.
Guenther's Appeal, 4 WEEKLY NOTES, 41, followed. 56.

CASES REVERSED, FOLLOWED, COMMENTED UPON, AND DISTINGUISHED
—*Continued.*
Harmony Building Association *v.* Berger, 99 Pa. St. 320, followed. 256.
Hay's Appeal, 52 Pa. St. 449, followed. 201.
Holmes's Estate, 22 WEEKLY NOTES, 546, reversed. 35.
Honor *v.* Albrighton, 93 Pa. St. 475, distinguished. 536.
Insurance Co. *v.* Needles, 113 U. S. 574, followed. 292.
King *v.* Steiren, 44 Pa. St. 99, followed. 208.
Lennig *v.* Senior, 21 WEEKLY NOTES, 379, followed. 111.
Lockwood *v.* R. R. Co., 17 Wall. 357, not followed. 386.
Powell, *Ex parte*, 1 Mont. & McA., 283, distinguished. 296.
Road in Lathrop Township, 84 Pa. St. 126, distinguished. 327.
Road in O'Hara Township, 87 Pa. St. 356, distinguished. 327.
Seguin's Appeal, 103 Pa. St. 139, followed. 92.
Simpson's Appeal, 18 WEEKLY NOTES, 175, distinguished. 305.
Sterrett's Appeal, 27 Pa. St. 62, commented on. 4.
Styer *v.* Freas, 15 Pa. St. 339, commented on. 4.
Swift *v.* Tyson, 16 Pet. 1, condemned, 389.
Thiel College *v.* Mercer County, 101 Pa. St. 533, distinguished. 521.
Turner *v.* Scott, 51 Pa. St. 126, distinguished. 24.

CASHIER. A bank is not bound by the agreement or declaration of its cashier outside the scope of his authority. See BANK. Allen *v.* First National Bank, 211.

CHARITY. A college whose advantages are open to all, without reference to religious belief, which is subjected to visitation by the State, whose land, building, library, etc., and endowment fund have been given it, which is not maintained by the fees of the students, although fees are taken from those able to pay, is a charity, and as such is entitled to exemption under the Act of May 14, 1874 (P. L. 158). Northampton Co. *v.* Lafayette College, 521.

"CHILDREN." The word "children" is primarily and generally a word of purchase, and will not be converted into a word of inheritance by the facts that the devisee was at the time of making the will and at the time of the testator's death without children, and that the will provides that the land devised shall "descend" on the death of the first taker to his children. Keim's Appeal, 135.

CITY SOLICITOR. The city solicitor cannot recover the commission given to him in the case of municipal claims by the Act of March 23, 1866, unless he has actually performed the services set forth in the Act. (C. P.) City of Philadelphia *v.* Atmore, 540.

CLERICAL ERROR. May be corrected when manifest, even in an Act of Assembly. See ACT OF ASSEMBLY. *In re* opening of First Street, 568.

COAL MINE. See TRADE-MARK. Laughman's Appeal, 465.

COLLATERAL INHERITANCE TAX. Where there is a legacy of "the annual net sum of—" the collateral inheritance tax must be paid out of the corpus of the testator's estate. (O. C.) Bispham's Estate, 79.

The exemption of estate under $250 from the collateral inheritance tax refers to the amount passing to the collateral and not to the amount of the decedent's

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COLLATERAL INHERITANCE TAX—*Continued.*
estate; all legacies under $250 are exempt from the tax. (C. P.) Commonwealth *v.* Kerchner, 260.

A devise of realty, situated in another State, made by a testator resident in Pennsylvania to a Pennsylvania corporation, is not subject to the collateral inheritance tax. Appeal of the Commonwealth, 273.

The provisions of the Act of May 4, 1855, substituting a charge of six per cent. for the twelve per cent. penalty are not inconsistent with the similar provisions of the Act of 1887, and where the Court finds that there has been such unavoidable delay as to render the enforcement of the penalty unjust, the charge of six per cent. must be made. Commonwealth's Appeal, 473.

Payment and receipt of the tax as found by the Court below, pending an appeal by the Commonwealth, will not estop the Commonwealth from prosecuting its appeal and recovering the interest upon the tax up to the day of payment. Id.

COMITY. By comity, a transitory right of action given by statute of one State may be enforced in another State, where it is not contrary to the policy of the said State. Usher *v.* West Jersey R. R. Co., 57.

See CONFLICT OF LAWS. Forepaugh *v.* Del. Lack. & West. R. R. Co., 385.

COMMERCIAL LAW. The so-called commercial law derives all its force from its adoption as a part of the common law of a State. Forepaugh *v.* Del. Lack. & West. R. R. Co., 385.

COMMISSIONS. A life tenant of personal estate in possession under the Act of February 24, 1834, is not entitled to commissions. Reiff's Appeal, 316.

See EXECUTOR. Barbite's Appeal, 64; Geiger's Appeal, 264.

See GUARDIAN AND WARD. (O. C.) Small's Estate, 92.

COMMITTEE. The committee of an habitual drunkard has a lien upon the estate of the latter for the amount ordered by a decree or order of Court to be paid to said committee, from the time of the entry of the decree or order upon the judgment docket. Hohman's Appeal, 242.

COMMON CARRIER. A common carrier's lien upon goods stopped *in transitu*, extends only to freight and charges upon the said goods, and does not embrace an unpaid balance of freight due by the consignee upon prior shipments of similar goods by the same vendor. Pennsylvania R. R. Co. *v.* American Oil Works, Limited, 88.

A bill of lading reciting that "said merchandise may be retained for all arrearages of freight and charges due thereon, and also on any other goods by the same consignee or owner, and such arrearages and the freight, and charges on said goods and merchandise shall be a lien thereon," does not, where goods shipped under it have been stopped *in transitu*, give to the carrier a lien on the goods for freight due by the consignee upon prior shipments to him. Id.

While the law of Pennsylvania will not permit a carrier to exempt himself by contract from liability for his own or his agent's negligence, it is not against the policy of the State to enforce a contract containing such an exemption when made and to be executed in a State within which such exemption is permitted. Forepaugh *v.* Del. Lack. & West. R. R. Co., 385, per MITCHELL, J.; GREEN and MCCOLLUM, JJ., concurring; WILLIAMS and STERRETT, JJ., dissenting; PAXSON, C. J., and CLARK, J., absent.

COMMON PLEAS. The Common Pleas has no original jurisdiction over the settlement of accounts

COMMON PLEAS—*Continued.*
of officers named in the Act of April 15, 1834, defining the powers of county auditors; its jurisdiction is appellate only. County of Schuylkill *v.* Boyer, 29.

A sheriff had his fees allowed at the rate fixed by the Act of June 12, 1878, and paid by the county; it did not appear that his accounts had been passed upon by the county auditors; after the expiration of his term, the Act of 1878 was declared unconstitutional; he thereupon brought an action in the Common Pleas to recover the difference between the amount of fees under the Act of 1878, and the amount payable under the Act in force at the time the Act of 1878 was passed: *held*, the Common Pleas had no jurisdiction. Id.

The Common Pleas has jurisdiction to set aside an agreement of submission to a referee under the Act of May 17, 1874, where the referee is a person not qualified to act as such by the terms of the Act, or the agreement is entered into by a party acting in a fiduciary capacity. Campbell *v.* County of Fayette, 107.

The jurisdiction of the Common Pleas after an appeal under the Act of June 13, 1874, providing for an appeal from the assessment of damages in case of the exercise of right of eminent domain by a corporation, or individual, is exclusive. *In re* Widening of Chestnut Street, 418.

CONDITION. A condition in a deed that the land granted thereby shall be "used for milling or manufacturing purposes only" is not a covenant to erect a mill. Madore's Appeal, 269.

CONFESSION. See EVIDENCE. Rizzolo *v.* Commonwealth, 13.

CONFLICT OF LAWS. Where an action in one State is brought to recover damages for a death occurring in another State, the right of action depends entirely upon the statutes of the State in which the death occurs, and must be prosecuted by the person designated in such statutes. Usher *v.* West Jersey R. R. Co., 57.

Where a foreign insurance company pays money arising from an insurance, and claimed by two persons, into Court, and both claimants are residents, the question whether the *lex fori* or *lex loci* should be followed does not arise. Brown's Appeal, 77.

A contract of carriage made by common carrier in New York, to be executed wholly within that State, is governed by the law of that State as the law of the *lex loci contractus*. Forepaugh *v.* Del. Lack. & West. R. R. Co., 385.

It is not contrary to the public policy of Pennsylvania to enforce a contract releasing a common carrier from liability for the negligence of its agents or employés when such contract is valid by the law of the State within which it was made, and to be performed, although such contract would be void in Pennsylvania, Id., per MITCHELL, J.; GREEN and MCCOLLUM, JJ., concurring; STERRETT and WILLIAMS, JJ., dissenting; PAXSON, C. J., and CLARK, J., absent.

CONSENT. The consent of the owner of a particular estate, for whose sole benefit the exercise of a power of sale is postponed by the instrument of its creation, may advance the time of execution. Hamlin *v.* Thomas, 4.

Such consent may be by parol. Id.

CONSIDERATION. A treasurer of the poor directors deposited the money of the board with a bank, which failed. The directors at a meeting irregularly convened agreed that if he would assign his bank book as treasurer to the board, his bond should be surrendered and he be released from all further liability: *held*, that the agreement on the part of the

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CONSIDERATION—*Continued.*
directors was without consideration, and would have been unenforceable even had it been made at a regular meeting. Nason *v.* Directors of the Poor of Erie County, 60,

CONSTITUTION OF PENNSYLVANIA.
Art. III., § 7, 460.
Art. III., § 13, 401, 419.
Art. III., § 21, 563.
Art. V., § 22, 419.
Art. V., § 26, 460.
Art. XIV., § 1, 401.
Art. XIV., § 5, 401.
Art. XVI., § 7, 530.
Art. XVI., § 8, 418, 491, 520.

CONSTITUTION OF UNITED STATES.
Art. IV., § 2, 539.

CONSTITUTIONAL LAW. An Act whose title is "An Act extending the powers of county auditors, authorizing them to settle, audit, and adjust the accounts of the directors of the poor," and which, in the body, declares it to be the duty of the auditors to audit "accounts of the directors of the poor, and of the treasurer and steward of each and every poor-house," sufficiently sets forth its object in its title and is not unconstitutional in respect to the authorization of the audit of the treasurer's account. Nason *v.* Directors of the Poor of Erie County, 60.

The Act of May 24, 1887, relative to the granting of licenses to sell liquor at wholesale, is constitutional. Commonwealth *ex rel.* Kaiser *v.* Hill, 184.

The Act of May 1, 1876 (P. L. 94), regulating the passage of ordinances by councils of all cities, except those of the first class, authorizing the paving and grading of streets, etc., is not unconstitutional, as being special legislation. City of Erie *v.* Brady, 252.

The taxing power of the Commonwealth cannot be extended to realty lying without her borders. Appeal of the Commonwealth, 273.

The Act of May 10, 1889, permitting judgment to be taken in foreign attachment at or after the third term, after execution of the writ, provided a declaration has been filed fifteen days before judgment, applies to actions pending at the time of the passage of the Act, and, as so applied, is constitutional, it being an Act of a remedial character affecting procedure. (C. P.) Lane & Co. *v.* White & Co., 380.

Art. XVI., § 8, of the Constitution of Pennsylvania, providing that the Legislature shall not deprive any person of an appeal from the assessment of damages by viewers, applies to the case of the vacation of a street and the assessment of damages therefor. (C. P.) *In re* Vacation of Howard Street, 491, 520.

A county solicitor elected under the Act of February 18, 1870, is a public officer within Art. III., § 13, Art. XIV., §§ 1, 5, of the Constitution. County of Lancaster *v.* Fulton, 401.

There is no distinction between the binding effect of the decisions of State Courts upon questions of commercial law and upon statutes; therefore the law declared by such Courts to govern contracts made within their jurisdiction is conclusive everywhere. The departure made by the Federal Courts, with respect to questions of general commercial law, will not be followed in Pennsylvania. Forepaugh *v.* Del. Lack. & West. R. R. Co., 385.

While as a rule an amendment of a statute declaring that it shall read in a certain way, repeals all provisions not retained in the altered form, yet this rule does not apply where the implied repeal would

CONSTITUTIONAL LAW—*Continued.*
produce an unconstitutional result. Reid *v.* Smoulter, 419.

Where an Act of Legislature has created an Orphans' Court, in accordance with Art. V., § 22, of the Constitution, an assistant clerk appointed thereunder, in accordance with the terms of the Act of May 19, 1874, is protected in his office by the Constitution, and his right cannot be divested by the Legislature while the Orphans' Court exists. Id.

When the Constitution creates a public office without making any provision for the salary to be attached thereto, the Legislature may fix the amount of salary from time to time, but it cannot repeal the Act fixing the salary without making any provision therefor. Id.

The 57th section of the Act of May 23, 1874, P. L. 269, providing that any city of the third class may become subject to its provisions by acceptance thereof by the passage of ordinance is constitutional. City of Meadville *v.* Dickson, 451.

The 16th section of the Act of April 11, 1876, P. L. 20, providing that any city of the third, fourth, or fifth class may, by an ordinance of councils, become subject to the Act of May 23, 1874, or to any portion thereof, is unconstitutional. Id.

The entire Act of May 17, 1887, P. L. 117, legislating for cities of the third, fourth, and fifth classes, of which the latter two classes do not exist in law, is unconstitutional. Id.

Sections 1 and 2 of the Act of May 6, 1887, P. L. 87, providing that viewers, deciding in favor of opening or widening any public plotted street in any city of the first class, may pass on the question of benefits and damages, are not unconstitutional as local or special legislation. *In re* Ruan Street, 460. [A reargument has been ordered in this case. H. B.]

Sections 3 and 4 of the Act of May 6, 1887, providing for the appointment of a Master, and prescribing his duties in road cases in cities of the first class are unconstitutional, as in violation of Art. III. § 7, prohibiting local or special laws "regulating the practice or jurisdiction of any judicial proceeding or inquiry." Id.

Where unconstitutional portions can be taken out of an Act, and still leave a complete legislative Act capable of execution in accordance with its plain intent, and not in any wise depending on the rejected, the Act will be valid, except as to the unconstitutional part. Rule applied to Act of May 6, 1887. Id.

A corporation which is about to issue bonds to sell, and to raise money thereby to pay obligations incurred in the construction of its works, is not within the provisions of Art. XVI. § 7, of the Constitution, prohibiting the issue of bonds except for money received, labor done, or property actually received. Appeal of the Commonwealth, 530.

The Act of April 17, 1866, limiting the time within which an action may be brought against a railroad company for damages for right of way, etc., is abrogated by Art. III. § 21, of the Constitution. Railroad Extension Co. *v.* Seiple, 563.

CONTRACT. A. made a contract with B., constituting the latter sole agent for the introduction to the United States of an article patented by the former and agreeing to supply B. "with sufficient samples of his said article . . . . as the same may be called for by the said B.:" *held*, that A. was not bound to submit to any unconscionable demands for samples made by B.; and hence that where A. had furnished 431,621 sample bottles in four months, and had declined to fill an order for an additional 100,000, evidence should have been admitted to show that the quantity actu-

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CONTRACT—*Continued.*
ally furnished was more than a reasonably sufficient quantity for a year, according to the usual course of trade. Jensen *v.* Perry, 90.

An alteration in a written contract, which does not change its legal effect, is immaterial. Express Publishing Co. *v.* Aldine Press, 165.

The interlineation of the word "before," in a contract providing that an order referred to therein should be subject to countermand *by* a certain date is immaterial. Id.

A contract, providing that A. should erect, partly upon land of B., an inclined plane, and operate the same, that B. should use it in mining a certain quantity of ore, which, by the same agreement, he sold to A., and that on all ore sold by B. to any one else he should pay to A. a certain price per ton for the use of the plane: *held*, the contract did not create the relation of landlord and tenant between A. and B. so as to entitle the latter to retain the plane as a fixture left on the premises, A. not having removed it some four years after the coal sold to him had been delivered. Charlotte Furnace Co *v.* Stouffer, 311.

The terms of a contract between a testator and a devisee to be executed in the lifetime of the testator may be contained in a will, and when executed by performance on the part of the devisee, the contract will not be avoided by the fact that its terms are contained in a testamentary paper. Smith *v.* Tuit, 312.

A. bequeathed certain realty to B. in consideration of his past care and kindness, and by the will provided that B. should take possession of the property on the day after the date of the will, and take A. to live with him as one of his family. B. took possession, and took A. to live with him; some years after A. conveyed the same realty to C.: *held*, that B., having performed his part of the contract, it could not be abrogated, and he would become entitled to the fee after the death of B., and that, as possession was necessary to carry out the terms of the contract, he could not be deprived of possession by C. during the lifetime of A. Id.

The good-will, etc., of a business was sold for the sum of $150, and the vendor undertook, by writing under seal, not to engage in the same business or use his influence in opposition to the vendee in any manner or form; the writing recited, "that each party is hereby held and fully bound in the sum of $300 for the faithful fulfilment of the above contract:" *held*, the last provision was a penalty and not a liquidation of damages, and hence on a breach by the vendor the vendee could prove his actual damage and recover the same, although in excess of $300. Moore *v.* Colt, 356.

Parol evidence admitted to contradict written agreement. See EVIDENCE. Honesdale Glass Co. *v.* Storms, 161.

Contemporaneous parol agreement not admitted to vary written contract. See EVIDENCE. Express Publishing Co. *v.* Aldine Press, 165.

Contract by next of kin for the collection of amount due decedent's estate from life insurance policies, upheld as against creditors. See DECEDENT'S ESTATE. Mumma's Appeal, 297.

CONTRIBUTION. There is no contribution amongst tortfeasors. Boyer's Appeal, 300.

Where one of several directors of a company, against whom a decree is entered for fraudulently appropriating the company's money, pays more than his proportion of the sum found due by the decree, he cannot use the same for the purpose of enforcing contribution from his co-defendant. Id.

One who, with money obtained from such a defendant, has paid more than such defendant's share, and taken an assignment of a proportion of the sum due under the decree, cannot enforce contribution. Id.

CONTRIBUTION—*Continued.*
Where one of several co-promisors continues liable, and is compelled to pay a debt, the liability of the other promisors for contribution will remain, notwithstanding they have been discharged as against the promisee by the operation of the Statute of Limitations. Martin *v.* Frantz, 325.

The right to contribution does not arise directly from the original instrument of joint obligation, but from the actual payment by one promisor of more than his share of the sum due by the instrument. Id.

CONTRIBUTORY NEGLIGENCE. Any negligence on his part, which in any degree has contributed to the injury suffered by a plaintiff is sufficient to bar a recovery by him for an injury so suffered. Bloomsburg Steam and Electric Light Co. *v.* Gardner, 21. See NEGLIGENCE.

CONVERSION. Conversion is altogether a doctrine of equity, and must be limited to its end; when that end is attained the conversion ceases, and the property which is subject to it takes its real character. Wentz's Appeal, 201.

Where realty is sold by order of Court the proceeds are treated as realty so far as to vest in the person who would have been entitled to the unsold realty, but once so vested they take their true character as personalty. Id.

A. died intestate; his realty was sold in partition, and part of the purchase-money left charged on the land in lieu of the widow's dower, the rest was paid to A.'s children or their guardian; one minor child (B.) married and, still a minor, died, leaving a child (C.) who died a minor. B.'s husband then died, and, afterwards, the widow died: *held*, the share of B. in the sum charged on the realty in lieu of dower was personalty, and hence passed to the administrator o B.'s husband, and not to B.'s brothers and sisters. Id.

CORPORATION. A foreign corportion is not liable to taxation on a portion of its capital stock merely because it owns property which is within the State. Commonwealth *v.* American Bell Telephone Co, 187.

Every grant of corporate powers is subject to the condition that the corporation shall be subject in the conduct of its affairs to such reasonable regulations, as the Legislature may from time to time prescribe, which do not materially interfere with the substantial enjoyment of the corporate privileges and serve only to secure the ends for which the corporation was created. Reed's Appeal, 292.

The Gettysburg Battlefield Memorial Association is a *quasi* public corporation created solely for the public benefit, and is subject to legislative regulations, respecting the public objects the corporation was designed to accomplish, provided the same are such as tend to secure the ends for which it was created. Id.

The Act of June 15, 1887 (P. L. 408), providing for the appointment of commissioners to act in conjunction with representatives of its several regiments engaged in the battle of Gettysburg, in selecting monuments to mark the position of said regiments in said battle is not an unwarranted interference with the rights of the Gettysburg Battlefield Memorial Association, but a reasonable and proper regulation in furtherance of the purposes for which the association was incorporated. Id.

The real estate of a manufacturing company is liable to taxation as such under the Act of April 15, 1834,

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CORPORATION—*Continued.*
notwithstanding the Act of June 30, 1885. Appeal of the Jas. H. Hawes Manuf. Co., 302.

A corporation is liable to indemnify the holder of a certificate of its stock, although fraudulently issued by its officers, to the extent of expenditure made by him on the faith of the stock. Kisterbook's Appeal, 446.

When the borrowing power of a corporation is limited or regulated by the "par value of the capital stock" the value to be taken as the measure of its borrowing power is the capital actually paid up and not the amount of authorized capital. Appeal of Lehigh Ave. Ry. Co., 530.

A corporation seeking to issue bonds to obtain money to pay for labor done in the construction of its works does not fall within the provisions of Art. XVI. § 7, of the Constitution, prohibiting the issue of bonds except for money, labor done or property actually received; nor if a railroad corporation within the Act of May 7, 1887, to enforce the above section against railroad corporations. Id.

COSTS. Costs of an audit are properly imposed upon an executor whose unfounded charges have rendered the audit necessary. Barbite's Appeal, 64.

Costs of a review upon the question of damages alone cannot under the general road law or the Act of May 19, 1887, be imposed upon the county. County of Huntingdon *v.* Kauffman, 97.

Costs under the Act of May 19, 1887, in cases of misdemeanor, are recoverable from the county only where the case is in the Quarter Sessions, and is terminated by the indictment being ignored or by a verdict and sentence thereon. Bradford County *v.* Wells, 117.

The Act of May 19, 1887, does not render a county liable for costs in prosecutions before justices of the peace under local Acts. Id.

An averment in the statement in assumpsit that the plaintiff claims more than $100, will not entitle him to costs where the judgment recovered is less than $100. (C. P.) Steen *v.* Smucker, 304.

COUNSEL. No appeal lies by counsel on his own behalf from a decree refusing to allow counsel fees to a plaintiff in partition. Pereyra's Appeal, 42.

COUNSEL FEES. Counsel fees will not be allowed to an executor for services rendered to him in defence of his own conduct in the execution of his trust. Geiger's Appeal, 264.

COUNTY. A county is not by the Act of May 19, 1887, P. L. 138, rendered liable for costs of prosecutions before justices of the peace. See Costs. Bradford County *v.* Wells, 117.

By the Act of June 13, 1836, a county is compellable to build necessary bridges the expense of which would be too great for the township within whose boundaries they are situated; when built, however, the county, unless it be one not exempted from the provisions of the Act of April 13, 1843, is not required to keep the bridge in repair, that duty rests upon the township. Commissioners of Erie County *v.* Commonwealth, 373.

By the Act of May 5, 1876, a county may be compelled to rebuild a county bridge where it has been "blown down, destroyed or partially destroyed, or swept away by floods;" but such Act does not impose the duty of making ordinary or extraordinary repairs on the county. Id.

COUNTY AUDITORS. The original jurisdiction of county auditors in the settlement of the accounts of officers named in the Act of April 15, 1834, is exclusive of, and not concurrent with the Common Pleas. County of Schuylkill *v.* Boyer, 29.

COUNTY AUDITORS—*Continued.*
In the absence of evidence to the contrary the presumption is that county auditors have performed their duty in the settlement of accounts. Id.

County auditors are authorized to audit the accounts of the treasurer of the directors of the poor. Nason *v.* Directors of the Poor of the County of Erie, 60.

COUNTY COMMISSIONERS. County commissioners act in a fiduciary capacity, and hence cannot on behalf of the county agree to the appointment of a referee under the Act of May 14, 1874. Campbell *v.* County of Fayette, 107.

County commissioners have no authority to make a contract with the county solicitor to perform legal services for a compensation in addition to his salary. County of Lancaster *v.* Fulton, 401.

COUNTY SOLICITOR. A county solicitor under Act of February 18, 1870, is a public officer within the Constitution Art. III., § 13, and Art. XIV. §§ 1 and 5, and hence cannot have his salary increased or diminished during his term of office. County of Lancaster *v.* Fulton, 401.

The obtaining for a county from the Commonwealth a credit for overpaid taxes, is a "proceeding in law or equity" within the scope of the duty of a county solicitor, and for which his salary is paid. Id.

Where a county solicitor while in office makes a bargain with the county commissioners to obtain a credit for the county for overpaid taxes, for a compensation to be determined by the amount of the credit, and afterwards obtains the credit by labor performed partly while in office and partly after his term has expired, such contract is contrary to public policy, and there can be no recovery upon it either for services rendered before the solicitor's term expired, or for those rendered afterwards, although the commissioners may have recognized the contract after the solicitor's term had expired. Id.

COVENANT. The insertion in an instrument of an express covenant excludes any implication of a covenant touching the same matter. Stoddard *v.* Emery, 566.

A breach of covenant in a lease cannot be recovered for by the lessor, where this breach occurs after assignment of the reversion. Id.

A covenant to erect does not arise from a condition that land shall be used for a certain erection only. Madore's Appeal, 269.

"CREDIT THE DRAWER." The effect of the words "credit the drawer" on a promissory note is merely to direct all persons to whom the note may be presented, to treat the drawer as the owner; the words imply no promise or undertaking upon the part of him who uses them. Temple *v.* Baker, 1.

CRIMINAL LAW. The allegation of an alibi does not relieve or excuse the Commonwealth of the burden of proving strictly the *corpus delicti*, or from showing the guilt of the accused beyond a reasonable doubt; such reasonable doubt may be raised by evidence going to prove an alibi, although not clear. Rudy *v.* Commonwealth, 502.

An instruction as follows: "The setting up of an alibi does not relieve the Commonwealth from furnishing as it has done here full proof of the commission of the offence or crime charged," when read with a subsequent part of the charge as follows: "Nor does his setting up an alibi as a defence change the burden of proof cast upon the Commonwealth by his plea of not guilty, or waive his right to demand from the Commonwealth before he can be convicted full and complete proof of his guilt beyond a reasonable doubt," is

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CRIMINAL LAW—*Continued.*
a sufficient and proper statement of the law bearing upon the effect of an alibi. Id.

Criminal Practice.—At the trial it is too late to ask for a rule to take testimony in support of an application for a change of venue in a murder case, where there has been a whole term in which such rule could have been moved for. Rizzolo v. Commonwealth, 13.

Evidence that 1554 names were placed in a jury wheel instead of 1550, as ordered by the Court: *held*, not ground for quashing an array or the indictment. Id.

An opinion based on newspaper reading will not disqualify a juror who states that he can render a true verdict according to the evidence, uninfluenced by the previously formed opinion. Id.

Where one, convicted upon a capital charge, is asked if he have anything to say why sentence should not be passed upon him, the requirements of law are complied with; it is not necessary for the Judge to say "sentence of death," when death is the only sentence possible under the law. Id.

In the trial of an indictment for a nuisance, the Commonwealth may except to any decision or ruling, as in civil cases. Commonwealth v. Bradney, 101.

An indictment may be quashed for matter *dehors* the record. Id.

A. was indicted for maintaining a nuisance, the district attorney attended the grand jury, and remained in the room during the jury's deliberation and vote, but did not appear to have interfered therewith, he also, by a mistake, but acting in good faith, excluded a juror; a true bill having been found in the juror's absence, the Court permitted the bill to be recommitted; the evidence was again given to the jury, who returned a true bill: *held*, the Court erred in quashing the indictment so found. Id.

An indictment without a previous accusation before a committing magistrate can only be sustained (1) where the Court gives in charge to the grand jury a matter of general public import; (2) when the prosecuting officer *ex officio* prefers an indictment; (3) where the indictment originates by the presentment of a grand jury of an offence of which it takes notice from its own observation or knowledge. Commonwealth v. Green, 149.

In the course of a hearing by a grand jury of a case of assault and battery, it appeared that the assault took place within a disorderly house, whereupon the grand jury presented the keeper of said house; upon this presentment an indictment was drawn, which was, by leave of Court, sent to the next grand jury, by which a true bill was returned, on motion, it appearing that the presentment of the first grand jury was based upon testimony and not upon its own knowledge and observation, the bill was quashed: *held*, proper practice. Id.

A juror in a murder case, brought into court upon a special venire, may be stood aside. Rudy v. Commonwealth, 502.

DEATH. The proper plaintiff in an action to recover for the death of a person, under the Act of New Jersey of March 3, 1848, is the personal representative, even when the action is brought in Pennsylvania. See ADMINISTRATOR. Usher v. West Jersey R. R. Co., 57.

DECEDENTS' ESTATES. Where stock in a corporation, or in an unincorporated association, forms part of a decedent's estate, surplus earnings, accumulated in the lifetime of the deceased but not divided

DECEDENTS' ESTATES—*Continued.*
until after his death, are part of the corpus of the estate, but earnings made after the death are part of the income. (O. C.) Oliver's Estate, 139.

A., having been cashier of B., State treasurer, speculated with State funds, and died; B. paid the amount of the deficit into the treasury, urged A.'s administrators not to close a certain speculative oil account left by A. at his death, and promised to advance the necessary money for margins if they should be required; the administrators kept the account open, but B. was not called on for margins, the transaction closed at a profit to the administrators, who turned over the profit received to B. A.'s estate was insolvent, and there were other creditors beside B.: *held*, B. was not entitled to the profit and that the administrators should be surcharged therewith. Breckinridge's Appeal, 105.

A dividend obtained from the estate of an insolvent co-executor, upon presentation by an executor of a certificate of the amount due by the executors in their representative capacity, when the amount so due has been paid by the executors, and other amounts due by the insolvent to the estate have been paid by the solvent executor, does not become part of the decedent's estate but belongs to the executor receiving the same, in his own right. Miller's Appeal, 267.

The proceeds of a policy of fire insurance effected by an insolvent decedent upon real estate, which is burned after his death, are assets for the payment of his debts, whether said proceeds be regarded as personal assets or as representing the building that was destroyed. Nichols's Appeal, 440.

An inventory which erroneously includes property of the executor himself may be corrected. (O. C.) Eichhorn's Estate, 364.

A devise was made of one-half of an estate to M. and the other to E. or her issue, provided that if E. should not be found within two years after the death of the testatrix, "diligent inquiry having been made by my executors who are to be allowed a reasonable sum for their expenses therein," her share should go to M.: *held*, the expenses were payable out of E.'s share and not out of the estate. (O. C.) Murray's Estate, 175.

An order of the Orphans' Court for sale of realty for the payment of a decedent's debts does not have the effect of imposing a trust on said realty for the payment of debts then subsisting. Williamson's Appeal, 337.

A charge of 50 per cent. of the amount realized is not unreasonable for collecting sums due upon speculative policies upon the life of a decedent held by third parties and paid to them by the insurance companies. Mumma's Appeal, 297.

Creditors as well as heirs and distributees are bound for the expenses incurred in the administration of the estate of a decedent, and can only object to credits claimed by the administrator therefor if the amounts paid out have been excessive. Id.

The next of kin have a right to make a contract for the collection of a sum due to the decedent's estate upon policies of life insurance, and the creditors will be bound by the amount of compensation fixed in said contract, if it be made in good faith and the amount fixed be not unreasonable. Id.

A distributee who has received an amount in excess of his proper share cannot, in the absence of a promise on his part to refund the excess, be compelled to pay it back to the executor or administrator. Miller v. Hulme, 131.

Where the personal representative of an insolvent

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DECEDENTS' ESTATES—*Continued.*
decedent buys up claims against the decedent at less than their face value, such purchase enures to the benefit of the estate, but where the amount paid by him does not exceed the dividend to which the creditors whose claims are extinguished would have been entitled the accountant should be allowed as against the estate the whole sum paid by him and not merely a *pro rata* dividend thereon. (O. C.) Hacker's Estate. 318.

Where the decedent leaves a widow and an adopted child and the widow elects to take against the will, she will be entitled to only such share of the decedent's estate as she would have taken had the decedent left issue in fact, him surviving, viz., one third of the estate. (O. C.) Rowan's Estate, 158.

Where a married woman dies without issue and testate as to some of her property and intestate as to some, the husband taking against the will takes one-half the whole estate, and cannot take the whole of the personalty as to which his wife died intestate and half of that covered by the will. Lee's Appeal, 363.

Claims against decedent's estate for services, the evidence of which rests entirely in parol and which are based upon loose declarations, should be closely and carefully scrutinized. (O. C.) Murray's Estate, 175.

The presumption that services have been rendered gratuitously and on account of blood relationship is not confined to domestic services. Barhite's Appeal, 64.

A girl who on her grandfather's invitation goes to live with him, and for nine years is maintained by him, and performs domestic and clerical services for him, cannot, in the absence of evidence of an express contract. claim compensation for the services of either kind from his estate. Id.

The claim of a son for services rendered to his deceased parent in his lifetime can be sustained only if supported by clear proof of an agreement showing the relation existing to have been not the ordinary one of parent and child but of master and servant. Zimmerman *v.* Zimmerman, 294.

Where a sister-in-law of a decedent has performed services as housekeeper and caretaker of his motherless children, without any contract, and has made no demand for compensation during the decedent's lifetime, the presumption is that the services were not performed in expectation of any reward. (O. C.) Cooper's Estate, 384.

A stale claim by an executor against his testator's estate, where the account produced to support it is not in a book of original entries, and which is supported by the executor's testimony only, is properly disallowed. Geiger's Appeal, 264.

Where an award is made to a creditor by an Auditor but is not paid, owing to the insolvency of the executor, the creditor may prove his debt and share in the distribution of a second fund raised in the same estate Pomeroy's Appeal, 296.

DECEIT. In an action for deceit a scienter must be proved, but where gross misstatements are proved to have been made, under circumstances tending to show a reckless assertion in entire ignorance of the fact, and the assertor is not called to vindicate his good faith, a jury may well find that he has been guilty of deceit. Griswold *v.* Gebbie, 72.

A principal is liable for the misrepresentation of his agent if made within the apparent scope of his authority. Id.

In an action of deceit, an actual intent to defraud must be proved; there can be no such thing as constructive deceit. Kern *v.* Simpson, 394.

DEED. A., being over seventy years old, in consideration of $1.00, and other considerations "hereinafter mentioned" conveyed by technical words certain realty to his niece (a feme covert), her heirs and assigns, excepting "the residence" of A., "in the house and on the premises during his natural life, and which is to be a lien upon the premises;" the instrument further contained a covenant by the niece to board and lodge A. during his life, and give him clothing, nursing, medical attendance and burial, "all of which is to be, and remains a lien upon the premises aforesaid until the whole of the duties aforesaid are performed on the part of the said" niece. The paper was signed by A and his niece, her husband not joining: *held,* (1) the instrument was not a will or a testamentary disposition; (2) it did not vest an absolute fee in the niece, but was an executory contract on the part of A. to give his property for his maintenance, and on the part of the niece to support her uncle in return therefor, and vested in the grantee an equitable title only, forfeitable on failure to maintain A. Dreisbach *v.* Serfass, 23.

A condition in a deed that the land granted shall be used for a certain erection only, is not a covenant that such erection shall be made. Madore's Appeal, 269.

Where a deed is ambiguous, the articles of agreement in pursuance of which it has been made, may be given in evidence to correct the ambiguity. Warfel *v.* Knott, 513.

DEPOSIT. See LOAN. Baer's Appeal. 299.

DEVISAVIT VEL NON. The evidence relied on to support a claim for an issue showed that the testator had a habit of excessive drinking, and that, about the time of the execution of the paper (a codicil), whose validity was in question, he was suffering from the effects of over stimulation; but it also appeared that the habit was not continuous, that the testator was aware of it, and had several times voluntarily gone to a home in order to rid himself of it. The proponent's testimony showed that the codicil was written by a disinterested attorney at the request of the testator to whom it was read, and who expressed satisfaction with it; that the subscribing witnesses regarded the testator as rational at the time of the execution; that he afterwards travelled and attended to business, and that subsequently to the execution of the codicil he expressed satisfaction with it, and stated its contents to other persons; *held,* that an issue *devisavit vel non* was properly refused. Appeal of Harmony Lodge, 366.

A disposing mind is one in which the testator has at the time of executing his will a full and intelligent consciousness of the nature and effect of the act in which he is engaged, a full knowledge of the property he possesses, and an understanding of the disposition he wishes to make of it, and of the person he intends to benefit; it is not necessary that he be able to call to mind all the items of his property and to appreciate the value of each item. Reichenbach *v.* Ruddach, 476.

In determining the question of fraud and undue influence the jury may consider the state and condition of mind of the decedent at the time of making the alleged will, the condition and relative situation of the decedent and the proponent, the situation, surroundings, and condition of the decedent, the nature and extent of his property, the circumstances under which the will was made, and the provisions of the will itself. Id.

An inference of undue influence may be drawn from the mere fact that a will is in favor of the mistress of the testator, and even if, prior to the execution of the will, a marriage has taken place it does not relieve the

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DEVISAVIT VEL NON—*Continued.*
testamentary act from the imputation of the continuance of the undue influence, if the jury under all the facts see fit to draw such inference. Id.

It is error to charge that the presumption of mental capacity in a person of full age must be overcome not by doubtful testimony but by positive evidence. Id.

Rule governing the granting of issue *devisavit vel non*. See WILLS. (O. C.) Palmer's Estate, 159.

DIRECTORS OF POOR. The directors of the poor of a county can perform no official act or bind the county, except when acting as a board at a meeting legally convened. Nason *v.* Directors of the Poor of Erie County, 60.

The treasurer of the directors of the poor is a treasurer of a poor-house within the meaning of the Acts of April 22, 1879, and June 2, 1881. Id.

DISTRICT ATTORNEY. The mere fact that the district attorney has, after fulfilling his duties before a grand jury, remained in the room during its deliberation and vote is not ground for quashing an indictment found a true bill under such circumstances, it not appearing that the district attorney participated in the deliberation. Commonwealth *v.* Bradney, 101.

It is better, however, that the district attorney should not be present during the deliberation and vote. Id.

DIVIDENDS. A stock dividend which represents profits actually made by a corporation, must be regarded as income and not as an increase of the corpus of an estate to which the stock upon which the dividend is declared belongs. Phila. Trust Co.'s Appeal, 137.

The same rule applies to a dividend of scrip convertible into stock so soon as the company acquires power to increase its stock, the profits represented by the scrip being in the meantime retained by the company. Id.

A dividend as soon as payable becomes a liability of the company declaring it. Id.

A. bequeathed the net rents, issues, profits and income of his estate to his daughter for life, and the corpus of the estate after her death over; he died owning 5582 shares in an unincorporated land company, holding about 600 acres of undeveloped land; the stock was supposed to be worthless and was inventoried at a nominal rate; subsequently, it was supposed that the land contained copper, 40 acres were sold for $500,000, and a dividend was declared out of the profits of the sale of $19.50 per share: *held*, that this sum was income payable to the life-tenant. (O. C.) Oliver's Estate, 139.

DIVORCE. A false representation by a woman to a man that she is pregnant by him, which representation is not believed by him, is not sufficient ground for a divorce from the bonds of a marriage which subsequently takes place between them. (C. P.) Todd *v.* Todd, 31.

To justify a divorce on the ground that a marriage has been brought about by duress *per minas*, the threats must have been such, against the libellant's life or to do him bodily harm, as would overpower the judgment and coerce the will. Id.

A single act of cruelty may be so severe and attended with such circumstances of atrocity as to justify a divorce, but no single act of cruelty, which comes short of endangering life, will afford such justification. Nye's Appeal, 121.

DOWER. The right of a woman's dower is not barred by her desertion of her husband. Nye's Appeal, 121.

DURESS. See DIVORCE. (C. P.) Todd *v.* Todd, 31.

EJECTMENT. An order making absolute a rule to bring ejectment within ninety days, under the provisions of the Act of June 24, 1885, is not the subject of a writ of error. Davenport *v.* Jones, 43.

In an ejectment brought to rescind an executed contract of sale on the ground of fraud, the evidence of fraud must be clear, precise, and indubitable, or the Court is not justified in submitting the case to the jury. Kern *v.* Middleton, 393.

See EVIDENCE, Rice *v.* Rice, 205; NOTICE, Logan *v.* Neill, 541.

ELECTION. See WIDOW, DECEDENTS' ESTATES, Lee's Appeal, 363. (O. C.) Rowan's Estate, 158.

EMINENT DOMAIN. Property devoted to public use cannot be taken for another public purpose without legislative authority given either in express terms or by necessary implication. To give rise to an implication of a grant to take such property, the necessity must be so absolute that without it the grant itself would be defeated; the necessity must not be one created by the grantee of the power of eminent domain for its own convenience or be merely a question of economy. Groff's Appeal, 425.

A turnpike company, chartered under the Act of April 29, 1874, to build a road between specified termini, which are on a public road, cannot seize and occupy for its entire road-bed the highway already dedicated to public use. Id.

Under the Act of June 13, 1874 (P. L. 283), providing for an appeal to the Common Pleas in cases of damages assessed against a corporation or individual, vested with exercise of the right of eminent domain, an appeal taken vests in the Common Pleas exclusive jurisdiction of the question of damages. *In re* Widening of Chestnut Street, 418.

When a street is vacated, and the damages and benefits derived therefrom are assessed, an appeal lies on behalf of a property owner affected thereby from the finding of the jury of view. (C. P.) *In re* Vacation of Howard Street, 491, 520.

In a proceeding to recover damages for land taken and injured by a railroad company, under the right of eminent domain, for its railroad, the measure of damages is the difference between the market value of the property immediately before the taking and that immediately after the taking. Schuylkill River East Side R. R. Co. *v.* Stocker, 455.

Where streets have been plotted but not opened over land a portion of which is taken for a railroad, the jury should not consider the streets as opened, but may consider the value of the land as affected by the fact that the streets had been plotted and might some day have been opened. Id.

In proceedings to assess damages for the taking of land by a railroad, where it appears that a lessee of the plaintiff was, at the time of the location of the defendant's road, operating a quarry on the plaintiff's premises, the plaintiff may show that the lease covered but a small part of the quarry, and that the railroad did not touch the part so covered. Reading & Pottsville R. R. Co. *v.* Balthaser, 9.

Where damages are claimed, as having been suffered by a quarry, which, before the opening of the defendant's road, had an outlet to market by canal and by a railroad, it is error to admit evidence on the part of the plaintiff to show where he sold the stone he quarried and how he shipped it to market, but such evidence having been admitted, the defendant should be permited to show that in consequence of the construction of the new road the freight by rail was reduced. Id.

Where a sum has been arrived at as a measure of

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EMINENT DOMAIN—*Continued.*
damage by calculating the number of tons of limestone under the right of way of a railroad, and multiplying by a price per ton, and such measure has been held erroneous by the Supreme Court, and on a second trial the same sum is fixed by the same witnesses, it is error to refuse to allow the witnesses to be asked upon cross-examination whether they had not, in consequence of the decision of the Supreme Court, made a new arrangement of the items of damage so as to enable them to arrive at the same total as before, but by a different process. Id.

Interest is not allowable as such in an action to assess damages for land taken by virtue of the right of eminent domain, but it may be taken into consideration by the jury, in view of all the circumstances of the case, in fixing a gross sum. Id.

EQUITY. Extraordinary circumstances entitling a partner to compensation for services in winding up partnership matter. See PARTNERSHIP. Zell's Appeal, 68.

A decree in equity against co-tortfeasors cannot be used to compel contribution amongst them. See CONTRIBUTION. Boyer's Appeal, 300.

After a sale in partition upon equity proceedings, a supplemental bill may be maintained by the vendee, who was also a party to the original proceedings, setting out that, after the sale and before delivery of the Master's deed, his co-tenant had removed articles belonging to the realty, and praying that compensation be made therefor out of the proceeds of the sale. Williams's Appeal, 365.

Where a Court surcharges a trustee with the principal of a ground-rent, whose title is in his *cestui que trust*, it is its duty to see that the ground rent is properly conveyed to the trustee. Harris's Appeal, 370.

Equity will decree the closing up of windows maintained, without authority, in a party-wall. (C. P.) Datz *v.* Phillips, 382.

Equity has jurisdiction to compel an account, whether the right to an account arises under a partnership or under a contract, where the accounts are continuous and not simple. Appeal of the Consolidated Oil Well Packer Co., Limited, 544.

The rule in equity that only irreparable injuries will be enjoined, does not apply to acts, especially corporate acts, which are entirely without authority, and for which there is no adequate measure of damages at law. Such acts will be always enjoined. Groff's Appeal, 425.

A Court of equity having jurisdiction in the case of an executory contract of sale of realty, may grant an injunction to keep the property in *statu quo*. (C. P.) Citizens' Natural Gas Co. *v.* Shenango Natural Gas Co., 573.

An injunction will usually issue to prevent interference with flowing gas wells used to supply the public. Id.

Practice. A cross-bill must be confined to the subject-matter of the original bill; if it set up new and distinct matters not embraced in the original suit, no decree can be founded on such matters. (C. P.) Datz *v.* Phillips, 382.

A cross-bill is a mode of defence; its office is to enable a defendant to have discovery or obtain relief for himself in reference to matter contained in the original bill. Id.

A bill for discovery and account is not a bill for specific performance within the technical meaning of that term. Appeal of the Consolidated Oil Well Packer Co., Limited, 544.

Multifariousness must be taken advantage of by

EQUITY—*Continued.*
demurrer, plea, or answer; it is too late to object to it at the hearing. (C. P.) Citizens' Natural Gas Co. *v.* Shenango Natural Gas Co., 573.

A plaintiff in equity may use set-off or cross demand. Id.

A Master's report should usually contain: (1) a history of the case, setting out and defining the issues; (2) findings of facts in short paraphraphs; (3) findings of law; (4) form of decree; (5) argument, illustrations, and authorities sustaining the foregoing. Id.

Unrelated matters may be adjudicated in the same suit, if the parties are willing and no confusion or inconsistency is produced thereby in the proceedings or decree. Id.

ERROR. Where there is evidence to support the hypothesis of a point, the Court is bound to give a specific instruction upon the effect of the facts stated therein and it is error to refuse such instruction. New York, L. E. & West. R. R. Co. *v.* Enches, 261.

It is not error for a Judge to repeat to the jury the language of the Supreme Court, in a case which is still law, whose application to the case on trial does not do any legal injury to the party complaining of the quotation. Taylor *v.* Wright, 285.

A statement by the Court of facts not in evidence, or an answer to a point stating the same, is error for which judgment will be reversed. P. W. & B. R. R. Co. *v.* Alvord, 430.

When a Judge sees fit to comment upon evidence he must do so impartially and carefully, and if he give undue prominence to the evidence upon one side he is guilty of error, for which judgment should be reversed. Reichenbach *v.* Ruddach, 476.

Example of charge held to be partial and unfair. Reichenbach *v.* Ruddach, 476.

ESTOPPEL. A plaintiff is not estopped from suing the members of a defectively organized partnership association, limited, individually, by the fact that he has already recovered a judgment for the same debt against the association. Sheble *v.* Strong, 437.

Where an application for a policy has been filled in by the agent of the insurer with statements other than those given him by the insured, the latter is not estopped by his receipt of the policy from showing what statements were in fact made by him. Kister *v.* Lebanon Mut. Ins. Co., 442.

A corporation is estopped from denying the validity of fraudulently issued stock as against a *bona fide* holder for value, but the estoppel exists only where money has been expended on the faith of the certificate and to the extent necessary to indemnify the person expending the money. Kisterbock's Appeal, 446.

Where, pending an appeal by the Commonwealth from the decree of the Court below, finding the amount of the collateral inheritance tax but refusing to allow interest thereon, the tax is paid to the register, the Commonwealth is not estopped from prosecuting its appeal and recovering the interest. Commonwealth's Appeal, 473.

H. seised of land subject to a judgment to W., as a second lien, conveyed to D.; S. obtained judgment against H. and sold the land thereunder; D., being at the sale, gave written notice that this land was his (D.'s), and at the sale bought in the land for a trifle; afterwards, on the issue of a scire facias by W. to revive his judgment, with notice to D., D. alleged that, before the sale, he had reconveyed by deed, not recorded, to H., and hence that the lien of W.'s judgment was discharged: *held*, D. was estopped from setting up the alleged deed to H. Hiestand *v.* Williamson, 511.

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EVIDENCE. The rule that the best evidence shall be produced means that no evidence shall be received which is merely substitutionary in its character when the original may be had; it excludes only such secondary evidence which indicates the existence of an original source of information other than itself; it does not prohibit the selection of weaker instead of stronger proofs. Western Union Telegraph Co. *v.* Stevenson, 497.

A. lived at B., and acted, in his business, which was dependent upon the state of the oil market in N. and O., upon quotations furnished him by a telegraph company under a contract: *held*, he could testify, as against the company, as to messages sent by him over the telegraph line to his agents at N. and O., directing sales and purchases of oil, and the messages received from the company's operators in reply, and that he knew his orders were acted upon in N. and O. because the oil was delivered and the transactions settled. Id.

As between living witnesses one is not to be excluded because another had a better opportunity of knowing the fact attempted to be shown. Id.

It is not permissible, even on cross-examination, to ask a witness as to the contents of a paper which can be produced. Hayes *v.* Press Co., Limited, 413.

It is not necessary to offer an almanac in evidence to prove the coincidence of days of the week with days of the month. Wilson *v.* Van Leer, 289.

A real estate broker, who has acted as such in making a sale of certain suburban property, is a competent witness, in an action involving the value of the property at the time of the sale, to testify as to such value as an expert, where he is shown to have a large general knowledge of suburban values, and to have made special inquiries at the time of the sale as to values in the neighborhood, and to have discovered a recent sale of property in the neighborhood, although he had not for the two years before and after the sale bought or sold any property in the immediate vicinity. Griswold *v.* Gebbie, 72.

A sewing machine agent who has charge of certain land is not competent to testify to the market value of land in the neighborhood where he gives no other proof of qualification. Schuylkill River East Side R. R. Co. *v.* Stocker, 455.

A grand juror is a competent witness to testify to the nature of the issue or question before the grand jury, and that the jury in making the presentment acted upon testimony, and not upon its own knowledge or observation. Comm'th *v.* Green, 149.

In an action by an executor or administrator to recover a debt due to the testator or decedent, a legatee or distributee who has absolutely parted with his interest is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact of his legateeship or distributeeship. Heft *v.* Ogle, 276.

Distinction between release of a collateral and of a direct interest, as affecting competency of witness. Id.

The question of the competency of a witness is to be decided by the Court where the facts upon which the competency is to be determined are not contradicted or denied. Wilson *v.* Van Leer, 289.

A witness was offered to testify as to the handwriting of an alleged testator; it appeared he had seen the testator write once or twice, thirty-one years before the trial, when the witness was a boy about twenty years old, and had seen him indorse a check some twenty-three years before the trial: *held*, it was not error to admit his testimony. Id.

EVIDENCE—*Continued.*

Where a husband who is his wife's executor is called as for cross-examination and asked as to matters occurring in the lifetime of his wife, he becomes generally competent as a witness. (O. C.) Eichhorn's Estate, 364.

A wife is not a competent witness for her husband in a case where his testimony is excluded on the ground of interest. Bitner *v.* Boone, 404.

A. sued an executor for services to the decedent: *held*, plaintiff's wife was not rendered a competent witness by the Act of May 23, 1887. Id.

A husband is not a competent witness for his wife in a case where her testimony is excluded on the ground of interest. Daisz's Appeal, 406.

In the absence of fraud, accident or mistake, parol evidence is not admissible to modify the terms of a written contract, especially when it does not appear at what time the alleged modification of the contract was made. Conrow *v.* Conrow, 339.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, although it may vary, change, or reform the instrument, if the said evidence be clear, precise and indubitable, *i. e.* it must be given by credible witnesses who distinctly remember the facts to which they testify and narrate the details exactly; absolute certainty is however out of the question. Ferguson *a.* Rafferty, 525.

Parol evidence on the part of the assured is admissible to correct fraudulent or mistaken entries in an application for insurance when they have been written by the agent of the insurer. Kister *v.* Lebanon Mut. Ins. Co., 442.

Where land is held in the name of individuals who constitute a partnership, parol evidence is admissible, except as against purchasers and lien creditors who have dealt with the owners on the faith of the individual title, to show that the land is really partnership property. Warriner *v.* Mitchell, 470.

In an action on a bond, given by a partner and another to a retiring partner to indemnify the latter against all partnership debts, it is admissible to show by parol that a debt, on its face an individual one, is in reality a partnership debt. Id.

A written contract provided that the plaintiff should not supply "any edition of this sheet for the year 1887" to any person, other than the defendant, in certain counties: *held*, that evidence was not admissible that, at the time of signing, the agent of the plaintiff said that the words meant any sheet published by the plaintiff for the year 1887, especially where the contract stated that the agent presenting the contract for signature had no right to change, modify or, in any way, affect its terms. Express Publishing Co. *v.* Aldine Press, 165.

An apprentice agreed to serve a company for a certain term, and that part of his wages should be withheld until his term was completed; a disagreement having taken place as to when the term expired, he quit work and the company refused to pay the back wages. Subsequently the company and the apprentice entered into a written agreement reciting that the apprentice had agreed to serve for the time claimed by the company, had broken his agreement, and forfeited "all his claims on the said company" and agreeing that the company should employ him for one year at certain wages, "his wages less 40 per cent. and 10 per cent. to be paid him according to our rules for paying apprentices, and this to be in full of all demand." At the end of the year, the apprentice claimed not only his year's wages but the back wages under the old

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EVIDENCE—*Continued.*
agreement, and offered evidence to show that he signed the second agreement upon faith of a representation and promise that he should be paid his back wages and under a threat that if he did not sign they would not be paid: *held*, the evidence was properly admissible to contradict the written agreement. Honesdale Glass Co. *v.* Storms, 161.

A. deposited money with B., a banker, taking a written certificate of deposit, which recited that the money was payable to A. "on return of this certificate twelve months after date," with interest: *held*, the character of the transaction could not be changed, from a loan to a deposit, by evidence that, at the time of the delivery of the money to B., he agreed that the money might be drawn out at any time within the year with out interest, there being no proof that such agreement was omitted from the written contract, through fraud, accident or mistake. Baer's Appeal, 299.

A. made an oil lease to B., by the terms of which B. covenanted to dig a well at once and, if it proved a paying one, to dig another, there being no limitation as to time mentioned in the lease; B. sunk the first well; in an action for unreasonable delay in sinking the second well and failing to sink any more, evidence that, at the time of executing the lease, B. said he would sink enough wells to take out the oil in the land, and as to the number of wells per acre usually dry in the oil producing business, was inadmissible. Stoddard *v.* Emery, 566.

A. sealed agreement purporting to be made by a partnership, and admitted to be signed by one partner in the firm-name was offered, to be followed by proof of assent or ratification by the other partners: *held*, properly admitted, as the offer did not disclose that the ratification or assent was not under seal, and that the agreement did not become invalid because such ratification was shown to be parol, when the admission of this parol evidence was not specifically objected to. Martin, Fuller & Co. *v.* Bray, 378.

Evidence not impeaching the validity of a judgment but showing that it has been given for one purpose and has been used for another is admissible, even in a collateral proceeding. Stark's Appeal, 537.

In an audit of the account of an assignee for creditors, the assignor offered to prove that certain sums of money arising from the sale of his property under judgment, given as an indemnity, had come into the assignee's hands and were not accounted for. The evidence was rejected: *held*, error. Id.

In an action by a father for the loss of his son's services through the negligence of the defendant, declarations of the son made subsequent to the accident, alleged to have occasioned the injury, and with reference thereto are not admissible as part of the *res gestae*. City of Bradford *v.* Downs, 153.

Evidence that the trains of a railroad company, after an accident, began the practice of ringing a bell before reaching the place at which the accident had occurred is admissible, as a quasi admission of negligence in not having rung the bell upon the occasion of the accident. (C. P.) Specht *v.* Penna. R. R. Co., 317.

The record of a judgment recovered in a former action between the same parties, shown to be for the same cause as the pending case, is competent evidence for the defendant. Miller *v.* Rohrer, 278.

Rule applied where one of the actions was a proceeding under the Act of March 17, 1869. See ATTACHMENT. Miller *v.* Rohrer, 278.

The record of an agreement, with an acknowledgment by the subscribing witness before a justice of the peace that he saw the covenantor sign, seal and deliver the same, is admissible in evidence. Shiffer *v.* Broadhead, 44.

EVIDENCE—*Continued.*
Articles of agreement are admissible to correct an ambiguity in a deed, which is given in pursuance of them. Warfel *v.* Knott, 513.

In an action of trespass *quare clausum fregit*, which involved the true boundary line between A. and B., it appeared that A., who formerly owned both properties, had entered into articles to convey one to C. (B.'s grantor), and that he subsequently made a deed to C., which contained nothing from which the point of beginning in making courses could be ascertained: *held*, a portion of the articles of agreement were admissible for the purpose of fixing this point of beginning. Id.

A will contained bequests to "the Old Man's Home," located at X, and to "the Old Man and Old Woman's Home," located at X; no charities with such titles existed: *held*, that in order to explain the latent ambiguity contained in the will, it was admissible to show that there were at X two charities, "The Old Men's Home" and the "Widow's Home and Asylum for Aged and Indigent Women," existing under the same roof, but under separate management. (O. C.) Dugan's Estate, 287.

While, in a sale of a tract of land, an over-statement of the number of acres contained therein is not sufficient to prove fraud, still, if the deficiency is very great in proportion to the whole tract, it is evidence of fraud. Griswold *v.* Gebbie, 72.

In an action of deceit for fraudulent representations that the number of acres in a tract purchased exceeded the real number, where the quantity of land in the tract was one of the elements of calculation of price, evidence as to the value of the land per acre is admissible, although the tract has been purchased as a whole. Id.

When a deed is attacked on the ground of the insanity of the grantor, evidence of the testator's intention with regard to a disposition of the property conveyed, at a time when he was unquestionably sane, is admissible. Rice *v.* Rice, 205.

Such intention may be shown by declarations, and no precise limit can be fixed as to the time at which they must have been made to be admissible, although remoteness will diminish their weight. Id.

In ejectment A. relied upon a deed; B. presented an inquest in lunacy, finding that the grantor had become insane some three months before the date of the deed: *held*, that it was error to exclude declarations of the grantor made within fifteen months prior to the date of the deed, that he intended to execute this conveyance "or a deed" to A. on the ground of remoteness. Id.

In a sheriff's interpleader to determine the ownership of personal property levied on as belonging to a husband and claimed by his wife, declarations of the husband in the absence of the wife cannot be given in evidence against her claim. Martin *v.* Rutt, 308.

In an issue formed to try the title to certain cigars levied on in 1886, an internal revenue certificate issued in 1876 to a third person is too remote and irrelevant to be admissible to show that said person had the right to manufacture cigars at the place where the cigars in question had been levied upon. Id.

In a sheriff's interpleader the record of the judgment of the defendant against the judgment debtor is admissible, as the foundation of the title claimed by the defendant. Id.

Where the issue is whether certain property is liable for assessment for municipal improvements, on the

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EVIDENCE—*Continued.*
foot front rule, for paving done in 1878, under an ordinance passed in 1874, evidence that in 1875 another part of the same lot was held rural property and therefore not so liable, is inadmissible. Keith *v.* City of Philadelphia, 115.

In fixing the amount of damages suffered by land from the construction of a railroad, evidence of improvements upon a square of ground, eight squares from the land in question, is inadmissible. Schuylkill River East Side R. R. Co. *v.* Stocker, 455.

Where in a proceeding to recover damages for the taking of land under the right of eminent domain, assessments for taxation of land have been admitted in evidence, it is not error to instruct the jury that there is no principle of law which makes such assessments evidence to determine the value of the land as between the owner and the takers. Id.

In a proceeding to fix land damages, it is error to permit a witness to testify as to the damage done to a portion of the tract under consideration, although he testify that in his judgment the rest of the land would not be affected one way or the other, he having made no special examination of the omitted part. Id.

An auditor's report which does not show an assignment of the excess in an over payment but shows an agreement to assign, upon which the adjudication was based, is not admissible to prove an agreement by the overpaid person to refund, but is admissible to prove that a certain claim was presented and partially allowed under an alleged agreement of counsel. Miller *v.* Hulme, 131.

Proofs of loss are admissible to show that the requirements of a policy of insurance have been complied with but not as evidence of the plaintiff's claim. Peoples' Mutual Accident Association *v.* Smith, 33.

Allowing down timber, the right to remove which has been purchased but the price for which has not been paid, to lie upon the ground of the vendor and rot is evidence of the abandonment on the part of the purchaser of the contract to purchase and remove. Short *v.* Messenger, 244.

Evidence *aliunde* to supply the defects of a certificate filed under the Partnership Association Limited Act is inadmissible. Vanhorn, Griffin & Co. *v.* Corcoran, 249.

Where the question is whether a saw mill and machinery were of a temporary character or were permanently attached to the realty, evidence of the statements of the owner to the plaintiff and others, at the time of the purchase of the mill, of the purposes for which he wanted it, is admissible to show its temporary character. Benedict *v.* Marsh, 256.

Where the defence, set up in an action by a broker against his principal to recover the loss on a margin transaction, is that the transaction was a gambling one the defendant may show that his means were inadequate to carry out the contract as a sale. Myers *v.* Tobias, 432.

In an issue *devisavit vel non* the record of the admission of the decedent's father to an insane asylum and that he was affected with melancholia resulting from intemperance is not admissible. Reichenbach *v.* Ruddach, 476.

In a trial for murder, the evidence against the prisoner being entirely circumstantial and it being shown that when the body of the murdered person was found the prisoner exclaimed "That is my father, some of those poor-house fellows have killed him," a witness was asked (1) whether the prisoner did not at the same time also say that the inmates of the poor-house had stolen from and annoyed the deceased, and (2) whether the deceased had not complained to the witness of abuse from the inmates of the poor-house: *held*, both questions were properly excluded. Rudy *v.* Commonwealth, 502.

A. was indicted for furnishing liquor on certain Sundays and was acquitted; he was afterwards tried for furnishing liquor to intoxicated persons; the Commonwealth gave evidence of the furnishing of liquors to such persons on Sundays; the defendant offered the record of his former acquittal: *held*, that to exclude said record was error and that the evidence of furnishing liquor on said Sundays was not evidence upon which the jury could rely to convict. Altenburg *v.* Commonwealth, 145.

Where a subordinate detective has told a prisoner that he had better tell all he knew and that it would be better for him if he did, but the superior detective has told the prisoner that anything he may say will be used against him, but nevertheless if he felt like telling anything to go ahead and to tell nothing or the whole truth, a subsequent confession to the captain should not be excluded as an involuntary confession. Rizzolo *v.* The Commonwealth, 13.

The particularity of the statement of the purpose for which a writing is offered in evidence is matter within the discretion of the Judge trying the case. See PRACTICE. Myers *v.* Kingston Coal Co., 223.

Admission of evidence as affected by special rule of Court. See RULE OF COURT. Dill *v.* Knapp, 258.

EXECUTION. Where a writ is placed in the hands of the sheriff under which he makes no levy, and subsequently another writ is given him under which he levies and sells, the proceeds of the sale must be applied to the second writ, as under it the sale was made, leaving the sheriff accountable to the first execution creditor. Stroudsburg Bank's Appeal, 213.

An execution issued to delay creditors and not to make money will be postponed to a subsequent writ; but postponement will not take place merely because the writ has been issued to prevent the levy of other creditors, if the execution creditor do not interfere with the sheriff in his duties or give directions inconsistent with the exigencies of the writ. Id.

Where an execution has been issued in violation of an agreement not to issue execution, except in a certain contingency, the Court may properly set it aside. Feagley *v.* Norbeck, 227.

A levy of goods within sight or potential control of the sheriff is valid only when followed by actual possession within a reasonable time. Dixon *v.* The White Sewing Machine Co., 433.

Where a debtor has bailed, pawned or demised goods, his interest in them may be levied upon but the possession of the bailee may not be disturbed. Id.

A levy on the goods of a stranger to the execution is a trespass, although there be no actual taking of the goods. Id.

The withdrawal or abandonment of a levy discharges it absolutely, although the sheriff has become liable in trespass to the owner of the goods levied on. Id.

A levy may be enlarged or restricted; a levy upon goods as the defendant's property may be changed by restriction to the interest of the defendant therein. Id.

EXECUTORS. An executor is not an officer of the law or in any sense an agent of the creditor of his testator; his power is derived from the will. Pomeroy's Appeal, 296.

A judgment recovered by executors is a full protection to a defendant against a future action for the

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EXECUTORS—*Continued.*
same cause, although all of the executors have not been joined. Conrow *v.* Conrow, 339.

An executor who, erroneously, includes in the inventory of the decedent's estate property of his own is not estopped from correcting the mistake. (O. C.) Eichhorn's Estate, 364.

A. and B., executors under a will which, *inter alia*, contained six legacies of $500 each to testator's grandchildren, to be paid them on reaching majority, filed an account, and were directed by the Orphans' Court to invest the $3000 for the benefit of the legatees. A. had control of the money, but did not invest it, and afterwards failed; B. paid the legacies as they fell due; the residuary legatees sought to surcharge B. with the interest which would have been earned by the $3000 if invested: *held*, that B. should not be surcharged; the direction of the Court was only intended to secure prompt payment of the specific legacies, and not to increase the residuary estate by the accumulation of interest. Miller's Appeal, 267.

A. and B., executors, filed an account, and a certificate of the amount due by them was filed as a lien; the amount represented by the certificate was paid, but the lien was not satisfied. A. defaulted as to part of the fund and, becoming insolvent, made an assignment for the benefit of creditors. B. assumed the debt of A. to the debtor's estate, and before the Auditor of A.'s insolvent estate presented the certificate and received a dividend thereon: *held*, he took the dividend in his own right by subrogation, and that it did not become part of the estate for which he was accountable as executor. Id.

Land, subject to a judgment, was devised for life, and a power of sale was given to the executors, who sold the property, and out of the proceeds paid the judgment and interest thereon accrued since the testator's death: *held*, the executors could not claim credit for the amount of the interest. Geiger's Appeal, 264.

Where an executor with a power of sale has purchased land of his testator and, afterwards, improved it and sold it, he is chargeable to the estate with the amount of the price paid him less any amount paid on behalf of the testator's debt from such price. Id.

An executor, who has mingled the money of his testator with his own, who produces no vouchers for many items of credit and who files an account involving a tedious and expensive audit upon which he is heavily surcharged, is not entitled to commissions, although his dereliction of duty may have been the result of ignorance. Id.

An executor is not entitled to commissions upon a sum of money owed by him to the decedent, or upon an advancement to a distributee, where he has had no service to perform to the estate except to take a receipt from the distributee. Barbite's Appeal, 64.

Costs of an audit may properly be put upon an executor where the audit is rendered necessary by his unfounded charge. Id.

An executor cannot claim credit for counsel fees for services rendered to him on his own account in defending his conduct in the administration of his trust. Id.

See SUBROGATION. Ewing's Appeal, 105.

See DECEDENTS' ESTATES. Breckenridge's Appeal, 105. ADMINISTRATOR.

EXECUTORY BEQUEST. Where a legatee, to whom a legacy is given absolutely with an executory limitation over, dies in the lifetime of the testator but after the event has happened, on the non-occurrence of which the limitation over depends, the executory bequest cannot take place. (O. C.) McGlathery's Estate, 55.

EXEMPTION. The debtor's exemption, under the Act of April 9, 1849, may be lost by laches. Harlan *v.* Haines, 84.

A. was entitled to the share of a fund after the death of his mother, the principal of which fund was liable to diminution in case the mother's needs could not be satisfied by the income; in 1874, his share was attached. In 1886, the mother died, and on January 14, 1887, A. claimed the exemption: *held*, the delay was such laches as deprived A. of his right to the exemption. Id.

Exemption by Act of June 30, 1885, of manufacturing corporations from taxation. See MANUFACTURING CORPORATIONS. Commonwealth's Appeal, Lackawanna Iron and Coal Co.'s Appeal, 191.

FAMILY CONTRACTS. In an agreement, under seal, between an aged and a younger member of the same family, by which the former conveys land to the latter in consideration of future support, a present fee simple will not be held to pass unless the intention of the makers that such an estate shall pass be very clear. Dreisbach *v.* Serfass, 23.

FEES. The city solicitor cannot recover the five per cent. commission provided for by the Act of March 23, 1866, unless he has actually performed the services mentioned therein. (C. P.) City of Philadelphia *v.* Atmore, 540.

FEE SIMPLE. A devise to C. for life and that after her death the property "shall descend to the children issued from my marriage with the said C. . . . . And if she should survive them or any of them, it is further my intention . . . . that the same should after her death and after the death of my children by her revert to the male children issued from my first marriage," gives to a child of C. who survives her a fee simple, or if the words "without heirs" be construed without issue, a fee tail. Homet *v.* Bacon, 214.

FEE TAIL. See FEE SIMPLE. Homet *v.* Bacon, 214.

FIXTURES. Whether an article attached to realty is personalty or realty, where the article is of an equivocal character, is for the jury, and the object and intention of the owner of the article is to be regarded in deciding the question. Benedict *v.* Marsh, 256.

An inclined plane erected partly on the land of a mine owner, under a contract that it shall be used by him in getting out certain ore, which he has sold to the erector and owner of the plane, and that upon all coal mined by the use thereof and sold to other persons by the mine owner he shall pay to the plane owner a certain amount per ton, is not a fixture as between the parties to the contract. Charlotte Furnace Co. *v.* Stouffer, 311.

FOREIGN ATTACHMENT. Under a writ of foreign attachment against an undivided interest in personal property, the sheriff must take physical possession of the property itself, and the Court may order its sale as perishable without regard to whether the real owners or all of them are parties to the proceeding. (C. P.) Apreda *v.* Romano, 124.

When the plaintiff's affidavit is insufficient it is not amendable. (C. P.) Shumway *v.* Webster, 336.

The Act of May 10, 1889, permitting judgment for want of appearance to be taken at or after the third term, provided a declaration has been filed fifteen days before entry of judgment, applies to actions pending at the time of the passage of the Act, and is constitutional. (C. P.) Lane & Co. *v.* White & Co. 380.

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FORFEITURE of mining lease for non-payment of royalty. See LEASE. Hoch's Appeal, 27.

FRAUD. Fraud, to set aside an executed agreement for the sale of land, must be shown by evidence clear, precise and indubitable. See EJECTMENT. Kern v. Middleton, 393.

A testator made a bequest of the residue of his estate to a religious corporation, which bequest was void as having been made within the statutory period for avoiding charitable bequests; an officer of the corporation wrote to the plaintiff, a daughter of the testator, who resided in Georgia, stating that he was an intimate friend of her father, offering, as her friend, to secure her interest under the will which was small, and stating also that her claims were somewhat doubtful, that he would use every effort to have them recognized, and promising to use his influence with a sister of the plaintiff to have her make a will in favor of the plaintiff; he did not, however, state that the bequest to the corporation was void but, by the tone of the letter, intimated that it was valid; under these circumstances, he obtained from her, for the consideration of the payment of the small claims above mentioned, a release of her interest in her father's estate and a request to the executor to pay to the corporation whatever interest she might have in the residue of the said estate: *held*, (1) that there was sufficient evidence to require the submission to a jury of the question whether or not the release had been obtained by fraud; (2) that while the executor was protected by the release in making payment to the religious corporation, the said corporation was a mere volunteer, and was liable to pay back the amount received through its officer's fraud. Brooks v. First Presbyterian Church, 508.

Misrepresentations by a life insurance agent as to the solvency of his company constitute such a fraud as will render a mutual policy induced by them voidable by the assured. New Era Life Association v. Weigle 551.

Fraudulent issue of stock. See CORPORATIONS. Kisterbock's Appeal, 446.

FRAUDS, STATUTE OF. An irregular indorsement cannot be turned by parol testimony into a guarantee of payment of the note upon which it is. Temple v. Baker, 1.

The consent of a life-tenant that a power of sale exercisable after her death may be executed in her lifetime may be evidenced by parol; such consent is not a conveyance of the life-tenant's estate but a mere removal of a limitation upon the power. Hamlin v. Thomas, 4.

The terms of a contract with reference to realty may be contained in a will with the effect of satisfying the Statute of Frauds. Smith v. Tuit, 312.

A. bought a house for $1575, and gave the same to his daughter; afterwards she bought a house for $2600 and about at the same time, received from her father $1575, of which $575 was proved to have gone to pay for the new house; evidence was given that she had declared that her father had said that if she were not satisfied with the first house he would get her another; it also appeared that, afterwards, a deed was prepared conveying the first house to the father, and was left unexecuted with him: *held*, the evidence did not show such a state of affairs as would entitle the heirs of the father to a decree of conveyance, in the absence of a writing such as would satisfy the Statute of Frauds. Daisz's Appeal, 406.

GAMBLING CONTRACT. In an action brought by a broker against his principal to recover

GAMBLING CONTRACT—*Continued.*

the loss on a margin transaction where the defence is that the transaction was a gambling one, the defendant may, to throw light on the true character of the transaction, show that his means were inadequate to carry the contract into effect as a sale. Myers v. Tobias, 432.

GRAND JURY. A grand jury, after the district attorney has finished his presentation of the case, has the right to require him to retire, so that its deliberations may not be affected by his presence. Commonwealth v. Bradney, 101.

A grand juror was, by a mistake of the district attorney, excluded from the deliberations of the jury, after a true bill had been found; it was by order of the Court recommitted, that it might be considered by the grand jury including the person excluded; a true bill was again found: *held*, the defect on the first finding was cured by the second finding. Id.

A grand jury has no right to make a presentment based upon the testimony of witnesses and not upon its own knowledge or observation. Commonwealth v. Green, 149.

A grand juror may testify as to the nature of an issue or question investigated by the grand jury and that a presentment was made not upon the knowledge or observation of the jury itself, but upon testimony before it. Id.

GRANTOR AND GRANTEE. A grantor has no legal right to complain that the grantee does not exercise all the rights and privileges which he has purchased and paid for. Madore's Appeal, 269.

GUARDIAN AND WARD. Where a guardian loans money of his ward to a firm of which the guardian is a member, the ward is entitled to elect between interest upon his money, and the proportional share of profits received by the guardian and earned by the ward's money, treated as firm capital, less a reasonable compensation to the guardian for actual services. (O. C.) Small's Estate, 92.

Under such circumstances, although no fraud be alleged, the guardian will be refused commissions. Id.

HABITUAL DRUNKARD. Order of payment to the committee of amount shown by his account to be due to him, a lien. See LIEN. Hohman's Appeal, 242.

HUCKSTERS. The Act of May 18, 1866, providing for the licensing of hucksters in Bradford, Cumberland, Franklin, Fulton, and York counties, made a discrimination in the price of a license fee between residents and non-residents; the discrimination was removed by Act of March 17, 1867: *held*, that while the discrimination against non-residents in the original Act violated Art. 4, § 2, of the Federal Constitution, yet it having been removed by the later Act, an indictment of a citizen of another State, for huckstering in the county of York without a license was valid. Commonwealth v. Shaffer, 539.

HUSBAND AND WIFE. A husband, whose wife brings an action against a firm of which he is a member, is not bound legally or morally to set up on behalf of his firm the legal unity existing between himself and his wife. Freiler v. Kear, 195.

The declarations of a husband cannot be given in evidence against his wife. Martin v. Rutt, 308.

A husband whose wife, having made a will, dies without issue and intestate as to some of her property, cannot, by election to take against the will, claim half of the property covered thereby and the whole of the unbequeathed personalty; his right is limited to one-half of the whole estate. Lee's Appeal, 363.

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HUSBAND AND WIFE—*Continued.*

The incapacity of a husband or wife to testify against the other is, as to matters not the subject of confidential communications, removed by the death of either. (O. C.) Eichhorn's Estate, 364.

A wife is not a competent witness to testify in favor of her husband in a case where the husband's testimony is excluded on ground of interest. Bitner *v.* Boone, 404.

This rule is not altered by the Act of May 23, 1887. Id.

A husband is not a competent witness to testify in favor of his wife, where her testimony is excluded on the ground of interest. Daisz's Appeal, 406.

The Act of June 3, 1887, § 4 P. L. 332 (Married Persons Property Act), does not confer on the wife the power to sue her husband in her own name: the language of the section by itself is broad enough to authorize such suits. but when construed with the other sections of the Act it appears that such was not the legislative intent. Small *v.* Small, 452.

In an action to recover for death of wife the plaintiff need not show pecuniary loss. See MEASURE OF DAMAGES. Del. Lack. & West. R. R. Co. *v.* Jones, 562.

INDICTMENT. See CRIMINAL PRACTICE. Commonwealth *v.* Green, 149.

INDORSEMENT. An irregular indorsement cannot be turned by parol into a guarantee. See PROMISSORY NOTES. Temple *v.* Baker, 1.

An indorsement upon a promissory note which is non-negotiable, on account of matter incorporated therein rendering its obligations uncertain, does not render the indorser liable upon the note. Citizens' National Bank *v.* Piollet, 83.

INFANT. Imputation to of contributory negligence. See NEGLIGENCE. Strawbridge & Clothier *v.* Bradford, 536.

INJUNCTION. See EQUITY.

INSANITY. Where a deed is impeached on the ground of insanity of the grantor, it is competent to show that the grantor, at a time when he was unquestionably sane, had expressed an intention to execute such a deed. Rice *v.* Rice, 205.

INSURANCE. Proofs of loss are admissible to show that such proofs have been made in compliance with the requirements of an insurance policy but they are not evidence of the plaintiff's claim. Peoples' Mutual Accident Association *v.* Smith, 33.

The provision in a policy that "if any broker or other person than the assured shall have procured this insurance to be taken by the company such broker or other person shall be considered the agent of the assured and not of the company" does not render a recognized agent of the company for the purpose of insurance, the agent of the assured. Kister *v.* Lebanon Mut. Ins. Co., 442.

A provision in a policy that an agent procuring insurance will be considered the agent of the assured, will not enable the company to disclaim the act of one of its own agents who has cheated an assured into signing a false warrant and paying the premium. Id.

An assured person who relies upon the act of the insurer's agent, is not under any absolute obligation to read the policy delivered to him. Id.

Parol evidence is admissible to show fraud or mistake in the filling up of an application by the agent of the insurer. Id.

S. filled out an application for a policy, afterwards issued to K., and signed all the papers as agent for the company, received the premiums and assessments

INSURANCE—*Continued.*

and gave receipts therefor which were recognized by the company: *held*, he was the company's agent, notwithstanding a provision in the policy that any broker or other person procuring insurance should be considered an agent of the assured. Id.

Misrepresentations by the agent of an insurance company as to the solvency of the company whereby a person is induced to insure upon the mutual plan, constitute such fraud as will render the contract of insurance voidable at the option of the assured. New Era Life Assn. *v.* Weigle, 551.

Insurance (Accident). Where a policy of insurance against accidental injury provides that in case of any accident immediate written notice shall be given to the insurer, the provision is complied with by a notice given within a reasonable time under all the facts and circumstances of the case. Peoples' Mutual Accident Association *v.* Smith, 33.

A., insured under a policy containing such a provision, received an injury to his eye on September 4, it did not at first appear to be a dangerous injury; on October 1, he gave notice to the insurer: *held*, he had complied with the provision for immediate notice Id

Insurance (Fire). Where a property, insured in the lifetime of an insolvent decedent, is destroyed after his death, the proceeds of the policy are assets for the payment of his debts, and are payable to the personal representative. Nichols's Appeal, 440.

Where an assured person represents the incumbrances against his property at a sum certain, and in that sum includes sums which are at the time of representation ripe to become incumbrances, his policy is not forfeited by the fact that such incumbrances are entered during the life of the policy, and that some existing ones are extinguished and new ones substituted for them, if the entire incumbrance do not at any time exceed the sum stated in the application for the policy. Kister *v.* Lebanon Mut. Ins. Co., 442.

The condition of a policy which requires immediate notice to be given of a loss is satisfied if notice be given within a reasonable time. Springfield Fire and Marine Ins. Co. *v.* Brown, 516.

The Act of June 27, 1883, providing that the condition of insurance as to the notice of loss and the furnishing of preliminary proofs shall be deemed complied with if "the assured . . . shall furnish . . . the notice of loss within ten days from the date of the fire, and the preliminary proof within twenty days from said date," is for the benefit of the assured; it avoids all controversy as to compliance with these conditions in case of notice within the times specified, but does not require notice or proofs to be given within said times; it may aid but cannot embarrass the assured in the prosecution of his claim. Id.

Where the policy of insurance contains a condition limiting the time within which an action must be brought upon the policy, the right to insist on the limitation as a defence is not waived by the omission to set it up in the affidavit of defence, coupled with an offer of settlement before trial. National Ins. Co. *v.* Brown, 518.

Insurance (Life). A policy payable to the wife of the assured, and in case of her death before that of the assured "to her children for their use," gives to the wife a contingent interest only, depending on her surviving her husband; hence, where in her husband's lifetime she assigns her interest, and afterwards dies, still during her husband's lifetime, her children will be entitled to the proceeds of the policy, in preference to the assignee. Brown's Appeal, 77.

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INSURANCE—*Continued.*

An agent falsely represented his company to have a paid up capital of $50,000, and thereby induced a person to insure on the mutual plan, the company failed, and went into the hands of a receiver; in an action by the receivers to recover assessments due by the terms of the policy, *held*, that the fraud of the agent rendered this contract voidable by the assured and constituted a good defence. New Era Life Ass'n *v.* Weigle, 551.

INTEREST. Interest is demandable as such in actions *ex contractu*, but not in actions *ex delicto*. Reading & Pottsville R. R. Co. *v.* Balthaser, 9.

INTERPLEADER. In a sheriff's interpleader in which the wife of the execution defendant is plaintiff, and the execution plaintiff defendant, it is not error to charge the jury that the question is whether the goods belong to the claimant or the execution defendant. Martin *v.* Rutt, 308.

See EVIDENCE.

INTERPRETATION OF STATUTES. Where there are two Acts, one special and the other general and antedating the special, and the general would, if standing alone, include the subject of the special, in case of a conflict between the two Acts as to the subject of the special Act, it must be taken that the special Act was designed to make an exception to the provisions of the general Act. Thomas *v.* Hinkle, 119.

No single sentence, although it form a separate section of a statute, must be construed apart from the context of the statute, or without regard to the general purpose and subject-matter thereof. Small *v.* Small, 452.

A radical change in the policy of the law should not rest on inference or implication from general words, but should appear by the explicit and unquestionable mandate of the Legislature. Id.

INTER-STATE COMMERCE. Where a transit is begun at a point within the State, and is continuous to another point within the same State, it does not present a case of inter-state commerce, although in course of the transit the goods or passengers which are the subject thereof are carried without the boundaries of the State. Lehigh Valley R. R. Co. *v.* Commonwealth, 189.

JOINT TRESPASSERS. The receipt of satisfaction from one of several joint trespassers works the release of the cause of action against all, whether the trespassers be sued together or in separate actions. Seither *v.* Phila. Traction Co., 246.

JUDGMENT. Where a satisfaction has been entered upon a judgment which has been replaced by another, the satisfaction will not be stricken off to enable the defendant to set up the defence of usury, where it does not appear that the taking the new judgment and satisfying the old one constituted a device to conclude the defendant. Read's Appeals, 76.

D. and H. made a mortgage to B., conveying all D.'s property, and an undivided interest of H. in a certain tract called X., as security for a debt of D. to B.; the bond accompanying the mortgage recited that H. joined in it and the mortgage solely to render X. a security for D.'s debt, and that the bond and warrant were to be inoperative as to all other property. D. and H. subsequently conveyed the mortgaged premises to a trustee to sell and pay liens in the order of their priority. The trustee sold several parcels of D.'s land, and B. released the lien of his mortgage thereon, and suffered the proceeds of the sales to be applied to other liens contemporaneous with and junior to his

JUDGMENT—*Continued.*

own. B. entered judgment on the bond of D. and H. The above facts being made to appear, coupled with an allegation that the trustee, who had never accounted, had realized enough by the sales of D.'s land to pay B.'s debt, as well as the others standing on an equal footing with it, *held*, that the judgment should be opened and the matter submitted to a jury. Kemmerer's Appeal, 169.

A judgment *de terris* entered against the widow and heirs of a decedent, on proceedings begun more than ten years after her decease, will be stricken off when the fact of the delay appears of record. Allen *v.* Krips, 248.

A judgment in a personal action is a bar to a recovery upon proceedings in attachment under the Act of 1869 for the same cause. Miller *v.* Rohrer, 278.

A judgment obtained for want of appearance to a scire facias against an heir, where judgment has been obtained against the administrator of a decedent, is a judgment *de terris* and not *in personam* and, hence, when its lien has been allowed to expire the holder is not entitled to be paid out of the distributive share of the heir against whom judgment has been recovered. Williamson's Appeal, 337.

A judgment against a partnership association, limited, is not a bar to an action against the individual partners where it is sought to hold them liable as general partners, on account of a defect in the formation of the association. Sheble *v.* Strong, 437.

While a judgment may not be attacked collaterally, yet evidence tending to show that a judgment given for one purpose has been used for another is admissible even in a collateral proceeding. Stark's Appeal, 537.

JUDICIAL NOTICE. Judicial notice will be taken of the coincidence of the days of the week and the days of the month. Wilson *v.* Van Leer, 289.

JURISDICTION. The United States District Court has no jurisdiction over a vessel which is in the hands of the sheriff by virtue of a writ of foreign attachment issued out of the State Court. (C. P.) Apreda *v.* Romano, 124.

The Supreme Court has jurisdiction upon certiorari to inquire into and determine the extent and limits of the powers of the Quarter Sessions, and the regularity of the exercise of their powers in liquor license cases. *In re* Application of Pollard, 181.

The Supreme Court has not jurisdiction upon certiorari to pass upon the sufficiency of the evidence upon which the Quarter Sessions has acted in revoking a license under the Act of May 13, 1887. *In re* Carlson's License, 184.

After an appeal under the Act of June 13, 1874, P. L. 283, the exclusive jurisdiction of the question of damages for property taken for public use is vested in the Common Pleas. *In re* Widening of Chestnut Street, 418.

JURY. The accidental placing of a few more names in the jury wheel than have been ordered by Court is not ground for quashing an array of jurors. Rizzolo *v.* Comm'th, 13.

A juror who has formed an opinion from reading newspapers, is not disqualified when he states that he can render a true verdict according to the evidence, uninfluenced by his former opinion. Id.

A juror in a murder case may be stood aside, and there is no difference in this regard between one brought in on a special venire, and one upon the regular panel. Rudy *v.* Comm'th, 502.

See GRAND JURY.

JUSTICE OF THE PEACE. Acknowledgment of agreement before. See ACKNOWLEDGMENT. Shiffer *v.* Broadhead, 44.

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LACHES. A trustee's account was confirmed in 1882; in 1883 he died; in 1887 the *cestui que trust* filed a petition for a review, setting forth that she lived in another State, and had had no notice of the filing of the account, and had only recently learned of its existence. The answer of the trustee's administratrix alleged that the account was filed with the actual and legal knowledge of the petitioner; the allegations as to notice were not contradicted by evidence: *held*, that the answer being conclusive as to notice, the petitioner had been guilty of such laches as would render the granting of a review improper. Priestley's Appeal, 305.

LANCASTER. See ROAD LAW. *In re* Opening of First Street, 568.

LANDLORD AND TENANT. A. erected an inclined plane, partly upon land of B. and partly on that of a third person, under an agreement that A. should build and operate the plane, and that B. should use it in mining a certain amount of ore, which by the same agreement he sold to A., and that on all ore sold to any one else B. should pay a fixed price per ton for the use of the plane; four years after A. had received his ore, he demanded the plane from B., who refused to deliver it: *held*, that the relation of landlord and tenant had not arisen between the parties, and hence B. could not retain the plane as a fixture left upon the premises. Charlotte Furnace Co. *v.* Stouffer, 311.

LEASE. A lessee in a mining lease covenanted to pay for every ton of clay or ochre taken by him twenty-five cents, payable quarterly; that he should take not less than five hundred tons per year "or pay for the same at the end of each and every year, in default of which the above lease is to be null and void." The lease continued, "It is further agreed that if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease is to be null and void:" *held*, that while the royalty reserved was due and payable at the end of a year, yet forfeiture did not occur for non-payment, unless payments were withheld for three months. Hoch's Appeal, 27.

LEGACIES. Where a decedent leaves his property in trust for his widow for life, and, after her death, certain pecuniary legacies and the rest of his estate to residuary legatees; in case his widow elects to take against the will, that portion of the estate which is not taken by the widow under her election will be sequestered and the income paid to the residuary legatees during the widow's life; the pecuniary legacies will neither abate nor be accelerated. (O. C.) Vance's Estate, 172.

Where all of testator's real estate is specifically devised, an intention to charge it with the payment of antecedent pecuniary legacies cannot be discovered from a blending of realty and personalty in the residuary clause of the will. (O. C.) Murphy's Estate, 232.

Legacies under $250 in amount are exempt from the collateral inheritance tax. (C. P.) Commonwealth *v.* Kerchner, 260.

Charge of legacies on real estate, see WILLS. (O. C.) Linnard's Estate, 492; Wiltberger's Estate, 493.

LIBEL. It is libellous to publish of a hotel keeper or other business man that he is "embarrassed." Hayes *v.* The Press Co., Limited, 413.

A newspaper may publish the fact that a judgment has been entered against a person, but if it go on to publish an inference therefrom that the said person is embarrassed, it is guilty of libel. Id.

In an action for a libel against a newspaper, it is error to permit the plaintiff to be asked on cross-examination whether the same statement did not appear in other papers. Id.

LIBEL—*Continued.*

LICENSE. See ACCOUNT. Appeal of the Consolidated Oil Well Packer Co., Limited, 544.

LIEN. Of common carrier where goods are stopped *in transitu*. See COMMON CARRIER. Penna. R. R. Co. *v.* American Oil Works, 88.

A decree upon the account of the committee of an habitual drunkard, ordering payment of a balance due to the committee, has all the effect of a lien from the date of its entry upon the judgment docket. Hohman's Appeal, 242.

A recognizance given for owelty in partition in the Orphans' Court, is a lien upon all the land taken by the recognizor under such proceedings and the fact that the recognizor is a married woman does not restrict the lien to the portion acquired as the consideration for the bond. Snively's Appeal, 310.

A judgment against the administrator of a decedent, followed by scire facias and judgment against the heirs, loses its lien if not revived at the expiration of five years from the date of the judgment on the scire facias. Williamson's Appeal, 337.

Liens of judgments obtained while the land affected by them was unquestionably the property of the debtor are not discharged by a sheriff's sale of the land under a judgment obtained after a conveyance by him; such sale affects only the interest remaining in the vendor. Hiestand *v.* Williamson, 511.

See MARITIME LIENS; MECHANICS' LIENS.

LIFE ESTATE. A devise absolute in terms followed by a provision for a sale of the subject thereof and a distribution of the proceeds on the devisee's death gives a life estate only. Geiger's Appeal, 264.

The life-tenant must keep down the interest upon incumbrances; hence where the life-tenant by virtue of a will was also an executor vested in common with his co-executor, with a power of sale to pay the debts of the testator, and the executors sold a piece of the testator's land and applied part of the proceeds to the payment of a judgment against the testator which was a lien on said piece of land, and interest accrued thereon since the testator's death, it was held that the executors could not claim credit for the amount of interest paid. Id.

A life-tenant in possession on giving security under the Act of February 24, 1834, is not a trustee and is entitled to no allowance for commissions or expenses. Reiff's Appeal, 316.

The Act of January 24, 1849, prohibiting a sale by the sheriff of a life estate in realty without notice to the tenant and leave of Court does not apply to a sale upon a mortgage given by the life-tenant. Datesman's Appeals, 353.

When a sale of property has been made under a mortgage executed by the life-tenant and by the remaindermen, for the sole benefit of the former, the amount of the mortgage and the expenses and costs of the distribution of the fund arising therefrom must be paid out of the life interest. Id.

Where a sheriff's sale has been made of property for a debt of the life-tenant, the proceeds after payment of the debt and costs, may either be invested until with the accumulation of interest they amount to the sum realized at the sale and the interest be then paid to the life-tenant; or the life estate may be valued and its amount be paid to the life-tenant and the rest of the fund to the remaindermen. Id.

The valuation of a life estate at one-third of the fee recognized. Id.

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LIFE ESTATE—*Continued.*

A life-tenant cannot claim compensation for repairs and improvements made without the consent of the remaindermen. Id.

See DIVIDENDS. (O. C.) Oliver's Estate, 139.

LIMITATION OF ACTIONS. To charge real estate of a decedent in the hands of his widow and heirs, proceedings against them must be had within ten years from the death of the decedent. Allen *v.* Krips, 248.

The right of action for contribution does not arise until one of several liable for a debt has paid more than his due proportion thereof, and until such payment the Statute of Limitations does not begin to run. Martin *v.* Frantz, 325.

Action upon an agreement in writing, not under seal, to indemnify a mortgagor against a mortgage, will be barred six years after the maturity of the mortgage. Furst *v.* Building & Loan Association, 505.

A building association agreed to indemnify a mortgagor against a mortgage given to a loan association; part of the consideration for the agreement was a check given by the mortgagor to the secretary of the building association, who was also secretary of the loan association; the check was good when given but was not presented; the bank suspended, dividends were given to the mortgagor on account of his deposit, the amount of which he paid on account of the check to the mortgagee: *held*, such payments could not be considered payments by the building association so as to toll the bar of the Statute of Limitations. Id.

The Statute of Limitations of 1713 does not apply to a proceeding for the assessment of damages occasioned by the construction of a railroad. Railroad Extension Co. *v.* Seiple, 563.

The Act of April 17, 1866, limiting the time of bringing actions to recover damages for right of way, etc., is abrogated by the Constitution of 1874, Article III., § 21. Id.

The question whether a claim is barred by the Statute of Limitations is ordinarily for the jury under proper instructions. Id.

LIQUOR LAW. The Act of May 13, 1887, makes the retail liquor license fee in cities of the first, second, and third classes $500, in other cities $300. W. had a population, which under the Act of May 23, 1874, would have made it a city of the third class, but, under the Act of April 11, 1876, it would have been of the fourth class, and under the Municipal Act of 1887 of a class below the third; after the passage of the License Act, the Acts of 1876 and 1887 were declared unconstitutional and the classification of the Act of 1874 was reaffirmed: *held*, the license fee in W. was $500. Commonwealth *ex rel.* Zirnhelt *v.* Smoulter, 48.

The Act of 1887 (High License) is designed to regulate the sale of liquors by vendors known to the law and does not interfere with the right of any individual to keep and use liquor, or to supply his table and family and guests with the same. Altenburg *v.* Commonweath, 145.

The provisions of the Act of 1887, against furnishing liquors by sale, gift, or otherwise on any election day or Sunday, or at any time to a minor, person of known intemperate habits, or person visibly affected by intoxicating drink, are not confined in their effect to liquor dealers, but embrace any person. Id.

A citizen may give to his help, or to his neighbors calling upon him, liquor, but he may not furnish it to any intoxicated person. Id.

The Court of Quarter Sessions, in granting licenses to wholesale liquor dealers, bottlers, and brewers, under the Act of May 24, 1887, has not the large discretion possessed by it with reference to retail licenses but is confined to the consideration of three matters, viz: whether the applicant is a citizen of the United States, is of temperate habits and is of good moral character, and unless it is alleged by remonstrance or objection that the petitioner is disqualified in any of the above respects, there is no question before the Quarter Sessions for it to pass upon and it should grant the license asked for. *In re* Prospect Brewing Co. 177; *In re* Applications of Pollard, *et al.*, 181.

Protest of the reversed Judges of the Quarter Sessions of Philadelphia, defendants in mandamus proceedings, and criticism by them of the Supreme Court. (Q. S.) *In re* Application for Wholesale Brewers' and Bottlers' Licenses, 198.

The provision of the Act of May 24, 1887 (§ 2, P. L. 194), that licenses shall be granted in such manner as is provided by existing laws, refers to existing laws in regard to wholesale licenses, not to the Act of May 13, 1887. *In re* Applications of Pollard *et al.*, 181.

The words "existing laws" in the Act of May 24, 1887, § 2, refer to the Act of March 22, 1867, in counties where no other local wholesale liquor law is in force, and under that Act the granting of wholesale licenses is within the discretion of the Quarter Sessions. (Q. S.) *In re* Gordon's Application, 345.

A licensed wholesale vendor may sell to any person willing to buy. *In re* Prospect Brewing Co., 177.

The Act of May 24, 1887, repeals the Act of April 3, 1872, relative to the granting of licenses for the sale of liquor in Allegheny County, so far as its provisions conflict with those of the Act of 1887; the county treasurer of Allegheny has therefore no longer any authority to grant liquor licenses. Commonwealth *ex rel.* Kaiser *v.* Hill, 184.

It is no defence to a rule to revoke a license, because the licensee has sold liquor to minors, to show that the licensee was ignorant that the persons to whom he sold were not of full age. *In re* Carlson's License; *In re* Tuttle's License, 184.

On a certiorari to the Quarter Sessions in a proceeding in which a liquor license has been revoked under the provisions of the Act of May 13, 1887, the Supreme Court cannot examine the testimony or the opinion of the Court below; the presumption is that the latter Court had before it sufficient evidence upon which to act. Id.

The Court may reconsider its action in refusing a license and grant one although a full term has elapsed since the entry of the order refusing the license. (Q. S.) *In re* Hamilton's Application, 303.

The Courts of Quarter Sessions in counties not heretofore affected by special laws upon the subject are not deprived of discretion in granting or refusing bottlers' licenses by the Act of May 24, 1887. (Q. S.) *In re* McBride's Application, 349.

Where a person of known intemperate habits purchases liquor from several persons, and while intoxicated meets with an accident which occasions his death, an action may be brought and a recovery had against any one of the persons who have furnished him with liquor. Taylor *v.* Wright, 285.

LOAN. A certificate of the following character given by a banker, viz., "X. . . . has deposited in this office $1354 payable to his order . . . . on the return of this certificate twelve months after date with interest at the rate of 4 per cent. per annum. A. S. H. No interest allowed after due," imports a loan to the banker and not a deposit in the ordinary sense. Baer's Appeal, 299.

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LOSE. The legal effect of the word "lose," implies an inability to retain; hence when a person holding a position voluntarily resigns it, he cannot be said to have lost the position. Shaefer *v.* Senseman, 208.

MANDAMUS. Where the Court of Quarter Sessions usurps a discretion to refuse a liquor license on a ground not allowed by the law as a reason for refusal, the issue of the license will be enforced by the Supreme Court by a mandamus. *In re* Prospect Brewing Co., 177.

MANUFACTURING CORPORATIONS. A manufacturing corporation which, in addition to manufacturing, carries on mining and other business, is subject to taxation upon so much of its capital as represents its business, other than that of manufactures, exclusively. Commonwealth's Appeal; Lackawanna Iron and Coal Co.'s Appeal, 191.

A manufacturing corporation does not lose the right to exemption from taxation upon its capital employed in manufactures, because its charter permits it to carry on an additional business, *e. g.*, mining. Id.

An iron manufacturing corporation cannot claim exemption from taxation on its capital engaged in coal or iron mining, on the plea that such mining is necessary for the carrying on of the manufacturing business. Id.

Where part of the capital stock of a manufacturing corporation is invested in dwelling-houses for its employés, the capital so invested is not exempt from taxation. Commonwealth *v.* Mahoning Rolling Mill Co., 194.

The real estate of a manufacturing corporation is, notwithstanding the Act of June 30, 1885, § 30 (P. L. 199), liable to taxation for county, borough, school and township purposes under the Act of April 15, 1834. Appeal of the James H. Hawes Mfg. Co., 302.

MARRIED WOMEN. A bequest to a married woman for her sole and separate use creates a trust for her during coverture and renders the appointment of a trustee necessary. (O. C.) Bond's Estate, 176.

A married woman may with the assent of her husband maintain an action against a partnership of which he is a member; and the defence of legal unity of person cannot be set up by members of the firm other than the husband. Freiler *v.* Kear, 195.

The bond of a married woman given for owelty, in partition in the Orphans' Court, is a lien upon all the land awarded to her by the decree in the proceedings, including the share coming to her under the intestate laws. Snively's Appeal, 310.

See Husband and Wife.

MARITIME LIEN. Inland freight paid upon a cargo, cannot give rise to a lien upon the vessel to which the cargo is delivered by the land carriers, and in which it is transported. (U. S. D. C.) Wright *v.* The Adirondack, 575.

MASTER. See Admiralty. (U. S. D. C.) Wright *v.* The Adirondack, 575.

MASTER'S REPORT. Requisites of. See Equity Practice. (C. P.) Citizens' Natural Gas Co. *v.* Shenango Natural Gas Co., 573.

MASTER AND SERVANT. In the case of a discharge without sufficient cause, the servant may recover from the master his wages for the whole term of his employment; he is bound, however, to use reasonable endeavors to obtain employment of a similar character in the same neighborhood, but the burden of showing that the plaintiff might have obtained such employment is upon the defendant. Emery *v.* Steckel, 206.

MASTER AND SERVANT—*Continued.*

A master is not liable for a wilful trespass committed by his servant in contravention of the express instructions of the master, although the trespass be in the course of a service rendered to the master. (C. P.) McClung *v.* Dearborne, 271.

Where a servant is engaged for a time certain and is disabled by illness, he may recover for the services actually rendered by him under the contract, but the master is so far absolved from the contract that he need not receive the servant back after his disability has passed away. Allentown Iron Co. *v.* McLaughlin, 343.

In such case the measure of the servant's recovery is the value of his services less the damage sustained by the master by reason of the servant's failure to perform his contract. Id.

A master has no right to discharge a servant during the term of the contract because he is too high priced, but if he has the right for any cause to discharge the servant, the fact that the master has at the time of discharge given as a reason that the servant is too high-priced will not render the discharge unlawful. Id.

A servant who continues to use defective appliances, upon the promise of his master that the defect shall be remedied, when the risk from the use is not such as to threaten immediate danger, may recover if, without fault on his part, he is injured through the use of such defective machinery. Brownfield *v.* Hughes, 557.

A. was employed by B. to run an engine the crank-pin of which was so high above him as to render it dangerous for him to reach up to it as required by his work; B. promised to erect a platform for him but did not; A. continued to run the engine and was injured while reaching up to the crank-pin to ascertain its temperature: *held*, A. could recover from B. Id.

Where a master supplies machinery which, although not the safest, is such as can with reasonable care be used without danger to his servant, his duty to his employé is discharged. Lehigh and Wilkes-Barre Coal Co. *v.* Hayes, 559.

Where it does not appear that it is the custom of coal operators to give warning that a draw is about to be made a coal operator cannot be held guilty of negligence in making a draw without warning to his servants. Id.

Duty of master towards minor servants employed to work on machines. See Negligence. O'Keefe *v.* Thorn, 379.

Brakeman held not chargeable with notice of the defective character of a brake used by him when there was no evidence he had ever seen the brake before and was killed within a few minutes after getting on the car to which it was attached. See Negligence. Phila. & Reading R. R. Co. *v.* Huber, 554.

MEASURE OF DAMAGES. In an action by one tenant in common against another for cutting timber trees, the measure of damages is the single value of the timber cut or removed in excess of the defendant's proportion of the said timber. Bush *v.* Gamble, 229.

In an action to recover for a personal injury it is sufficient if the idea of compensation as the measure of damage be kept before the mind of the jury, although the word compensation be not used in the charge. Lake Shore and Michigan Southern Ry. Co. *v.* Franz, 321.

In an action by a husband to recover for the death of his wife, where the evidence shows the deceased to have been a healthy, vigorous woman and the plaintiff shows no particular pecuniary loss, the jury may infer

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MEASURE OF DAMAGES—*Continued.*
that she was an ordinarily useful wife and fix the damages accordingly. Del. Lack. & Western R. R. Co. *v.* Jones, 562.

MECHANICS' LIENS. A claim of a lien for alterations and repairs and of one for an erection and construction arise under different Acts of Assembly, and each is required to conform to the provisions of its own law. Morrison *v.* Henderson, 38.

A claim filed against a building with "two-story back building or addition attached, for work and labor done in the erection and construction of a two-story back building . . . . according to the terms of the contract hereto annexed," where the contract shows that the work done was an alteration of an addition to an old building, *i. e.*, the one against which the lien is filed, is fatally defective. Id.

The Act of Aug. 1, 1868, is as to the city of Philadelphia, amendatory of the Act of June 16, 1836, and must be construed as part of it, and where its terms conflict with those of the Act of 1836 the terms of the Act of 1868 must govern. Thomas *v.* Hinkle, 119.

Under the Act of 1868 a claim for an addition not filed until after the property has been conveyed to a third party will not give a lien. Id.

A mechanics' lien may be amended by apportionment at any stage of the proceedings thereon, when such amendment is conducive to justice and a fair trial upon the merits. (C. P.) Florey *v.* Haverford College, 372.

A bill of particulars need not allege that the materials were furnished on the credit of the building, when they have actually entered into its construction. Id.

A. made a contract with a railroad company to put up machinery in a building, which was altered and added to by workmen employed directly by the company; B. made a contract with A. to furnish part of the machinery and delivered the same to A. at a point without the State; the machinery was afterwards placed in the building; at the time of delivery B. did not know the location of the building for which the machinery was intended. A mechanic's lien being filed by B., on the trial thereunder, the company denied that A. was a contractor to add to or alter the building, and claimed that the machinery had been sold by B. on A.'s credit alone: *held*, the Court did not err in leaving to the jury the questions whether A. was a contractor, and whether the machinery was furnished on the credit of the building, with the instruction that if the machinery were not furnished on the credit of the building, though used in it, the lien could not be maintained. Poole & Hunt *v.* Union Pass. R'y Co., 376.

MINING LEASE. See LEASE. Hoch's Appeal, 27.

MINOR. Duty of employer to minor employé. See NEGLIGENCE. O'Keefe *v.* Thorn, 379.

MORTGAGE. The holder of a legal title, which is in effect a mortgage, may mortgage his title, which will become a security to his mortgagee subject to the equity of redemption existing against the mortgagor. Brooke *v.* Bordner, 53.

B. advanced money, with which to purchase land, to A. and took title under an agreement to convey to A., when A. repaid the loan; A. entered into exclusive possession of the land; B. mortgaged to C., who had notice of A.'s possession; B. defaulted: *held*, C. was entitled to judgment for the full amount of his mortgage, but subject to be released and discharged on the payment by A. of the amount of his debt to B. Id.

The assignee of a mortgage is affected with notice of any defence of payment and by any original equity

MORTGAGE—*Continued.*
between the mortgagor and mortgagee which would have been developed by an inquiry from the mortgagor. Morgan's Appeal, 167.

Where a house is mortgaged, to secure the payment of a sum due therefor, and it appears that it was agreed that sums, due for boarding from the mortgagee to the mortgagor and him whose personal representative she is, should be set off against the price of the house, the amount so due is a good defence *pro tanto* to the mortgage in the hands of the assignee, although no notice of the agreement appears on the mortgage, and part of the indebtedness was incurred before the execution of the mortgage. Id.

A mortgage which is given as security for another's debt is discharged where the mortgagee, who holds a mortgage of land of the principal debtor, releases his lien upon the principal debtor's land and enough is realized by the sale thereof to pay the debt, if the proceeds have been applied thereto. Kemmerer's Appeal, 169.

Where property subject to a mortgage is sold by the sheriff to one who shortly, after the sale, gives his own mortgage for the same amount to the mortgagee, whereupon the original mortgage is satisfied of record, it is not error to find that this sale was subject to the mortgage. Hohman's Appeal, 242.

A life estate may be sold under a mortgage given by the life-tenant, without the notice and leave required by the Act of 1849. See LIFE ESTATE. Datesman's Appeals, 353.

The proceeds of a sheriff's sale on a mortgage given by the life-tenant and the remainderman for the benefit of the former should be distributed, after payment of the debt, as follows: the value of the life estate less the debt and costs and the expenses of audit to the life-tenant, the balance to the remainderman; or the balance, after payment of the debt, costs and expenses, should be invested until, with the accrued interest, it equals the amount brought at the sale, and the interest thereafter should be paid to the life-tenant during his life. Id.

MUNICIPALITY. A city which under the Act of May 23, 1874, would be of the third class, but which under the municipal Acts of 1876 and 1887 would be of a lower class, is restored to the third class by the declaration by the Supreme Court that the last two-named Acts are unconstitutional, so that an Act affecting cities of different classes in different ways, passed at a time when the Act of 1874 was supposed to be superseded by the later Acts of classification, will operate upon the said city as a city of the third class. Commonwealth *ex rel.* Zirnhelt *v* Smoulter, 48.

A municipality has no right to file a lien for a sewer against the owners of the adjoining properties in the absence of a statute conferring on it the power to file a lien for such improvements. City of Meadville *v.* Dickson, 451.

The Act of May 23, 1874, § 57 (P. L. 269), is constitutional. See CONSTITUTIONAL LAW. Id.

The Act of April 11, 1876, § 16 (P. L. 20), is unconstitutional. See CONSTITUTIONAL LAW. Id.

The Act of May 17, 1887 (P. L. 117), is unconstitutional. See CONSTITUTIONAL LAW. Id.

A township, in the care of its roads, is bound to provide for the ordinary needs of travel and to remove obstructions and defects which would naturally or probably cause injury to a traveller; but it is not an insurer against all possible accidents and is not bound to anticipate the dangers to which a broken wagon or frightened horse may expose a driver. Township of Jackson *v.* Wagner, 217.

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MUNICIPALITY—*Continued.*

Where an injury, suffered by a traveller upon a township road, is caused jointly by a defect in the road and a defect in the adjoining premises, the township is liable where the defect in its road is a proximate cause of the injury. Township of Plymouth *v.* Graver, 220.

If the condition of a road, owing to the adjoining premises, is such that travel upon it is unsafe without the erection of a barrier, the township is liable for injury which would have been prevented by the existence of a barrier. Id.

A township road ran parallel to and adjoining a railroad, a horse, frightened by a train, ran on the track and was killed: *held*, a question for the jury whether it was negligence on the part of the township's road supervisors not to have erected a fence or other barrier between the road and the railroad. Id.

A city is not responsible for damages resulting from obstructions to the highway, the danger from which is occult. (C. P.) Eisenbrey *v.* City of Philadelphia, 231.

A municipality cannot cause the cost of repaving a public street to be assessed upon the abutting property owners, even when the original cost of paving has been paid by the city out of public funds. City of Williamsport *v.* Beck, 423.

MUNICIPAL CLAIM. The provision of the Act of March 23, 1866, that, before any scire facias shall be issued upon a municipal claim, notice shall be served on the owner of the lot charged, applies only to the original scire facias and not to a scire facias to revive. (C. P.) City *v.* Hemphill, 79.

Whether property is subject to a municipal claim for paving, etc., assessed upon the foot front rule is a question to be determined by the rural or non-rural condititon of the property at the time the work is done and not by its condition at the time of the passage of the ordinance authorizing the work. Keith *v.* City of Philadelphia, 115.

The provisions of the Act of May 17, 1887, P. L. 117, providing that "all taxes heretofore levied in cities of the third . . . . class in any one year, in amount not exceeding twenty mills on the dollar, and all assessments made in pursuance of the ordinances of such cities are hereby made valid," are not retroactive as to assessments for paving, grading, etc., but only as to the taxes. City of Erie *v.* Brady, 252.

A municipality of the third class cannot recover the cost of paving a street from abutting property owners, unless, before passing the paving ordinance, councils have had made an estimate of the cost and a map of the properties benefited and a schedule of the amount each of said properties will be liable to pay and attached the same to the ordinance as required by the Act of May 1, 1876 (P. L. 94), and an omission is not cured by Act of May 24, 1887, Art. 23, § 2. City of Williamsport *v.* Beck, 423.

A municipal lien cannot be sustained in the absence of express statutory authority therefor; it is a mere creature of statute. City of Meadville *v.* Dickson, 451.

The city solicitor cannot recover the five per cent. commission upon the amount of a municipal claim, given by the Act of March 23, 1866, unless he has actually performed the services mentioned in the said Act. (C. P.) City of Philadelphia *v.* Atmore, 540.

NEGLIGENCE. A company laying pipes under a street took down barriers before the work was completed, leaving a way for the passage of vehicles on the west side of the street, the east side being obstructed by piles of earth and a cross ditch; on a certain afternoon the cross ditch was filled up and the east side

NEGLIGENCE—*Continued.*

opened to traffic, at the same time a cross ditch was dug on the west side of the street. At the close of work no barrier was erected except the earth dug from the ditch; a barrel was put upon a neighboring heap of earth and a light near it; as to the sufficiency and location of the light the evidence was conflicting; the plaintiff, who had frequently driven on the west side, attempted to do the same thing on the night of the day of the change; the night was dark, and seeing no light and being ignorant of the existence of the ditch, he fell into the same and was seriously injured: *held*, the questions, both of negligence and contributory negligence, were for the jury. Bloomsburg Steam & Electric Light Co. *v.* Gardner, 21.

A. and others were walking along a railroad track; A. became separated from the others just before reaching a road crossing, which was without gate or flagman; his companions passed on to a point some 100 or 150 yards, and one of them looking back saw A., just about stepping across the track, struck by a locomotive and instantly killed: *held*, the railroad company could not be held liable, A. was either a trespasser or guilty of contributory negligence and no presumption arose that he had stopped, looked and listened. Penna. R. R. Co. *v.* Mooney, 40.

B. was employed by F. to work a farm for a share of the product. F., while B. and his wife were at work, set off two blasts with dynamite at about eighty feet off from where B. and his wife were. Mrs. B. claimed that she was injured by the second blast, and brought an action against F.: *held*, she could not recover, (1) there was no evidence of negligence on the part of F., and the plaintiff was not struck, but her injury was internal; (2) the plaintiff was guilty of contributory negligence in remaining in her original position after the first blast. Fox *v.* Borkey, 49.

In an action by a father to recover for loss of the services of his son through an accident occurring through the defendant's negligence, a recovery cannot be defeated by showing that such care, attention and medical treatment as a prudent person would bestow upon a child so injured was not given to the injured child. City of Bradford *v.* Downs, 153.

A passenger alighted from a cable car on the north side, where he was in safety, and immediately, without waiting for the car to move on, passed around the rear of the car, and started to cross the street. There was room between the tracks for him to stand in safety and to see the whole track; he, however, stepped on the south track and was struck by a car: *held*, he was properly nonsuited on the ground of contributory negligence. Buzby *v.* Phila. Traction Co., 155.

When a driver of a bob-tail car permits a boy to drive for him, while he himself goes within the car, and the boy asks or permits other boys to come upon the platform, while the driver may properly put such boys off he should stop his car for the purpose, and if he compel them to get off while the car is in motion, the car company is liable for the consequences of his negligence in so doing. Hestonville, Mantua & Fairmount Pass. R. R. Co. *v.* Biddle, 156.

Plaintiff drove along a public highway, on one side of which was an irregular pile of stones, about twenty-five feet long and from one foot to two feet high, leaving an unobstructed highway fifteen feet wide; after passing the pile the plaintiff's horse took fright at some donkeys, and turning suddenly broke a forward wheel and ran back to the stone pile, which the axle struck, causing the plaintiff to be thrown out of her wagon and injured: *held*, that the liability of the

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NEGLIGENCE—*Continued.*
township, within which the road was, for the damage done to the plaintiff, depended on whether the road was in a safe condition for the ordinary purposes of travel or not. Township of Jackson *v.* Wagner, 217.

Where the negligence of a defendant concurs with any other cause, except the negligence of the plaintiff, in producing an injury to the plaintiff the defendant is liable for such injury. Township of Plymouth *v.* Graver, 220.

It is a question for the jury whether or not a township is guilty of negligence in leaving a side of its road unguarded where the adjoining premises are dangerous. Id.

A defendant is not responsible for an accident of which his negligence is not the immediate cause, or so proximate a cause that the accident might reasonably have been forseen as likely to happen therefrom. (C. P.) Eisenbrey *v.* City of Philadelphia, 231.

An owner of a house fronting on the highway built around his steps a paling fence in which was a gate that opened outwardly towards the street; the steps were within the legal limit for such obstructions, but the gate, when opened, exceeded the limit some ten inches: as the plaintiff was passing by at night, some one opened the gate from within, striking and injuring the plaintiff: *held*, the city was not liable for suffering the obstruction on the highway, as the proximate cause of the injury was the reckless and negligent opening of the gate. Id.

A plaintiff was injured by being struck by a train of the defendant at a crossing which had been used by the public for a number of years; on approaching the crossing the train neither whistled nor rang a bell. After the accident the practice was adopted by the defendant of ringing a bell before reaching the crossing: *held*, that the adoption of the practice was a *quasi* admission of negligence in not ringing the bell on the occasion of the accident. (C. P.) Specht *v.* Penna. R. R. Co., 317.

In an action to recover for personal injuries, the plaintiff's case was to the effect that, being a passenger upon the defendant's train, she endeavored to alight on reaching her destination, but was delayed by persons getting upon the train, and that, when she had reached the lowest step of the car platform and was preparing to alight, she was thrown down by a sudden movement of the car in starting. The defendant's evidence was that the plaintiff and her mother attempted to get off the train after it had started, and persisted in the attempt, notwithstanding the warning of a brakeman, who offered to stop the train, and who assisted the mother to alight in safety, and that the plaintiff stepped off and was injured. The Court refused the following points: (*a*) If the jury believe from the evidence that the plaintiff undertook to get off the train after it began to move she is guilty of contributory negligence and cannot recover; (*b*) If the jury believe from the evidence that the plaintiff attempted to get off, after the train was in motion, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover; but charged that if the jury found the plaintiff in getting off was guilty of negligence she could not recover: *held*, error, both points should have been affirmed. N. Y. L. E. & W. R. R. Co. *v.* Enches, 261.

Where a case involves the question of contributory negligence, it is the duty of the Court to explain to the jury what would constitute negligence on the part of the plaintiff. Id.

The plaintiff, driving in a city, approached a street on which were several railroad tracks side by side, the safety-gates were up and there was no flagman at the place; before driving across the track, the plaintiff stopped, looked and listened, but saw or heard nothing but a hand-car which passed rapidly on one of the tracks while he paused; the view of the track on which the car passed was blocked in both directions by cars standing on the track next adjacent to it; the plaintiff then proceeded to cross, without again stopping and, while crossing the track whose view was obstructed, was struck by a second hand-car and injured: *held*, that this case was one for the jury on the question of negligence on the part of both plaintiff and defendant. Lake Shore & Michigan So. Ry. Co. *v.* Franz, 321.

The fact that safety-gates are up does not exempt one about to cross a railroad from the obligation of stopping, looking and listening, but is, if unexplained, evidence of negligence on the part of the railroad company, and has a tendency to give an approaching traveller the impression that the crossing is safe, and thereby to blunt the edge of his caution. Id.

A. lived on the line of a railroad at a point where, for over a year, the company had been straightening its track, and had been running a train of gravel cars some six times daily; he entered the service of the company as a trackman and, after being in the service of the company for some six weeks, was killed by a gravel train run negligently, but in the way the company had been accustomed to run such trains: *held*, the death was due to a risk of his employment, of which he had notice, and there could be no recovery therefor. Kennedy *v.* Penna. R. R. Co., 371.

A boy of fourteen, who stated that he was unaccustomed to machinery, was put to work by his employer's foreman at a tin stamping machine, the operator of which sits on a bench in front thereof, puts a piece of tin in place with his right hand and then by pressing on a treadle brings down a heavy hammer upon the tin; the only instruction given the boy was that the foreman stamped a few pieces of tin in his presence; on the second day of his work, the boy put in a piece of tin which got out of place, as he leaned forward to adjust it with his right hand, the bench, which was shaky and so high that the boy's feet could not touch the ground, tilted over and the boy's foot pressed the treadle, bringing down the hammer, which crushed the fingers of his left hand. In an action against the employer to recover for the injury, on the ground of negligence in putting the boy to the work in question, without proper instruction, and in not furnishing him with the proper appliances, *held*, a nonsuit was properly entered. O'Keefe *v.* Thorn, 379.

In an action to recover for injuries received, the plaintiff's case was that as she was attempting to board a train of defendant, standing at a station, the brakeman, who was standing on the station platform, jumped on the steps in front of her, giving her a start which caused her to lose her balance and fall between the platform and the car: *held*, sufficient to require the submission of the question of the defendant's negligence to the jury. P. W. & B. R. R. Co. *v.* Alvord, 430.

A telegraph company may make regulations calculated to insure accuracy and declare that, if they be not observed, an injured person shall be considered in default, and in such case non-compliance with the rules will render an injured person guilty of contributory negligence. Western Union Tel. Co. *v.* Stevenson, 497.

Negligence will not be imputed to a child who has not ability to foresee and avoid the particular danger

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NEGLIGENCE—*Continued.*
from which he suffers; whether he has such ability is ordinarily a question for the jury under proper instructions. Strawbridge & Clothier *v.* Bradford, 536.

The plaintiff, a boy between thirteen and fourteen, was employed in the defendant's store, by the rules of which he was required to ride up and down on a freight elevator; while going up, on a personal matter, his foot was caught between the elevator and a floor sill which projected 8¾ inches from the side of the elevator shaft, and his leg was broken: *held*, the questions of negligence on the part of the defendant in not providing a proper elevator, and of contributory negligence, and of the ability of the plaintiff to understand the danger to which he was exposed, were properly submitted to the jury. Id.

An insurance agent, who being ordered by his company to cancel a policy, does not do it for eight days, is guilty of such negligence as will render him liable to his company for any loss which the company is compelled to pay on account of the policy's remaining in force on the eighth day. Kraber's Exr's *v.* Union Ins. Co., 547.

Where an action is brought to recover for the death of a person, caused by defective machinery belonging to the defendant, and there is no evidence of negligence on his part so far as the character of the machinery and its appliances is concerned, there can be no recovery. Lehigh & Wilkes-Barre Coal Co. *v.* Hayes, 559.

Negligence is the absence of care, according to the circumstances of the case, and is generally a question for the jury. Del. Lack. & Western R. R. Co. *v.* Jones, 562.

An employé of a railroad company, who had been for four years a brakeman, was required to uncouple certain cars in motion and apply the brake; the brake was defective, and slipped, causing the brakeman to fall and be killed; the whole operation of coupling and braking consumed some two or three minutes, and there was no evidence that the brakeman had ever seen the brake before: *held*, that the Court could not say as a matter of law that he was bound to acquire a knowledge of the defect in the brake, and abstain from its use. Phila. & Reading R. R. Co. *v.* Huber, 554.

NOTICE. Exclusive possession of land is constructive notice, to one about to take a mortgage from one not in possession, of the title or equity of the possessor. Brooke *v.* Bordner, 53.

Notice by a partner to a person, not a member of the firm, not to sell any goods to a co-partner without the written order of the partner giving the notice, will prevent the firm from becoming liable for goods furnished in disregard of the notice. (C. P.) Gill *v.* Baizley & Roeske, 55.

Notice under Act of March 23, 1866 (Municipal Claims), is not required to be given before the issue of a scire facias to revive. (C. P.) City *v.* Hemphill, 79.

The assignee of a mortgage is affected with notice of any defence by way of payment or growing out of original equities between the mortgagor and mortgagee, which inquiry from the mortgagor would have developed. Morgan's Appeal, 167.

A mortgage ordered by the Orphans' Court for the payment of a decedent's debts was executed but not confirmed; subsequently the assignee of the mortgage petitioned for confirmation, the mortgagor's administratrix answered that the mortgage was to secure an indebtedness from the decedent, her husband, to the mortgagee for the price of a house, that in the decedent's lifetime it was agreed that indebtedness due, and subsequently to become due, from the

NOTICE—*Continued.*
mortgagee to the decedent and the mortgagor for board and washing should be credited on the debt, and that after her husband's death, she continued to board the mortgagor under an agreement that the balance due for the house should be so paid. It appeared from the evidence that the mortgagor boarded with the decedent for three years prior to his death, and with his widow four or five years after that event, and had never paid anything for such boarding, and the Court found that such indebtedness for boarding was intended to go in satisfaction of the debt for the house: *held*, (1) the assignee was affected with notice of the agreement; (2) that the mortgage should be confirmed for the sum due upon the house less the amount due for boarding up to the date of the assignment. Id.

Where one has purchased timber to be removed from certain land within a reasonable time, title to remain in the land owner until the price be paid, notice by the owner of the land to the person placed by the purchaser in charge of the removal, that the timber is deteriorating and must be removed promptly or it will be taken by the land owner, is notice to the principal. Short *v.* Messenger, 244.

A purchaser at sheriff's sale is put upon inquiry by notice, read at the sale, that the goods to be sold are the property of the claimant and not of the execution defendant, although the particular title of the claimant be not stated. Ferguson *v.* Rafferty, 525.

One who buys land, which is the possession of a third person, from one who is out of possession and does not possess evidence of title, has sufficient notice to put him on inquiry as to an adverse title. Logan *v.* Neill, 541.

When inquiry becomes a duty, neglect to make it affects the negligent person with constructive notice of such facts as a proper inquiry would have disclosed. Id.

NUISANCE. In the trial of an indictment for nuisance the Commonwealth has the benefit of exceptions as in a civil case. Commonwealth *v.* Bradney, 101.

A motion to quash is part of the trial. Id.

A street railway company was authorized by ordinance to lay its track on a certain street, provided the track were "laid in the centre or middle of said street with a street rail in such manner that vehicles of every description can conveniently cross and recross said street without hinderance at any time and at any point;" at an open space caused by intersection of several streets, the track diverged from a straight line to enter on the company's premises: *held*, in the absence of evidence showing that the track interfered with public travel the mere location of the track as above was not a violation of the ordinance and hence was not a nuisance. Commonwealth *v.* Wilkes-Barre & Kingston Street Railway Co., 280.

When the grantee of a limited right exercises it in excess, so as to produce a nuisance, the grantor may abate it to the extent of the excess and, if the abatement cannot be without obstructing the exercise altogether, it may be entirely stopped, until means have been taken to reduce it within its proper limits. Crosland *v.* Borough of Pottsville, 829.

C. granted B. the right to run a drain through C.'s property for surface water only; B. used the drain as a common sewer, thus creating a nuisance; C., after notice to B., disconnected the drain and plugged up the pipe, whereby the sewage was forced into the street; the borough officials re-connected the drain renewing the nuisance; C. re-disconnected it and as the

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NUISANCE—*Continued.*
borough officials attempted to re-connect a second time endeavored peaceably to prevent them from so doing, whereupon he was arrested: *held*, C. was within his right and could recover from the borough for the arrest and for injury done to his property through the reconnection. Id.
See PARTY WALL. (C. P.) Datz *v.* Phillips, 382.

ORPHANS' COURT. The right of the clerk of an Orphans' Court to appoint an assistant is derived from the Constitution and such right cannot be divested while the said Court continues in existence. Reid *v.* Smoulter, 419.

PARENT AND CHILD. The law regards the services performed by a child in nursing an aged parent during his last illness as the fulfilment of a filial duty, and will not permit a recovery of compensation therefor, in the absence of any express contract to make compensation. Zimmerman *v.* Zimmerman, 294.

PARTITION. The provision for the allowance of counsel fees to the plaintiff or petitioner in partition, by the Act of April 27, 1864, is in relief of the plaintiff or petitioner only and not in favor of the counsel, who therefore has no status to complain of a decree refusing such allowance. Pereyra's Appeal, 42.

In partition of realty, the proceds are to be considered as realty only so far as to vest them in the persons who would have been entitled to the land represented by them if unsold; when they have once so vested, either in possession or in right, their true character of personalty must govern in any future dealings with them. Wentz's Appeal, 201.

Where part of the purchase-money, proceeds of a sale in partition, remains charged on the realty in lien of the widow's dower, the amount so charged is regarded as realty only for the purpose of determining in what persons are to be vested the different shares of the fund charged; for the purpose of inheritance from such persons the fund is personalty, although some of the persons may be minors and may die before the widow without ever having had the enjoyment of the fund. Id.

Where, in proceedings in partition in the Orphans' Court, land is awarded to one of the heirs, a married woman, upon her bid, her bond to secure to the other heirs their shares of the purchase-money will be a lien upon the whole of the real estate so awarded to her, including her own share under the intestate laws. Snively's Appeal, 310.

Where in such proceedings land has been awarded to an heir who gives a recognizance for owelty by the other heirs, and the decree is confirmed and is not appealed from, on a subsequent sale of the land by the executor of the heirs to whom it was awarded, objections cannot be made, upon the distribution of the fund arising from the sale, to the right of the heir to bid to have the property awarded to her and to give the recognizance on the ground that she was a married woman. Id.

After a decree and a sale in partition, a supplemental bill may be maintained to recover compensation for the removal of articles belonging to the realty. See EQUITY. Williams's Appeal, 365.

PARTNERSHIP. When one partner notifies a third person not to sell goods to his co-partner, the firm will not be liable for goods furnished to the co-partner in defiance of the notice. (C. P.) Gill *v.* Baizley & Roeske, 55.

PARTNERSHIP—*Continued.*
On the dissolution of a partnership by death of a member thereof, the proper person to recover the assets of the firm is the surviving partner and not the representative of the decedent. Kutz *v.* Dreibelbis, 67.

Assumpsit will not ordinarily lie by one partner against another, who has received partnership assets, or against his estate, but where the partnership is in a single and finished transaction, assumpsit will lie between the partners. Id.

Where the representative of a deceased partner has received partnership assets and there appears to be no outstanding indebtedness on the part of the firm, in assumpsit by the surviving partner he should be allowed to recover only his portion of the assets, and not the whole so as to compel the representatives to bring suit to settle the partnership. Id.

A. and B. owned land as partners, the title being in a trustee, who sold the land and accounted to A. the liquidating partner. B. and A 's heirs, alleging the sale to be fraudulent, brought ejectments for the land, and obtained a settlement, whereupon B. executed a quit claim deed; the ejectments were pressed by B., notwithstanding hindrance from A.'s heirs; after the settlement, however, A.'s heirs filed a bill against B. to recover their proportion thereof: *held*, that in equity A.'s heirs should allow to B. compensation for his services in obtaining the settlement, notwithstanding the rule that a partner is not entitled to compensation for services as such. Zell's Appeal, 68.

The mere use of the word "we," with reference to certain transactions, in letters from the decedent to another person who was acting as an agent in the matters, is not sufficient to establish a partnership between the decedent and the person addressed. Ford's Appeal, 105.

The defendants, A., B. and C. were indebted as partners to the plaintiffs; C. retired from the firm, A. and B. assuming the debt; A. and B. subsequently made an assignment to D. for the benefit of creditors, the plaintiffs entered into an agreement that D. might conduct the business for the purpose of paying off creditors, and agreed to accept notes of A. and B. for the indebtedness of the continuing partners; the plaintiffs sued A., B. and C., before the time at which some of the notes would have expired; C. claimed that the indulgence to A. and B. released him, or at least postponed the time at which he could be sued: *held*, the plaintiffs were entitled to judgment against C. (C. P.) Wood *v.* Rhoads, 124.

A firm may be sued by the wife of one of its members, and the defence of the legal unity of the plaintiff and her husband defendant cannot be set up on behalf of the firm except by the husband. Freiler *v.* Kear, 195.

The signers of a defective certificate of association, under the Act of June 2, 1877, are liable as general partners, and may be so proceeded against in assumpsit; the remedy against them is not confined to that given by the second section of the Act. Vanhorn, Griffin & Co. *v.* Corcoran *et al.*, 249.

A father, owning a paper-box factory took his son into partnership, the latter contributing a sum of money to the firm assets, under an agreement that he should receive one-third of the profits of the business: *held*, that upon dissolution the son was entitled to a return of the money contributed by him and his undrawn profits only. Plumly's Appeal, 281.

The father having, after dissolution, continued the business, using the firm and his son's assets during a delay occasioned in winding up by a difference of

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PARTNERSHIP—*Continued.*
opinion as to the son's right to claim that the realty, machinery and fixtures of the factory should be treated as firm assets and sold: *held*, that the father might retain the profits made by his use of the son's assets, and was compellable to account to the son only for interest on the son's share from the date of dissolution. Id.

The father having claimed credit for disbursements made for the renewal of machinery for the amount charged off on the firm books for depreciation thereof, and for interest paid upon mortgages of the real estate: *held*, he had no right to such credits, but the amount represented thereby should be paid to the son, with interest from the date of dissolution. Id.

The assignment by a partner to his co-partners of all his interest in a firm will carry with it the exclusive right to a firm trade-mark. Laughman's Appeal, 465.

Between partners, land which is treated as partnership property, especially if bought with partnership funds, is regarded as partnership property, although the title be taken in the names of the partners individually. Warriner *v.* Mitchell, 470.

PARTNERSHIP ASSOCIATIONS, LIMITED. In order to constitute a valid organization under the Act of June 2, 1874 (P. L. 271), there must be paid into the association at the time of filing the certificate at least so much of the capital as the certificate endows the association with at the outset; if this is not done the petitioners of the association will be liable as general partners. Hill, Keiser & Co. *v.* Stetler, 113.

Where after an association has commenced business without having paid in the capital recited, a person buys stock in the association at par from the treasurer and subsequently becomes a manager, he is chargeable with notice of the failure to comply with the Act of 1874, and will be liable as a general partner for all debts contracted after he had become a member of the association. Id.

To render valid a subscription to the capital of an association in property other than cash, as permitted by Act of May 1, 1876 (P. L. 89), the certificate must show the property so subscribed and its valuation with sufficient precision and particularity to enable creditors to ascertain of what it consists and to estimate its value. A certificate which contains an indefinite and general description with a lumping valuation is insufficient and the partners will be liable as general partners. Vanhorn, Griffin & Co. *v.* Corcoran *et al.*, 249.

A defect of the above character in a certificate cannot be supplied by evidence *aliunde*. Id.

The contribution of property contemplated by the Act of 1876 is a contribution of property appropriate to the kind of business intended to be carried on by the association. Id.

Where the statement filed in the formation of a partnership association limited is defective the signers are liable as general partners; they are not exempted from such liability by the fact that they acted in good faith or that creditors seeking to enforce the liability as general partners had full knowledge of the facts, which should have been but were not set forth in the partnership statement. Sheble *v.* Strong, 437.

A statement is defective which does not contain such a detailed description and valuation of machinery contributed as capital, as is required by the Act of May 1, 1876. Id.

A judgment against a partnership association limited is not a bar to an action against its members as individuals when it is sought to hold them as general partners. Id.

PARTY WALL. The maintenance of windows in a party wall without authority to do so from the adjoining owner is a nuisance of which equity may decree the abatement. (C. P.) Datz *v.* Phillips, 382.

PAYMENT. There is no presumption of payment for a water-pipe, which is not laid by the city under Act giving a lien therefor, from a lapse of time where no connection has been made with such pipe for the use of the premises on whose behalf a claim of payment is set up, for the city cannot enforce a claim until a demand is made for the water. (C. P.) Commonwealth *ex rel.* Taylor *v.* Wagner, 171.

An award and decree in favor of a creditor of a decedent do not constitute payment. Pomeroy's Appeal, 296.

A statement set up that the defendant, a bank, held a judgment against X. to secure the payment of notes amounting to $625; that X. conveyed land, bound by the judgment, to the plaintiff, which land was afterwards sold under the judgment and the proceeds of the sale paid to the bank by the sheriff; that prior to the execution X. had paid to the bank $300 "which should have been credited on said judgment" but was not; that, had it been so credited, the bank would have been overpaid $126.35; this amount the plaintiff claimed to recover from the bank, alleging further that he did not know of the judgment when he bought the land or of X.'s payment at the time of the sale. The affidavit of defence alleged that the money received from the sheriff was received on account of X.'s indebtedness to the bank, but was not sufficient to pay all X.'s indebtedness to the bank, the balance thereof having been subsequently paid by X.'s indorsers: *held*, the Court below erred in entering judgment for plaintiff; the defendant was entitled to the money claimed as against X., and plaintiff stood in no better position than X. through whom he claimed, and there was no allegation of an agreement to apply the $300 to the judgment. First National Bank *v.* Fair, 391.

Payments tolling bar of Statute of Limitations. See LIMITATION OF ACTIONS. Furst *v.* Building and Loan Association, 505.

PENALTY. See CONTRACT. Moore *v.* Colt, 356.

PERISHABLE PROPERTY. A vessel taken in foreign attachment may be sold as perishable. (C. P.) Apreda *v.* Romano, 124.

PHILADELPHIA. A mechanic's lien for an addition can in Philadelphia be filed only under the Act of August 1, 1868. Thomas *v.* Hinkle, 119.

The city may refuse a permit for water until the cost of laying the pipe conveying it is paid. (C. P.) Commonwealth *ex rel.* Taylor *v.* Wagner, 171.

PLEADING. A. was indicted for selling liquor on Sundays and was acquitted, he was afterwards indicted for furnishing liquor to men of known intemperate habits between the same dates as those mentioned in the first indictment; he pleaded that he had been indicted for furnishing liquor on Sundays between the dates mentioned in the second indictment and had been acquitted: *held*, that this was an informal plea of former acquittal and that, the two indictments being for different offences, the plea could not be sustained, although evidence of any furnishing of liquor to any person on any Sunday within the dates set out in the first indictment should be excluded. Altenburg *v.* Commonwealth, 145.

The return to an alternative mandamus must be framed with certainty to the greatest possible intent. *In re* Prospect Brewing Co., 177.

A corporation, relator, set forth that it possessed the qualifications required by law to entitle it to a license as a wholesale brewer and that certain Judges sitting

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PLEADING—*Continued.*
in the Quarter Sessions, had, notwithstanding, refused the license without assigning any reasons therefor; it also set out certain testimony taken before the Court below with regard to the manufacture and sale of a liquor known as ambrosia; to a writ of alternative mandamus addressed to the said Judges to show cause why the license prayed for should not be granted, the Judges returned generally (*a*) that the company, relator, had conducted its business in violation of law; (*b*) that it was not a fit person to receive a license; (*c*) that in so far as it was possible for a corporation to possess any moral character it did not possess a good moral character; they also returned that the statement of testimony made by the relator was incompetent, inaccurate and misleading, and that the Court found that the relator had sold ambrosia to unlicensed dealers and had induced them to purchase the same by false representations as to the character of the article: *held*, the return was insufficient; (*a*) because it did not state in what respect the company had violated the law; (*b*) because the question of fitness to receive a license was not before the Court and because the return was in that respect evasive; (*c*) because a corporation could not have a moral character and the return did not allege the characters of the officers and stockholders not to be good; (*d*) because it did not show how the statement of testimony of the relator was incompetent, inacurate and misleading; (*e*) because the company under its license could sell to anybody; (*f*) because it did not state what false representations were made as to the character of ambrosia. Id.

A narr. in two counts set forth in the first count that K. and E. owned certain land in common subject to a ground rent of $88; that they conveyed three small pieces of said land reserving a ground-rent of $18 on each lot, and covenanting to protect the grantees from all liability for the paramount rent; that the plaintiff became the owner of the three small rents and the defendant the owner of the land retained by K. and E.; that a large amount of the $88 rent fell into arrears and also a large amount of the $18 rents; that the defendant, to compel the tenants of the three small lots to apply money due to the plaintiff to the paramount rent, refused and neglected to pay a large portion of the same, whereupon the owner thereof collected the same out of the three small lots, whereby the defendant was relieved from the payment of so much of the paramount rent and by means whereof the plaintiff was prevented from collecting a large portion of his rents and the defendant became liable to pay to the plaintiff the money received from the tenants of the small lots from the owner of the $88 ground-rent, and being so liable promised, etc. The second count differed from the first only in that it alleged that the defendant collected and received from the tenants of the small lots the rent reserved out of each. In neither count was there a profert made of the deeds showing the titles of the parties; on demurrer: *held*, (1) that assumpsit would not lie; (2) that covenant could not lie for want of privity; (3) that if the second count meant that the defendant had collected the small ground-rents in the name or on behalf of the plaintiff or as his agent, it should say so; (4) that the plaintiff was bound to make profert of the deeds, or set forth cause or excuse for not making it. Provident Life & Trust Co. *v.* Loftus, 236.

A. sold the down timber on certain land to B. at a certain price; A. to hold title until B. paid the price; B. paid part of the price and removed part of the timber; A sold the land to C., subject to B.'s right; B. delaying in the removal of the timber, C. notified him to remove it or he would take the timber himself, and afterwards took the timber: *held*, B. could maintain trespass on the case against C. Short *v.* Messenger, 244.

A statement in an action upon a promissory note which does not contain a specific and positive averment of the whole facts in the plaintiff's title, will not entitle him to judgment. Erie Boot and Shoe Co. *v.* Eichenlaub, 332.

A statement set forth that A., president of the company defendant, made a note on behalf of said company in favor of an estate of which A. was executor, which note was payable at a certain bank, and was indorsed by A., as executor, and by the plaintiff; that the note went to protest, and that plaintiff was compelled to pay its amount to the bank, and that he was an accommodation indorser for the company at its request. The affidavit of defence set up that the note was made in fraud of the company, of which fact the plaintiff had notice before he took the note: *held*, the statement was deficient in not stating that the bank was a *bona fide* holder for value before maturity. Id.

The Act of 1810 provides that "a defendant, sued before a justice, who shall neglect or refuse to set off a claim against the plaintiff, cognizable before such justice, shall be barred from recovering the same, by any after suit;" a defendant having been sued before a justice did not set off a claim for wages against the plaintiff, but brought an action afterwards to recover the same: *held*, a plea of the pendency of the former action was a plea in bar and not in abatement. Felpel *v.* Hershour, 523.

PLEDGOR AND PLEDGEE. Where a pledgee of fraudulently issued stock has established his claim for indemnity against the corporation and has received in settlement genuine stock, the pledgor of the stock who has never advanced money thereon or parted with anything on the faith of the certificate, has no equity to redeem the genuine stock on repayment of the advances made to him with interest. Kisterbock's Appeal, 446.

A pledge of fraudulently issued stock is only a pledge of a claim to be indemnified for the fraudulent acts of the officers of the company by which such stock purports to have been issued. Id.

POWERS. Where a power is complete and its exercise is postponed until the happening of a certain contingency for the benefit of a particular person, the power may be exercised before the happening of the contingency if the said person consents. Hamlin *v.* Thomas, 4.

Where there is a devise of realty to a widow for life with a direction that after her death the executor shall sell the same and pay the proceeds to certain persons, if the executor, with the consent of the widow and without an order of Court, sell a part of the realty in her lifetime for the payment of the decedent's debts, the purchaser will take a good title. Id.

The widow's consent in such case may be by parol, and is effective unless obtained by fraud. Id.

A will contained a bequest, an estate in trust, for the testatrix's children, they to receive the income, the share of each to be paid to his issue on her death, followed by a provision, that the income of the share of any one dying without issue should be paid to the surviving brothers and sisters or their issue, followed by a proviso that "each of my children" should have a power of appointment to his wife *durante viduitate*, and a power of appointment amongst children: *held*, the power of appointment to the wife was not confined to those children who should die without issue, and hence, where a child died with issue living, his

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POWERS—*Continued.*
will appointing an estate to his widow *durante viduitate* was a valid execution of the power. (O. C.) Mifflin's Estate, 463.

Where a will provides that a *cestui que trust* may appoint the estate, the appointment to take effect after her death, and the corpus of the trust estate is set apart upon the settlement of the executor's account, her appointees will take directly upon her death; it is not necessary that the estate pass again through the hands of the executors of the original testator. (O. C.) Sterling's Estate, 495.

PRACTICE. Assumpsit will lie between partners where the partnership is in a single and finished transaction. Kutz *v.* Dreibelbis, 67.

Assumpsit may be maintained by the true owner of money to recover the same from a bailee of the one who has stolen the same, although such bailee has taken the money without knowledge that it has been stolen. Hindmarch *v.* Hoffman, 239.

Assumpsit and not covenant is the correct remedy for a breach of a sealed contract modified by a parol agreement. Stoddard v. Emery, 566.

An appearance will not cure a writ made returnable at a time not authorized by law. Williamson *v.* McCormick, 51.

An attachment under the Act of March 17, 1869, must be made returnable on the first return day after its issue. Id.

While an affidavit for an attachment under the Act of 1869 need only follow the terms of the Act, yet where it assumes to state specific acts as the basis of the complaint supporting the attachment it must state the case with reasonable particularity and clearness. (C. P.) Wright *v.* Ewen, Kerlin & Co., 111.

Sufficiency of affidavit to hold to bail. See TRESPASS. (C. P.) Tucker *v.* Hough, 91.

Sufficiency of affidavit under attachment Act of 1869. See ATTACHMENT. (C. P.) Wright *v.* Ewen, Kerlin & Co., 111.

Where the plaintiff's affidavit in foreign attachment is insufficient it is not amendable. (C. P.) Shumway *v.* Webster, 336.

The Act of May 10, 1889 (foreign attachment), applies to actions pending at the time of the passage of the Act. See FOREIGN ATTACHMENT. (C. P.) Lane & Co. *v.* White & Co., 380.

Where the sole objection to an amendment is that it will deprive the defendant of a defence under the Statute of Limitations, the amendment should be allowed and the defendant be left to his prayer for instructions as to its effect upon his rights under the Statute of Limitations, after the evidence has closed. Railroad Extension Co. *v.* Seiple, 563.

Where a party has accepted service of notice of intention to file the report of a referee under the Act of May 14, 1874, upon a day certain, it is immaterial that such notice was not given by the prothonotary as required by the Act. Allison *v.* Gilton, 342.

There is no absolute rule that a party offering a writing in evidence can be required to make a formal statement of the purpose of the offer; such statement may be called for, but how it is to be made, and with what particularity of detail, are matters within the discretion of the Judge trying the case. Myers *v.* Kingston Coal Co., 223.

In cases of surprise, occasioned by reference in the speech of counsel to matters judicially noticed, where the new view or matter may lead to substantial injustice, and is such as could not reasonably have been foreseen, the only relief which can be afforded is by

PRACTICE—*Continued.*
giving an opportunity to reply or by granting a new trial. Wilson *v.* Van Leer, 289.

Where a statement improperly joined a count for personal injury done to the plaintiff, with a count for the death of his child, caused by the same accident, but at the trial the evidence as to the child was excluded, and the jury was instructed that it was to try only the case arising from the personal injuries to the plaintiff, judgment will not be arrested after verdict. (C. P.) Specht *v.* Penna. R. R. Co., 317.

Where a Judge conceives it to be his duty to give a binding charge, the better practice is to decline to answer points in detail. Myers *v.* Kingston Coal Co., 223

A jury should not be permitted to take out with it an affidavit which has been given in evidence. Schuylkill River East Side R. R. Co. *v.* Stocker, 455.

Where the jury has been properly instructed, and has disregarded the instructions, the remedy is not a writ of error but an application to set aside the verdict. Reading & Pottsville R. R. *v.* Balthaser, 9.

It is bad practice to enter a judgment *non obstante veredicto* while a motion or rule for a new trial is undisposed of. Freiler *v.* Kear, 195.

Where two personal actions are instituted for the same cause, a judgment in one extinguishes the right to recover in the other. Miller *v.* Rohrer, 278.

Where an attachment under the Act of 1869 is issued after a personal action has been begun against the same defendant for the same cause of action, and is still pending, but before judgment is obtained in the attachment proceeding judgment is obtained in the first brought action, the judgment therein will bar a recovery in the attachment proceedings. Id.

A claim for wages under $100 is within the rule of the Act of March 20, 1810, requiring claims under $100 to be set off in actions before a justice. See SET-OFF. Felpel *v.* Hershour, 523.

Where the rights of an intervenor in an attachment execution sufficiently appear by the answers to the interrogatories and evidence they will be protected, although the intervenor have filed no plea and the case has gone to trial simply on the garnishee's plea of *nulla bona.* First National Bank *v.* Ladd, 340.

A life estate may be sold under a mortgage given by the life tenant without the notice and leave required by the Act of 1849. See LIFE ESTATE. Datesman's Appeals, 353.

A *capias ad satisfaciendum* may be issued upon a judgment against a trustee for trust money in his hands. Harris *v.* Sheldon, 370.

An order refusing a liquor license may be revoked and a license granted, although more than a term has elapsed since the entry of the order of refusal. (Q. S.) *In re* Hamilton's Application, 303.

Proceedings to charge real estate of a decedent in the hands of his widow and heirs, must be begun within ten years after his death, or any judgment *de terris* obtained upon them will be stricken off. Allen *v.* Krips, 248.

Persons liable as general partners under the provisions of the Partnership Association Limited Act may be proceeded against in assumpsit. Vanhorn, Griffin & Co. *v.* Corcoran, 249.

A Court may recommit a report to a referee under the Act of June 22, 1871 (Referees in Luzerne County), to take further testimony on a disputed fact, which he has reported impossible of determination. Shiffer *v.* Broadhead, 44.

Practice under the Act of 1887. Where in an action on a promissory note to which the defence

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PRACTICE—*Continued.*
of fraud in obtaining the same is set up, the statement merely alleges a transfer of the note to the plaintiff without giving the date of the transfer or the consideration therefor, the plaintiff is not entitled to summary judgment. Gere *v.* Unger, 7.

Where the statement does not set up a case which would *prima facie* meet the defence set up by the affidavit, the case should not be sent to trial. Id.

The Act of May 25, 1887, prescribes a new method for taking judgment for want of affidavit of defence, which supersedes all others. Marlin *v.* Waters, 129.

If the plaintiff desires to take judgment on the return-day he must serve a copy of his statement; if, however, he chooses to wait until the defendant is in court, he need only file his statement and give notice thereof to the defendant. Id.

Practice in Supreme Court. Setting forth a question put to a witness, the allowance of which was excepted to, without setting forth also the answer, is not a good assignment of error under Rule XXIV. Battles *v.* Sliney, 71.

Where on the trial of a case the Judge has refused a point based on the finding by the jury of certain facts, and does not give reasons for his refusal, the Supreme Court will assume that the point was refused because the Judge regarded it as an incorrect statement of the law, and not because there is no evidence to support the finding of fact. Short *v.* Messenger. 244.

Where the Supreme Court, in an opinion reversing a judgment and awarding a new venire, makes a mistake owing to a misstatement of date in the paper-book, and the Court below refuses to correct the error, and follows the opinion of the Supreme Court, that Court will, on a second writ of error, reverse and send the case back for trial or decision more in accordance with the real facts. Blymyer *v.* Colvin, 315.

A certiorari to the action of a Court in refusing to quash a warrant of arrest issued under the act of July 12, 1842, brings up the record only, and proceedings subsequent to the issue of the warrant form no part thereof. Cooper *v.* Hart & Co., 358.

The Commonwealth is not estopped from the prosecution of an appeal from a refusal to allow interest on the amount due for collateral inheritance tax, by a receipt by the register of the tax without interest. See COLLATERAL INHERITANCE TAX. Commonwealth's Appeal, 473.

An assignment of error should embody that part of the bill of exceptions upon which it is founded; if an assignment of error in the admission or rejection of evidence contain neither the offer, the objection, nor the ruling of the Court below it is irregular and may be disregarded. Warfel *v.* Knott, 513.

An exception to the admission of evidence not taken at the time it is offered cannot be taken before the Supreme Court. Id.

Where a binding charge has been given upon uncontradicted evidence, and the party against whom the charge was given did not at the trial ask that the credibility of the evidence should be submitted to the jury, such non-submission cannot be successfully assigned as error. New Era Life Association *v.* Weigle, 551.

PRINCIPAL AND AGENT. A principal is bound by misstatements of his agent made within the scope of his authority, and as to third persons affected by his acts or words the apparent scope of his authority governs. Griswold *v.* Gebbie, 72.

An agent to engage a real estate broker to sell a country-seat is authorized to give the broker a description thereof, including acreage. Id.

PRINCIPAL AND AGENT—*Continued.*
A person charged by the purchaser of timber with the removal thereof, is such an agent that notice to him with reference to the removal of such timber is notice to the purchaser. Short *v.* Messenger, 244.

One who takes the benefit of a contract made by one calling himself his agent cannot repudiate the authority of the agent in an action upon the contract. Siemens Regenerative Gas Lamp Co. *v.* Horstmann & Sons, 396.

An agent for a gas lamp company made a written offer on the company's letter head that if the plaintiff would buy certain lamps he would buy them back at half price, and signed the offer as "general agent;" the offer was accepted and the lamps delivered to plaintiff; the manager of the company afterwards wrote for permission, on behalf of the company, to inspect the lamps from time to time; it was also shown that up to within a month of the proposal the agent was practically the representative of the company, and that no notice of his withdrawal from that position had been given to the public: *held*, there was sufficient evidence of the authority of the agent to make the contract to go the jury. Id.

A volunteer cannot claim exemption from the legal consequence of a fraud committed for his benefit by his agent. Brooks *v.* First Presbyterian Church, 508.

An agent who neglects to obey the instructions of his principal is liable for any loss occurring to the latter through such neglect. Kraber's Exr's *v.* Union Insurance Co., 547.

Where an order to an agent is plain and there is a reply that the order will be attended to, the facts that he has, on former occasions, disobeyed orders and that his principal has forborne holding him to his legal responsibility for disobedience will not relieve the agent from accountability for neglect or disobedience to the order in question. Id.

PROFERT. See PLEADING. Provident Life and Trust Co. *v.* Loftus, 236.

PROMISSORY NOTE. An indorser of a promissory note who signs before the payee of the note does not become liable to him either as indorser or guarantor, and such liability will not be added by the fact that the indorser has likewise written his name on the face of the note after the words "credit the drawer." Temple *v.* Baker, 1.

An irregular indorsement cannot be turned into a guarantee of payment of the note by parol testimony, because of the Statute of Frauds. Id.

The words "credit the drawer" upon a promissory note are merely a direction to all persons to whom the note may be presented to treat the drawer as owner, notwithstanding the apparent title of the indorsee. Id.

Fraud in procuring a promissory note is a good defence against any but a *bona fide* holder for value before notice, and where such fraud is set up the burden is on the plaintiff to show that he is such holder. Gere *v.* Unger, 7.

The mere allegation that a fraudulently procured note was delivered to plaintiff in payment and satisfaction of an old debt does not show a good defence. Id.

Where the allegation is that a note, to which a defence of fraud is alleged, was "by delivery transferred to the plaintiffs" without giving the date of transfer or the consideration for the transfer, the plaintiff is not entitled to a summary judgment. Id.

A promissory note which bears upon its face the statement "this note is given for advancements and it is the understanding it will be renewed at matur-

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PROMISSORY NOTE—*Continued.*

ity" is not negotiable, and an indorser thereon is not liable as such to the holder. Citizens' National Bank *v.* Piollet, 83.

One who takes a promissory note with knowledge of its fraudulent inception cannot, by showing that he is the assignee of a *bona fide* holder for value, entitle himself to recover thereupon from the maker whose signature has been obtained by fraud. Erie Boot and Shoe Co. *v.* Eichenlaub, 332.

PUBLIC MONEYS. A receiver of public money who has given bond for its safe keeping is not discharged from liability therefor by the failure of the bank in which he has deposited said money. Nason *v.* Directors of the Poor of the County of Erie, 60.

PUBLIC OFFICERS. The Legislature which has fixed the salary of a public officer, cannot repeal the Act fixing his salary without making any provision therefor, as that would be in effect an expulsion of the incumbent from office. Reid *v.* Smoulter, 419.

QUARTER SESSIONS. It is error for the Quarter Sessions to assume jurisdiction and sustain exceptions filed therein to the report of viewers, while an appeal therefrom is pending in the Common Pleas. *In re* Widening of Chestnut Street, 418.

QUESTIONS OF LAW AND FACT. What is reasonable time within which to give a notice required by a policy of insurance is a question for the jury unless the delay be so great that the Court may rule it as matter of law. Peoples' Mutual Accident Association *v.* Smith, 33.

The construction of a written correspondence where the letters are not ambiguous is for the Court. Kraber's Ex'rs *v.* Union Ins. Co., 547.

The interpretation of a paper in which there is no ambiguity is a matter of law for the Court. Shaefer *v.* Senseman, 208.

C. executed the following obligation under seal: "Nazareth, March 29, 1875. Six months after the date when E. loses his situation as teacher at N. Hall, I promise to pay said E. the sum of $3000. . . . Provided that said E. loses the said situation at any time after the date of this note and previous to the date of my second marriage. In the event of the decease of my daughter J. [E.'s wife] before the said E. loses said situation the note shall be null and void." It appeared that when the obligation was given E.'s wife lived with C., who contemplated a second marriage, and E. had accepted a more lucrative position in another town; and that the consideration of the obligation was E.'s agreement to continue to live with C. On June 29, 1876, E. resigned his position. On July 11, 1876, C. remarried. In an action on the obligation: *held*, that the decision of the case was for the Court as matter of law and that a nonsuit was properly granted on the ground that E. had not lost his position. Id.

Whether a barrier between a public road and a railway is reasonably necessary for the safety of travellers on the former is a question for the jury. Township of Plymouth *v.* Graver, 2-0.

The competency of a witness when the facts upon which the competency is predicated are admitted is a matter of law for the Court. Wilson *v.* Van Leer, 289.

J. and W. dissolved partnership, J. with M. giving a bond to indemnify W. against the payment of partnership debts; J. paid all the firm debts except the balance of a judgment confessed by himself and W. to secure the payment of the price of a foundry used

QUESTIONS OF LAW AND FACT—*Continued.*

in the business of J. and W., the title being in their names as individuals; W. paid this balance and proceeded on the bond. On the trial he gave evidence to show that the debt was a firm debt: *held*, it was for the jury to determine whether the debt were or were not a firm debt. Warriner *v.* Mitchell, 470.

Whether a telegraph company by habitually recovering from and delivering to its patrons messages by word of mouth, has in a given case waived the right to insist upon stipulations printed upon its blanks is a question for the jury. Western Union Tel. Co. *v.* Stevenson, 497.

Whether a child between thirteen and fourteen has sufficient understanding to comprehend and guard against a risk incident to his employment is ordinarily a question for the jury. Strawbridge & Clothier *v.* Bradford, 536.

What is negligence in a given case, which does not fall within a fixed standard, as where the measure of duty has not been fixed by law, is a question for the jury. Del. Lack. & West. R. R. Co. *v.* Jones, 562.

Whether a claim is barred by the Statute of Limitations is ordinarily a question for the jury under proper instructions. Railroad Extension Co. *v.* Seiple, 563.

RAILROAD. Slight deflection of track from course permitted by ordinance, not shown to be noxious, held not to be a nuisance. See NUISANCE. Commonwealth *v.* Wilkes-Barre, Kingston St. Ry. Co., 280.

In an action against railroad company for the erection of an embankment on the street upon which plaintiff's property abut-, it is no defence to show that the railroad company fixed its grade in compliance with the ordinance of the borough council, there being no evidence that the grade of the street was fixed by ordinance, and the railroad not conforming with the actual grade of the street. Railroad Extension Co. *v.* Duke, 563.

The Act of April 17, 1866, limiting the time within which actions may be brought against a railroad company for right of way, etc., is abrogated by Art. III. § 21, of the Constitution. Railroad Extension Co. *v.* Seiple, 563.

Under the provision of the Act of March 27, 1848, supplementary to the charter of the Pennsylvania R. R. Co., "that if said railroad company shall find it necessary to change the site of any portion of any turnpike or public road they shall cause the same to be reconstructed," etc., the question of necessity is to be determined in the first instance by the railroad company, subject to control in case it abuses its power. Pennsylvania R. R. Co.'s Appeal, 409.

The "necessity" in the said Act does not mean absolute necessity; the question in any given case is what is reasonably practicable. Id.

When a railroad has, without objection from the public, occupied part of a township road for a diagonal crossing and has reconstructed the road, carrying it over the railroad, obtaining therefor the authority of the Quarter Sessions, the township supervisors, after the new road has been in use for several years, cannot cut down the embankment and make a new crossing at grade at the place of the original one. Id.

The question of whether the railroad company can change the bed of a road, unless it occupy the same longitudinally, not decided. Id.

A railroad company may legally issue bonds in order by the sale thereof to raise money to pay obligations incurred in the construction of its road, if the

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RAILROAD—*Continued.*
amount is not in excess of the amount permitted to be borrowed by the company. Appeal of the Commonwealth, 530.

RECORD. Purchasers and lien creditors, dealing with the owners of land on the faith of an individual title appearing upon record, may not be deprived of their rights against the individual interests appearing on the record, by parol proof that said interests were really partnership interests; but such rule does not apply between the partners themselves. Warriner *v.* Mitchell, 470.

REFEREE. Under the Act of June 22, 1871 (Referees in Luzerne County), the Court has power to recommit the report, when the referee reports that it is impossible to determine a disputed fact. Shiffer *v.* Broadhead, 44.

No one not actually admitted to the bar of the Supreme Court can act as referee under the Act of May 14, 1874. Campbell *v.* County of Fayette, 107.

A submission to a referee under the Act of 1874 cannot be validly made by parties acting in a fiduciary capacity. Id.

Acceptance of service of notice of intention to file the report of a referree under the Act of May 14, 1874, will cure the absence of the notice by prothonotary required by the Act. Allison *v.* Gilton, 342.

RELEASE. The release of one of several joint trespassers is the release of all. Seither *v.* Phila. Traction Co., 246.

The rule is not altered where there are separate actions against different trespassers for the same injury. Id.

REMAINDER. A devise that in the event of the decease of A. and of B., his wife, while his widow, or, in the event of her second marriage, a portion of an estate shall be given to the children of A. and of his wife, living at the time of the death of A. and B., makes a contingent remainder which vests only in those of the children of A. and B. who are living at the death of both or at the time of the marriage of B. after A.'s death. Commonwealth Title Ins. Co.'s Appeal, 35.

A devise or bequest to such children or such child or individuals as shall attain a given age, or shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class preceding the restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, is contingent on account of the person. Id.

A devise to daughters of the testator, with remainder, on the death of each respectively, "to the surviving brothers and sisters and the lawful issue of such as may be dead, ... provided, that if my said daughters or either of them should die leaving lawful issue," the said issue shall take the shares of their parents, gives to each of the sisters and brothers a remainder in the share of each, contingent upon the death of such brother or sister without issue, and does not give to each one who survives the testator a vested remainder, subject to divestiture by the birth of issue who survive their parent. Woelpper's Appeal, 233.

A bequest of personalty to a daughter, with remainder at her death to her children who may then be living or their issue, and in default of any child or issue of any child then to the surviving children of the testator, is as to the surviving children, contingent upon their surviving the legatee for life. Reiff's Appeal, 316.

REMAINDERMAN. Where the fee is sold by the sheriff, upon a mortgage made by the life tenant and remainderman, the former may be paid that part

REMAINDERMAN—*Continued.*
of the proceeds which represents the life estate and the balance of the fund will be paid to the remainderman. Datesman's Appeal, 353.

A remainderman cannot be required to contribute to improvements and repairs made without his assent by the life-tenant. Id.

REPLEVIN. A., one of several tenants in common of land subject to a life interest of his mother, being in possession of the whole tract, sold the timber thereon, with an agreement that he should retain the timber as security for the price; he had previously purchased the interest of his co-tenants in the timber, and his mother assented to the sale: *held*, A. could maintain replevin for all the timber against one who bought the timber at sheriff's sale under an execution against A.'s vendee, who had not paid A. for the timber. Ferguson *v.* Rafferty, 525.

RES ADJUDICATA. The binding effect of a decree or judgment, which is relied upon to show that the matter before the Court is *res adjudicata*, depends upon the identity of the rights involved in the former and in the present case and not upon the evidence presented or the arguments used. Myers *v.* Kingston Coal Co., 223.

To render a judgment conclusive in a subsequent action, it must appear to have rested on the same questions that are sought to be raised in the second action. Sheble *v.* Strong, 437.

A judgment against a partnership association, limited, is not a bar to an action against the individual members for the same debts, where it is sought to hold them as general partners, the organization of the association being alleged to be defective and invalid, for the question of individual liability could not have been raised in the first action. Id.

ROAD LAW. There is no authority under the Act of May 14, 1874, or of the Act of June 13, 1836, to appoint reviewers upon the question of damages alone. County of Huntingdon *v.* Kauffman, 97.

Costs of such review cannot be placed upon the county. Id.

A report of viewers appointed under the Act of June 13, 1836, to vacate parts of a public road, that the road had become useless, dangerous, inconvenient and burdensome and should be vacated, and that the said vacation "shall take effect from the time when the Penna. R. R. Co. shall have completed, ready for use, including approaches thereto, an overhead bridge over the tracks of its road, on B. Street," is not a conditional and, therefore, illegal and irregular report. *In re* Roads in Londonderry Township, 327.

The Act of June 13, 1836, § 24, providing for the change or supply of a road, or of any part of it, necessarily implies an interval of time between the decree of vacation and the order to close in fact. Id.

Sections 1 and 2 of the Act of May 6, 1857, empowering viewers who decide in favor of opening or widening streets in any city of the first class to pass upon the question of benefits and damages are constitutional; sections 3 and 4 providing for the appointment of a Master and prescribing his duties in road cases in cities of the first class are unconstitutional. See CONSTITUTIONAL LAW. *In re* Ruan St., 460. [A reargument has since been ordered in this case.—H. B.]

Property owners specially benefited by the vacation of a street may be assessed for the damages occasioned by such vacation, and such assessment may be made by a jury appointed for the purpose. (C. P.) *In re* Vacation of Howard Street, 491, 520.

An appeal lies from the finding of damages by a jury of view upon the vacation of a street. Id.

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ROAD LAW—*Continued.*

The Act of April 13, 1854, § 2, provides that sums awarded for road damages in the city of Lancaster, except damages for the removal, or injury to buildings, which are to be separately assessed and paid out of the city treasury, shall be paid by the county; section 3 provides that the county commissioners shall open an account with the city of sums paid by the city, for any opening roads and erecting and repairing bridges in the county, and of the amount drawn from the county treasury for opening streets and alleys in the city, "while the balance on said account, if against the city, shall be payable out of the treasury of said *county*, and be reimbursable out of the county treasury only when the balance shall be in favor of said city."

Held, (1) the word county italicized is a clerical mistake for city.

(2) That the primary obligation to pay damages to a land owner (except for injury to buildings) is upon the county, and the liability of the city to the county can be settled only in a proceeding between them. *In re* Opening of First Street, 568; *In re* Opening of Broad Street, 571.

RULE OF COURT. A rule of Court (C. P. of Butler Co.) was as follows: "Defendant shall file with his plea sworn copies of any instrument of writing. book accounts, specify items of claims and any material facts upon which he relies for his defence under oath; and file his affidavit stating what amount he verily believes he is entitled to defalk or to recover from the plaintiff in said suit."

The plaintiff sued to recover the value of certain barrels of petroleum; the defendant by affidavit set up that he had been tricked by the plaintiff into taking a lease of certain oil wells from him, and had been put to great expense with reference thereto, that in consequence the plaintiff gave him an order upon the Oil Pipe Line for the barrels in question to recompense him for his loss. No writings were annexed to the affidavit. On the trial the defendant offered to prove the oil sued for was received by him on an order given to him by the plaintiff to recompense him for money laid out upon the property and wells; the Court excluded the evidence on the ground that the rule of Court had not been complied with: *held*, not to be error, the Supreme Court adopting the Common Pleas' interpretation of its own rule. Dill *v.* Knapp, 258.

SALE. Where A., owning land, sells down timber thereon to B., retaining the title thereto until B. shall have paid the price, if B. abandons the contract A. may take the timber the subject thereof; allowing the timber to lie and rot is evidence of an abandonment. Short *v.* Messenger, 244.

SET-OFF. Where a debtor sends to his creditor a note, which he requests him to get discounted "for us, and give us at our expense what the proceeds will be," but gives no further directions as to the disposition of the proceeds, the creditor, having had the note discounted and having received the proceeds, will not be held to have received them in a fiduciary capacity and, in an action brought by the debtor to recover them, may set off the amount due by the debtor. (C. P.) Queen City Suspender Co. *v.* Adamson. 397.

The Act of March 20, 1810, requiring claims cognizable before a justice to be set off in an action brought before him, and providing that a defendant who neglects or refuses to so set off his claim shall be barred from recovering the same in any after-suit, covers claims for wages for manual labor, notwithstanding the privileges given such claims by the Acts of April 20, 1876, May 14, 1874, March 4, 1887, and March 22, 1877. Felpel *v.* Hershour, 523.

In equity the rule that a plaintiff cannot use a set-off or cross demand does not apply. (C. P.) Citizens' Natural Gas Company *v.* Shenango Natural Gas Co., 573.

SHERIFF. It is a trespass if a sheriff levy on goods of a stranger, or disturb his right of possession thereof, although the goods be not actually taken. Dixon *v.* White Sewing Machine Co., 433.

That a sheriff may change his levy so as to enlarge, restrict or abandon it is unquestionable; if he have levied on goods as the defendants' he may, on claim by another, restrict his levy to the interest of the defendants therein. Id.

The sheriff may alter his return at any time before it is actually filed in Court. Id.

The Court cannot dictate a return to a sheriff, it can only compel him to make a return, and require that it be in form appropriate to the writ and, as matter of law, sufficient. Id.

A return which is made by the sheriff after action brought against him, for matters with regard to which the return is made, does not give rise to the presumption, to which it is ordinarily entitled, in the sheriff's favor. Id.

SHERIFF'S SALE. Where a property which is subject to a mortgage is sold by the sheriff, and the purchaser, shortly after the sale, gives to the mortgagor a fresh mortgage for the same amount as the original one, which thereupon is satisfied of record, it is not error to find that the sale was subject to the first mortgage. Hohman's Appeal, 242.

Where a judgment is entered subsequently to the conveyance of the debtor's land and the land is sold upon such judgment, the title of the purchaser is dependent upon the existence of fraud in the conveyance, and the sale will not discharge liens existing against the absolute title. Hiestand *v.* Williamson, 511.

A notice read at a sheriff's sale, that the goods about to be sold are the property of the claimant and not of the execution debtor, will put purchasers upon inquiry as to the title, although the notice do not state the exact title of the claimant. Ferguson *v.* Rafferty, 525.

STOCK Par value of stock means the amount paid in upon the stock. Appeal of the Lehigh Avenue Railway Co., 530.

STOPPAGE IN TRANSITU. The effect of a stoppage *in transitu* is to restore the possession of the goods stopped to the vendor. Pennsylvania R. R. Co. *v.* American Oil Works, 88.

Where goods are stopped *in transitu*, the carrier has a lien upon them for freight and charges due upon them, but no lien for an unpaid balance of freight due by the consignee upon prior shipments of similar goods by the same vendor. Id.

STREETS. The cost of repairing a street cannot be assessed by the municipality upon the abutting property owners, even if the cost of the original paving were paid by the city out of public funds. City of Williamsport *v.* Beck, 423.

SUBROGATION. A. died insolvent, and was short in his accounts as cashier to B., State treasurer, $42,500, which sum B. paid into the State treasury. By the advice of B., who offered, if needed, to advance money for margins, A.'s administrators continued a speculation left open by A.; the speculation resulted in a profit of $9314.90, which A.'s administrators paid over to B.; with this sum they were surcharged: *held*,

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SUBROGATION—*Continued.*
that they should be held subrogated to B.'s rights and allowed as an offset against the surcharge the amount of any dividend of the decedent's estate which would be due to B. as a general creditor of A. Ewing's Appeal, 105.

An executor paying the default of his co-executor, who has become insolvent, *held* subrogated to the rights of the testator's estate in a proceeding to distribute the insolvent's estate. See EXECUTOR. Miller's Appeal, 267.

SURETY. One who mortgages his land as surety for another's debt has a right to demand that the mortgagee shall not release any lien, which he has upon realty of the principal debtor, so as to divert money which would otherwise have gone in satisfaction of the debt; and in case of a diversion of an amount which would have paid the same, the surety's property is discharged from liability. Kemmerer's Appeal, 169.

SURPRISE. See PRACTICE. Wilson *v.* Van Leer, 289.

SURVIVORS. See WILLS. (O. C.) Sterling's Estate, 495.

TAXATION. A telephone company of Massachusetts, having no office, agent or place of business in Pennsylvania, leased to certain Pennsylvania corporations certain telephones, with the right to use them, the lessor retaining the property in them. The rent of each telephone was to be paid whether the instruments were used or not. All the contracts and the payments thereunder were made in Boston. The Pennsylvania corporations carried on the active business of telephone communication within the State, had and owned the lines of wire and other necessary apparatus, maintained their offices and employed and paid their own officers and agents. Under the terms of the lease the foreign corporation reserved a certain control over the telephones and might under certain circumstances take possession of and operate them: *held*, the capital stock of the company was not liable to the tax, imposed by Act of June 7, 1879, § 2 (P. L. 112), upon the stock of corporations "doing business" or "having capital employed" in this Commonwealth. Commonwealth *v.* American Bell Telephone Co., 187.

Semble, that if the company should take possession of and operate the telephones, the capital stock would be so liable. Id.

Receipts by a railroad corporation for continuous transportation of freight and passengers from one point within the State to another, are subject to taxation by the State, although in the course of the transit the freight and passengers are carried out of the State and in again. Lehigh Valley R. R. Co. *v.* The Commonwealth, 189.

The Act of June 30, 1885, which relieves from taxation the capital of manufacturing corporations, relieves only so much of their capital as is employed for manufacturing purposes; if such a company have capital which it employs for other purposes, the company is taxable, in respect to such capital, although the other purposes may be convenient to the exercise of the manufacturing business of the company. Commonwealth's Appeal; Lackawanna Iron and Coal Co.'s Appeal, 191.

A corporation which is authorized to manufacture, to mine coal, to quarry and to mine iron is taxable upon all its capital, except that which represents its manufacturing business. Id.

A manufacturing corporation does not forfeit its right to the exemption from taxation of its capital

TAXATION—*Continued.*
employed in manufacture, by the fact that it is, also, by its charter authorized to carry on a business other than that of manufacturing. Id.

Capital invested by a manufacturing company in dwelling-houses for its employés is subject to taxation. Commonwealth *v.* Mahoning Rolling Mill Co., 194.

The Commonwealth cannot levy and enforce a tax upon real estate without her borders, although owned by a resident of the State. Appeal of the Commonwealth, 273.

The Act of June 30, 1885, § 20 (P. L. 199), which abolishes "the taxes laid upon manufacturing corporations under the revenue laws of the Commonwealth" does not exempt the real estate of said corporations from taxation, as such, under the Act of April 15, 1834. Appeal of the Jas. H. Hawes Manuf. Co., 302.

The "revenue laws of the Commonwealth" referred to in the Act of June 30, 1885, § 20, are those which provide revenue for State, as distinguished from county, borough, school and township purposes. Id.

The buildings owned by a college (which falls within the definition of a purely public charity), located within the college inclosure and forming part of the true college, and occupied by the professors and the gardener of the college, are exempt from taxation. Northampton County *v.* Lafayette College, 521.

The fact that a portion of the annual expense or annual cost of a college is met by tuition fees is not enough to deprive an institution, substantially maintained by charity, of the exemption from taxation given by the Act of May 14, 1874 (P. L. 158). Id.

TELEGRAPH COMPANIES. A telegraph company cannot by a rule or regulation exempt itself from liability for negligence, but it may prescribe reasonable rules, calculated to insure accuracy and diminish loss in case of mistake, and declare that if these rules be not observed an injured person shall be considered in default and precluded by the doctrine of contributory negligence. Western Union Tel. Co. *v.* Stevenson, 497.

Whether, under given circumstances, a telegraph company by the habitual transmission of messages delivered to its operator by word of mouth has waived the right to insist upon the stipulation of rules printed upon its blanks is a question for the jury. Id.

TENANTS IN COMMON. A tenant in common since the Act of May 4, 1869 (P. L. 1251), may bring any action against his co-tenant who cuts and carries off timber that he might bring against a stranger; but the measure of his recovery will be single damages only and not treble damages, as against a stranger under the Act of March 27, 1824. Bush *v.* Gamble, 229.

As possession is the only unity necessary between tenants in common, where a plaintiff in ejectment shows title only to an undivided portion of the land and recovers accordingly, he will be held a tenant in common with the defendant, although the latter show no title to any of the land, except possession when the writ was served. Id.

TIMBER. One tenant in common may maintain trespass against his co-tenant for cutting or removing timber owned in common. Bush *v.* Gamble, 229.

In such a case the measure of damages is the single value only and not the treble value which is recoverable against a stranger. Id.

TORTS. There is no contribution enforceable amongst tortfeasors. Boyer's Appeal, 300.

TOWNSHIP. A township is compellable to keep in repair, as a part of the highway, a county bridge within its borders, unless the county, within which

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TOWNSHIP—*Continued.*
is the bridge, is within the Act of April 13, 1843. Commissioners of Erie County *v.* Commonwealth, 373.

TRADE-MARKS. While a geographical name may, under some circumstances, be used as a trade-mark, yet when the article to which it is applied is the product of the place named, the term cannot be used as a trade-mark to the exclusion of owners of like products of the same place. Laughman's Appeal, 465.

When a tract of coal land, which does not present the features, extent or sharply defined boundaries of what is ordinarily known as an independent region, and whose right to be called a separate coal basin or even sub-basin is doubtful, has received distinct geographical recognition from the public, its name, when applied to its own natural products, must be taken in its geographical sense, and cannot be used by a coal operator to the exclusion of others mining coal in the same tract. Id.

Rule rpplied to the term "Sonman Coal." Id.

A trade-mark is a subject of assignment at least to the extent that unless reserved it will pass with an assignment of the business in which it is used. Id.

A trade-name of any natural product or article upon which it cannot conveniently be placed, though not strictly a trade-mark, is a species of property, in the use of which the owner is entitled to protection, and may be assigned in the same manner as a trade-mark. Id.

TREASURER. Treasurer of directors of poor. See Directors of Poor. Nason *v.* Directors, 60.

TRESPASS. A defendant being sued in trespass for entering on land and cutting trees, it appeared that some of the trees cut were those which he had a right by contract to cut and carry away, while others he had no right to cut: *held*, that his right of entry was not for all purposes, and did not prevent his becoming a trespasser as to the illegal act of cutting those trees which were not covered by his contract. Shiffer *v.* Broadhead, 44.

Trespass may be maintained by one tenant in common against another for cutting trees. See Tenant in Common. Bush *v.* Gamble, 229.

The release of one joint trespasser discharges the cause of action against all. Seither *v.* Phila. Traction Co., 246.

An affidavit that the defendant, an employé of the plaintiff, during his employment, possessed himself of certain goods of the plaintiff, and refused to comply with the plaintiff's demand for their return, is not sufficient to prevent the discharge of the defendant on common bail. (C. P.) Tucker *v.* Hough, 91.

A. brought trespass against C. for taking and selling a quantity of lumber which A. alleged was part of a larger lot replevied by him from B.; C. denied that the lumber was part of said lot, and contended that as A. had not held possession of the lumber, he could not maintain trespass: *held*, that if the evidence showed that the lumber belonged to A. he could recover whether the lumber were part of that replevied by him or not. Garey *v.* Woodward, 314.

A levy by the sheriff upon goods of a stranger to the execution is a trespass, although there be no actual taking. Dixon *v.* White Sewing Machine Co., 433.

To maintain trespass against the sheriff for an illegal levy upon goods, they must either have been in the actual possession of the plaintiff or he must have had the right of taking possession at the time of the levy. Id.

See Joint Trespass.

TRESPASS ON THE CASE. Action upon sustained. See Pleading. Short *v.* Messenger, 244.

TRUST. A trust "to hold and invest the principal sum . . . . and keep the same invested and from time to time as the interest . . . shall be received to pay over to my son M. during all the term of his natural life," and after my death, "to pay the principal sum . . . . to the lawful . . . . children of said M. share and share alike; any deceased child leaving lawful issue such issue to take" *per stirpes*, "and in the event of my son M. dying in my life time or without leaving any such lawful child . . . . then the same to be paid over as hereinafter provided in case of a legatee dying in my lifetime" is an active trust. Watson's Appeal, 86.

The *cestui que trust* of an active trust is not within the purview of the Act of May 17, 1871, and cannot claim to have the corpus of the estate handed over to him on the entry of security. Id.

Where stock of a corporation is held in trust for A. for life, a stock dividend which represents profits actually made by the corporation must be regarded as income and not as capital. Phila. Trust, etc. Co.'s Appeal, 137.

The same rule applies to a scrip dividend, convertible into stock so soon as the company shall acquire power to increase its stock, the company retaining meanwhile the profits represented by the scrip. Id.

A bequest to a married woman for her sole and separate use creates a trust during coverture and renders a trustee necessary. (O. C.) Bond's Estate, 176.

An order of the Orphans' Court, directing the sale of a decedent's realty for the payment of his debts, does not have the effect of imposing a trust on such realty for the payment of subsisting debts. Williamson's Appeal, 337.

TRUSTEE. A trustee cannot agree to the submission of a cause to a referee under the Act of May 14, 1874. Campbell *v.* County of Fayette, 107.

A life-tenant who takes possession of an estate on giving security, under the Act of February 24, 1834, is not a trustee and, on his death, the whole of the corpus of the estate must be paid over by his representatives without any deduction for commissions or expenses. Reiff's Appeal, 316.

When a judgment is entered against a trustee for trust moneys in his hands, a ca. sa. may be issued against him. Harris *v.* Sheldon, 370.

A trustee who has been surcharged with the principal of a ground-rent, whose title is in his *cestui que trust*, is entitled to a conveyance of the ground-rent. Harris's Appeal, 370.

USURY. A satisfaction of a judgment will not be stricken off merely to enable the defence of usury to be set up where the satisfaction has not been the result of accident, mistake or in furtherance of a design to bar the defence of usury. Read's Appeals, 76.

A. gave a judgment note for $5000 to B., which note was entered September 24, 1879, and agreed to pay a bonus of $300; for this $300 he gave a judgment note payable in three instalments; on December 19, 1879, after the payment of the first instalment, he gave a mortgage for $5000 in satisfaction of the judgment; afterwards the rest of the bonus was paid: *held*, that the whole of the usurious bonus could be set up as a defence *pro tanto* to the mortgage. Blymyer *v.* Colvin, 315.

VOLUNTEER. See Fraud. Brooks *v.* First Presbyterian Church, 508.

WAGES. A claim for wages for manual labor is within the Act of March 20, 1810, requiring claims under $100 to be set off by the defendant in an action before a justice. See Set-off. Felpel *v.* Hershour, 523.

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WAIVER. A telegraph company printed upon its blanks regulations limiting its liability; in an oil exchange, business requiring such rapid action was transacted that messages were habitually delivered to and received from the telegraph operator by word of mouth: *held*, it was a question for the jury whether by dispensing with the use of blanks the company did not intend to relieve its patrons from the stipulation printed thereon. Western Union Tel. Co. *v.* Stevenson, 497.

The right of an insurance company to set up as a defence on the trial the fact that the action has not been brought, until after the expiration of the time limited in the policy for the bringing of an action upon it, is not waived by an omission to set up the defence in the affidavit of defence and an offer of settlement, made at a time when the case is on for trial. National Ins. Co. *v.* Brown, 518.

WARRANT OF ARREST. An affidavit which avers that the defendant purchased iron of the plaintiffs, agreeing that the same should be shipped to plaintiffs' agent, in care of the defendant, to remain in possession of such agent until paid for, and that the defendant, in violation of the agreement and in fraud of plaintiffs' right, took possession of the iron so shipped without paying therefor, is not sufficient to sustain a warrant of arrest under the Act of July 12, 1842; the facts set out show a fraudulent breach of contract not the fraudulent incurring of a debt. Cooper *v.* Hart & Co., 358.

WATER. A municipality which furnishes water to its citizens may refuse a permit for the use thereof until the expense of laying the water-pipe in front of the premises, for which the permit is sought, is paid. (C. P.) Commonwealth *ex rel.* Taylor *v.* Wagner, 171.

WIDOW. A widow cannot bring an action in Pennsylvania for negligence causing the death of her husband in New Jersey, the personal representative of the decedent being the only person authorized by the law of New Jersey to bring such action. Usher v. West Jersey Railroad Co., 57.

A widow, who has for a considerable time before her husband's death lived apart from him, is not entitled to the $300 exemption under the Act of April 14, 1851, where the cause for her leaving her husband has not been such as would entitle her to a divorce. Nye's Appeal, 121.

A widow who elects to take against the will of her husband, who dies leaving no children, born to him, but leaving an adopted child, will take but one-third of the decedent's estate. (O. C.) Rowan's Estate, 158.

Effect of widow's election to take against the will, upon pecuniary and residuary legatees. See LEGACIES. (O. C.) Vance's Estate, 172.

WILLS. A paper conveying land, in consideration of the residence of the grantor thereon and his support during life by the grantee, which provides for the immediate possession of the land by the grantee, is not a will. Dreisbach *v.* Serfass, 23.

A will made a bequest to E. for life with remainder, after E.'s death, to I., and if he shall then be dead "his children shall have the same to be equally divided among them the same as if it came from their father." I. outlived E. but died before the testator: *held*, the devise over to the children could not take effect, but the estate being vested in I. it went under the Act of 1844 to his issue *per stirpes*. (O. C.) McGlathery's Estate, 55.

A legacy of "the annual net sum of $1200" shows an intent that the legatee should take the annuity discharged of the collateral inheritance tax, and imposes the payment of the tax on the corpus of the testator's estate. (O. C.) Bispham's Estate, 79.

WILLS—*Continued.*

An heir is not to be disinherited except by plain words or necessary implication. Howe's Appeal, 133.

A will providing that "all my property, consisting of bonds and mortgages, ground-rents, stocks and personal effects in the State of Pennsylvania," be sold and divided amongst certain persons, will not pass real estate situated in Pennsylvania, owned by the testator, of which no mention is made in the will. Id.

A devise to A. and B. "in common, ... to be enjoyed by the said A. and B. during life, and immediately after their decease the same shall descend to their children in equal shares, or their heirs, yet so that the children of each only divide the share that belonged to their father," gives to A. and B. a life estate only, with remainder to the children, although A. and B. had no children when the will was made or when the testator died. Keim's Appeal, 135.

Where the evidence presented to the Orphans' Court on an application for an issue *devisavit vel non* is such that the Court would not feel constrained to set aside the verdict should it be against the validity of the will, an issue should be directed. (O. C.) Palmer's Estate, 159.

An issue to test the validity of a will will be granted only where there is evidence upon which a verdict against the will would be sustained. (O. C.) Humphries's Estate, 144.

To invalidate a will on the ground of undue influence, as fraud or restraint, the influence must be shown to have been operative at the time of making the will. Id.

A. married B., both believing B. to have been divorced from C., and lived as man and wife thirty years; C. reappeared, and it appeared that a divorce had not been obtained from him; A. then made his will in favor of B.: *held*, the circumstances were not such as to raise *per se* the presumption of undue influence. Id.

A bequest to a married woman, for her sole and separate use, creates a trust during coverture. (O. C.) Bond's Estate, 176.

A will gave a life estate to the testator's wife, C., and continued, that after her death the property "should descend to the children issued from my marriage with said C., and if she should survive them, or any of them, it is further my intention . . . that the same should after her death, and after the death of my children by her without any heir, revert to the male children issued from my first marriage." C. died before the testator; after her death, he made a codicil, confirming to his daughter L., C.'s only child, "such parts of my estate as I have by said will . . . disposed of in favor of my wife, C., to revert after her death to her children, if any": *held*, (*a*) the will gave a life estate to C., with remainder to L. in fee, with a contingent remainder to the male children, if L. should die before C. and without issue; (*b*) that the codicil did not cut down L.'s estate to a life interest in the event of her death without children, but even if the words, "without any heirs" should be construed "without issue," she would still take an estate tail; (*c*) that the male children had a remainder contingent upon L. dying without issue, leaving C. her surviving. Homet *v.* Bacon, 214.

Where a will contains pecuniary legacies and specific devises of all the testator's realty and, also, a residuary clause, which in terms blends realty and personalty, the pecuniary legacies are not charged upon the realty specifically devised. (O. C.) Murphy's Estate, 232.

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WILLS—*Continued.*

The rule that in case of a devise for life with remainder to survivors, the time of survivorship to be taken is the testator's death, will not be applied where it appears from the will that the testator intended the survivorship to be taken as of another time. Woelpper's Appeal, 233.

A devise in trust for certain daughters, with remainder after their respective deaths to the "surviving brothers and sisters, and the lawful issue of such as may be dead, . . . provided that if my said daughters, or either of them, should die leaving lawful issue, the share of such daughter so dying shall go to and be equally divided among such issue," gives a remainder on the death of each daughter only to those brothers and sisters who survive her. Id.

A devise in absolute terms is not curtailed by the existence of a power of sale of the subject thereof for the debts of the testator. Geiger's Appeal, 264.

Where a devise in absolute terms is followed by a direction that on the devisee's death the property shall be sold, the testator's debts paid, and the remainder of the proceeds be distributed amongst certain persons, the estate given to the first devisee is for life only. Id.

A testator devised to his wife "all my improvement and income" of certain realty, she to pay his debt, and "if she cannot pay it, she shall sell so much of the land to pay for the rest of the land and keep it for her one youse, as long as she keeps my name, and after she marries . . . she shall have the one-half of all my real and personal property fer her own youse, and the other half to my 3 sisters." To this was added a direction to the executor to divide the testator's property on the marriage of the widow, accompanied by a power of sale: *held*, the wife took an estate *durante viduitate*, which was not enlarged by the power of sale for the payment of debts, or by the subsequent provisions of the will. Long v. Paul, 361.

Bequests were made to the Old Man's Home, located at X., $5000; to the Old Man and Old Woman's Home, located at X., $5000. It appeared that there were no charities at X. whose names exactly corresponded with the language of the will, but that two, whose names were the "Old Men's Home" and the "Widow's Home and Asylum for Aged and Indigent Women," were located at X. under the same roof, but under separate management; it also appeared that the names used by the testator were those frequently applied to the institution: *held*, that the Old Men's Home took the first bequest, and that the second should be divided equally between the Old Men's Home and the Widow's Home and Asylum for Aged and Indigent Women. (O. C.) Dugan's Estate, 287.

A will may be so made as to constitute part of a contract between a testator and a devisee, and be as to the said contract irrevocable. See CONTRACT. Smith v. Tuit, 312.

A will gave the testator's son H. $1000, to be paid on his arrival at the age of twenty-one, the rest of the estate to be divided between the testator's two sons, H. and L. Of L.'s share $1000 to be paid to him on his majority, the residue to be used in purchasing for him a farm of which L. should have full control, but no power to sell or convey, with remainder on L.'s death to his issue, or in default of them then over. During L.'s minority the guardian, by order of the Orphans' Court, applied $1000 to his maintenance: *held*, the gift of $1000 was absolute, and the sum paid for the maintenance should be deducted from the residue and not from the $1000, and that any accumulations during L.'s minority, after deducting the amount expended for his maintenance, were payable to L. on his coming of age in addition to the $1000. Lightner v. Lightner, 334.

A testatrix made a devise, in trust to pay each of her children an equal proportion of the income of the estate for life and to convey to the issue of each upon his or her death; but if any should die without issue to pay over the income of his or her share to the testatrix's surviving children or their issue, "provided that each of my children shall have power to limit and appoint . . . . the rents and income of her share to any surviving widows or husbands," *durante viduitate*, ... "and provided as respects any of my children, who may leave issue upon the further trust to . . . . convey his or her share . . . . to and among his or her child or children . . . . as he may . . . . appoint," etc.: *held*, the will gave a power of appointment to the widow, not only to those children of the testatrix who should die without issue, but to all. (O. C.) Mifflin's Estate, 463.

Where a will contains pecuniary legacies far in excess of the amount of the testatrix's personalty and shows a manifest desire to dispose of all of the testator's estate, the legacies will be held charged upon the realty. (O. C.) Linnard's Estate, 492. (O. C.) Wiltberger's Estate, 493.

A will provided that a legacy after the death of a life tenant, should "become part of my residuary estate," and bequeathed a certain sum "should there be any residuary:" *held*, to be equivalent to a residuary clause for the purpose of showing an intent on the part of the testator to dispose of his entire estate. Id.

In a devise in trust for certain children of the testator, and if either or both should die without leaving children "said estate shall be divided *pro rata* to my other surviving children mentioned in my aforesaid will" the "surviving children" interested are those who survive the testator and not those who survive the *cestui que trust*, only. (O. C.) Sterling's Estate, 495.

See REMAINDER. Commonwealth Title Ins. Co.'s Appeal, 35.

WINDOW. The maintenance of an unauthorized window in a party wall is a nuisance which may be abated by proceedings in equity. (C. P.) Datz v. Phillips, 382.

WITNESS. See EVIDENCE.

WRIT OF ERROR. A writ of error does not lie to a proceeding not according to the common law, unless it be expressly provided for by statute. Davenport v. Jones, 43.

A writ of error will not lie to the order of a Court making absolute a rule, obtained under Act of June 24, 1885, by claimants in possession of a tract of land against purchasers thereof at a commissioner's sale, to bring ejectment therefor within ninety days. Id.

An order setting aside an execution is a subject of a writ of error. Feagley v. Norbeck, 227.

When the record does not show that the issuing of an execution was irregular, the refusal of a Court to set it aside is not reviewable on a writ of error. Harris v. Sheldon, 370.

Where on a writ of error the Supreme Court has fallen into error though a misstatement of fact in a paper-book, and, on the re-trial in the Court below, the Judge refuses to correct the mistake and follows the opinion of the appellate Court literally, the mistake may be corrected upon a second writ of error. Blymyer v. Colvin, 315.

A writ of error lies to the dismissal by the Court, of exceptions to the report of a referee under the Act of June 16, 1836. Harris's Appeal, 370.

END OF VOLUME XXIV.

Eric. J.G.

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